CONFLICTS BETWEEN SEAMEN'S REMEDIES AND WORKMEN'S COMPENSATION ACTS

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I. INTRODUCTION

WHEN an accident occurs involving an employee in a maritime setting, a problem concerning jurisdiction often confronts the injured worker. On the one hand, he may want to qualify for damages under the Jones Act[1] as a seaman because of the higher amounts ordinarily recoverable. On the other hand, if actionable negligence is not provable, the borderline seaman may be in the position of wanting to prove that he is *not* a seaman or crew member, so as to be able to recover non-fault workmen's compensation under either the Longshoremen's and Harbor Workers' Compensation Act[2] or a state compensation act.

As between the Longshoremen's Act and seamen's remedies, the distinction turns upon the particular wording of the Longshoremen's Act exclusion clause which exempts from coverage the "master or member of a crew of any vessel . . . ."[3] As between state acts and seamen's remedies, the beginning-point of the distinction has been the general exclusiveness of admiralty law with respect to seamen's rights under the rule that states cannot legislate in an area preempted by federal legislation. This article will be chiefly concerned with drawing the boundary between compensation acts, both state and longshoremen's, on the one hand, and

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1. Merchant Marine Act, 46 U.S.C. § 688 (1970). This act gives to seamen or their personal representatives a right of action against the employer for negligence. The remedy is the same as that of railroad workers under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60 (1970)) and the common-law defenses are similarly modified. Seamen also have the non-fault remedy of maintenance and cure which by its nature is of no value in death cases, and a right of action for injury caused by the unseaworthiness of a vessel or her tackle.

2. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1970) [hereinafter cited as Longshoremen's Act].

3. Id. § 903(a)(1).

seamen's remedies, mainly damages under the Jones Act, on the other.

Since the great bulk of recent cases have originated as efforts to establish the affirmative coverage of the Jones Act, and since the central question for this purpose is "who is a seaman?," it seems desirable to begin with a reasonably full presentation of the state of the case law on that question. Later there will be a separate examination of the distinctive problems stemming from the special features of the relation of the Longshoremen's Act and of state acts to seamen's remedies, including in both instances the question whether there may be, in effect, a twilight zone of potentially overlapping coverage.

II. The Determination of Seaman Status

A. *Who Is a "Seaman?"*

The term "seaman," which controls Jones Act coverage, is undefined in that act.[4] However, when the Longshoremen's Act is potentially involved, there is another statutory term that must be observed. The Longshoremen's Act specificially excludes coverage of "a master or member of a crew of any vessel."[5] This exception was inserted to undo the effect of *International Stevedoring Co. v. Haverty*,[6] which had held that a stevedore was a "seaman" under the Jones Act. For most practical purposes, there seems to be no significant distinction between the concepts of "seaman" and "crew member." However, when the case takes the form of a claim under the Longshoremen's Act, the analysis necessarily is cast in the form of an interpretation of the "member of a crew" language of that act, just as when the case arises under the Jones Act the primary question is dictated by the language of the Jones Act and is therefore: Is the plaintiff a seaman?

The term "seaman" was originally used in maritime terminology to refer to a mariner—one who was trained to reef and steer and maneuver a vessel.[7] From this concept there emerged three elements that were

4. The Jones Act applies to "[a]ny seaman who shall suffer personal injury in the course of his employment . . . ." 46 U.S.C. § 688 (1970). It does not apply to seamen on government-owned ships, since they are under the Federal Employers' Compensation Act, 5 U.S.C. §§ 8101-93 (1970).

5. Longshoremen's Act § 903(a). Since § 905 of this same act makes the employer's liability under the act exclusive of all other liability to the employee, it has been reasoned that the effect of the Longshoremen's Act language is to limit the Jones Act concept of "seamen" to one who is a "member of a crew" of a vessel in navigable waters. Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1956); Swanson v. Marra Bros., 328 U.S. 1 (1946); McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953).

6. 272 U.S. 50 (1926).

7. Beddoo v. Smoot Sand & Gravel Corp., 128 F.2d 608 (D.C. Cir. 1942). The court in this same opinion went on to point out that the term had become much more flexible and inclusive in scope.

generally supposed to be present to support a finding that a man was a "seaman" or "a member of a crew": (1) that the "vessel" was "in navigation"; (2) that the worker had a "more or less permanent connection with the ship"; and, (3) that the worker's function was "primarily to aid in navigation."[8]

From the early image of the "seaman" as a tattooed helmsman shouting "Land ho" from a bridge of a three-masted schooner, the legal concept of "seaman" has been rapidly and relentlessly broadened to the point where it covers practically any worker, from helmsman to bartender,[9] who sustains an injury while working on almost any structure that floats, or once floated, or is capable of floating,[10] on navigable waters.[11]

B. *"Seaman" Status as an Issue of Fact*

The major turning-point leading to the broadening of the reach of the terms "seaman" and "member of a crew" was the establishment of the proposition that "seaman" or "crew" status was a question of fact to be determined by the fact-finder—which is to say, in the case of the Jones Act, by the jury.[12]

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8. For cases specifying these three requirements see Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); Bodden v. Coordinated Caribbean Transp., Inc., 369 F.2d 273 (5th Cir. 1966); Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966); Rotolo v. Halliburton Co., 317 F.2d 9 (5th Cir.), cert. denied, 375 U.S. 852 (1963); Nelson v. Greene Line Steamers, Inc., 255 F.2d 31 (6th Cir.), cert. denied, 358 U.S. 867 (1958); McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953); Gahagan Const. Corp. v. Armao, 165 F.2d 301 (1st Cir.), cert. denied, 333 U.S. 876 (1948); Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941); Fontenot v. Halliburton Co., 264 F. Supp. 45 (W.D. La. 1967); Tuder v. Material Serv. Corp., 177 F. Supp. 71 (N.D. Ill. 1959); Rackus v. Moore-McCormick Lines, Inc., 85 F. Supp. 185 (E.D. Pa. 1949); Cheramu v. Liberty Mut. Ins. Co., 1965 A.M.C. 2063 (Jud. D. Ct. La. 1965); Arundel Corp. v. Jasper, 219 Md. 519, 150 A.2d 415 (1959). Hence, where a compensation claimant used a boat only for a short period of time each year for harvesting oysters, and did not sleep on the boat, nor have his meals on it, nor make the boat his temporary home, nor look to the boat itself for the payment of his wages, he was not excluded from compensation. Woodfield Fish & Oyster Co. v. Wilde, 124 F. Supp. 331 (D. Md. 1953).

9. See, e.g., Sennett v. Shell Oil Co., 325 F. Supp. 1 (E.D. La. 1971); Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951). See also McAfoos v. Canadian Pac. Steamships, Ltd., 143 F. Supp. 73 (S.D.N.Y. 1956), rev'd on other grounds, 243 F.2d 270 (2d Cir.), cert. denied, 355 U.S. 823 (1957), in which a magician's helper sought maintenance and cure. Judge Levet stated that "[t]he term 'seaman' is not limited to those who can 'hand, reef, and steer' and has been extended to include a person employed as an entertainer on board a vessel." Id. at 75.

10. See Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 255 (1958) (Harlan, J., dissenting); accord, Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

11. Bernardo v. Bethlehem Steel Co., 169 F. Supp. 914 (S.D.N.Y. 1959).

12. Id. at 917.

This rule made its appearance, for Jones Act purposes, in the middle fifties. For many years prior to that time the question of seaman status had been treated as one of law, to be tested by the courts against the three requirements mentioned above. As a result there is no lack of cases in which longshoremen and harbor workers were denied Jones Act awards on the ground that as a matter of law they were not crew members.[13] Probably the leading case supporting this rule is *Swanson v. Marra Brothers*,[14] in which the Supreme Court of the United States in 1946 affirmed the dismissal of a longshoreman's tort complaint on the ground that such recovery was available only to "members of the crew of a vessel plying in navigable waters."[15] Again, in *Desper v. Starved Rock Ferry Co.*,[16] decided in 1952, the Supreme Court, although asserting that seaman status depends on the facts of each case, said that crew member status was an issue of law, not fact, and ruled that the plaintiff's activities at the time of injury—which were determinative of his status—were not the type of work usually done by a seaman. Plaintiff had been repairing a craft laid up for the winter at a time when the craft had neither captain nor crew. This was held to be the kind of work ordinarily done by shore-based repairmen. Accordingly, seaman status was denied, although plaintiff had been a seaman during the summer and was "a probable navigator in the near future."[17]

It is interesting to observe that it was in the following year, 1953, that the Supreme Court made it completely clear that the status of a railroad worker injured during temporary work on navigable waters was also to be decided as a matter of law. In *Pennsylvania Railroad v. O'Rourke*[18] the Court overturned a jury verdict for the worker obtained under the Federal Employers' Liability Act, on the ground that as a matter of law the plaintiff's status was that of a maritime employee.

The transition from court to jury determination of seaman status was first visible in the Supreme Court's 1955 decision in *Gianfala v. Texas Co.*[19] In this case the plaintiff was a driller who had been injured while

13. E.g., Frankel v. Bethlehem-Fairfield Shipyard, Inc., 132 F.2d 634 (4th Cir. 1942), cert. denied, 319 U.S. 746 (1943) (construction worker on an uncompleted new vessel); Lugo v. Moore-McCormick Lines, Inc., 86 F. Supp. 541 (S.D.N.Y. 1949) (painter aboard ship); Armento v. United States, 74 F. Supp. 198 (E.D.N.Y. 1947) (repairman aboard ship).

14. 328 U.S. 1 (1946).

15. Id. at 7. The Swanson holding was based on the fact that Congress had intended to limit the decision in International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), by the Longshoremen's Act so that if a harbor worker were injured on navigable waters he must recover, if at all, under the Longshoremen's Act and could not recover under the Jones Act.

16. 342 U.S. 187 (1952).

17. Id. at 191.

18. 344 U.S. 334 (1953) (5-4 decision). The Longshoremen's Act was held to be the plaintiff's exclusive remedy.

19. 350 U.S. 879, rev'g per curiam 222 F.2d 382 (5th Cir. 1955).

working on a barge above an offshore oil field. The Fifth Circuit, relying on *Desper*, had faithfully attempted to apply the standard legal tests mentioned above. As to the requirement of a vessel in navigation, the court of appeals could find no evidence here supporting that characterization since the barge was held to the sea floor by water in its hold, and was moved at most once a year. The court, moreover, found no permanent connection with the vessel and, as to navigational duties, could discover nothing beyond the fact that, in those rare occasions when the barge prepared to move, the plaintiff turned a valve to pump out the sea water. The Fifth Circuit accordingly reversed the jury's award of damages under the Jones Act. The Supreme Court in turn reversed in a per curiam opinion and restored the jury award. In the process it necessarily accepted the jury's characterization of this combination of facts as compliance with the legal tests of seaman status.

In reaching this result, the Court cited its own earlier decision in *South Chicago Coal & Dock Co. v. Bassett*.[20] The employee in this case had fallen from a coal lighter into the water and had drowned. The lighter's function was that of refueling other vessels in a navigable river, and decedent's job was mainly that of keeping the coal moving down the chute by removing obstructions to its flow with a stick. He also handled the ship's rope when the ship was being released or made fast. He lived on land and was paid by the hour; but the vessel's license required that three seamen be aboard—a number that could be met only if he were considered a seaman. The deputy commissioner held that he was not a member of the crew and awarded compensation under the Longshoremen's Act. The district court reversed; the court of appeals reversed the district court; and the Supreme Court, pronouncing the last word, said it was a question for the deputy commissioner to decide.

Basset was therefore available as authority for the general proposition that crew member status was an issue of fact for the fact-finder to decide. Of course, the practical implications of according finality to a fact-finder in the person of an expert administrator are quite different from those that flow from according similar finality to the findings of a lay jury, as every practicing lawyer knows. But, in principle, *Bassett* became a bridge by which the Supreme Court was able to make the crossing from court to jury determination of seaman status.

Two years after *Gianfala*, in *Senko v. LaCrosse Dredging Corp.*,[21] the Supreme Court made explicit what had been implicit in *Gianfala*. To say that the facts in *Senko* were borderline is putting it mildly. Claimant was a handyman who usually worked on shore, but because he sometimes did an occasional maintenance job on a swamp dredge a jury finding that he

20. 309 U.S. 251 (1940).
21. 352 U.S. 370 (1957).

was a seaman and crew member was allowed to stand—even though the injury itself occurred on shore. This dissent observed that "his *connection* was not with the vessel but with the construction gang. He had no duties connected with navigation; in fact he had never been on the dredge when it was pushed from one location to another, and never even saw it moved. . . . [His duties were] about as nautical as measuring the depth of a natural swimming pool under construction in marshy ground."[22] The majority said, however, that "a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."[23]

If any doubt remained after *Senko* as to the finality of jury findings on seaman status it was stamped out in a succession of subsequent Supreme Court decisions. In the following year, the Court had two occasions to reaffirm the *Senko* rule. *Grimes v. Raymond Concrete Pile Co.*[24] had reached the Court in the form of an affirmance of a directed verdict for the defendant in a Jones Act suit brought by a pile-driver operator on a radar tower in the ocean. The respondents were engaged in the construction of a "Texas Tower" about a hundred miles east of Cape Cod. This was a structure affixed to the ocean floor by three caissons, rising to a triangular metal platform sixty feet above the sea. Plaintiff had lived in the tower as it was towed to sea and assisted in keeping it in safe tow. After the tower had been anchored in place, plaintiff was sent to a nearby materials barge on a tug and on his return to the tower by means of a Navy life ring was injured when the ring struck the tug's pilot house. The trial court directed a verdict for the defendant on the mistaken ground that the Defense Bases Act, incorporating the Longshoremen's Act, provided plaintiff's exclusive remedy even if he was a crew member. The First Circuit correctly pointed out that this was an error, since the Defense Bases Act also incorporates the Longshoremen's Act exclusion of crew members, but went on to conclude that it would be "perfectly futile" to remand, since there was no evidence of crew member status anyway. The court accordingly let the directed verdict stand. The First Circuit particularly emphasized that, as a matter of law, a permanently stationed radar tower could not be a "vessel" but that, even if it were, the plaintiff had no "more or less permanent connection" with it. But the Supreme Court, citing *Bassett, Gianfala,* and *Senko,* held that the plaintiff's evidence "presented an evidentiary basis for a jury's finding whether or not the petitioner was a member of a crew of any vessel."[25]

22. Id. at 376-77 (dissenting opinion).
23. Id. at 374.
24. 356 U.S. 252 (1958), rev'g per curiam 245 F.2d 437 (1st Cir. 1957).
25. Id. at 253.

A week later, in another per curiam opinion, *Butler v. Whiteman*,[26] the Supreme Court again reversed a directed verdict for the defendant and sent the case back for a jury trial. Respondent owned a barge and tug which were moored to his wharf on the Mississippi River. Decedent was a laborer who did odd jobs around the wharf on an hourly wage basis. On the morning of his death he had been engaged in cleaning the tug's boiler. There was some evidence that the tug was a "dead ship," and no steam had been raised on it for over a year; but decedent's work was connected with rehabilitation of the tug in anticipation of a Coast Guard inspection and a return to service. The trial court ruled that all of the elements of a Jones Act case were missing: (1) the tug was not in navigation; (2) decedent had no navigational duties and was not a seaman or member of a crew; and (3) in any case there was no evidence of negligence. Decedent had last been seen alive running across the barge to the tug, but the circumstances of his drowning were unexplained. The plaintiff's theory was that the defendant had been negligent in not providing a gangplank between the barge and the tug. On this record, the Supreme Court held that there was a sufficient evidentiary basis on which to send the case to the jury on all three issues. *Tipton v. Socony Mobil Oil Co.*[27] may also be placed in this line of cases. Claimant was a "roughneck" oil-rig worker of the kind that had been specifically brought within the Longshoremen's Act by the Outer Continental Shelf Lands Act;[28] in fact, he had received payments under those acts. The Supreme Court held not only that he was entitled to a jury determination of whether he held the status of seaman under the Jones Act, but that it was reversible error to admit evidence before the jury that payments under the Longshoremen's Act had been received. It is well settled then, both by Supreme Court cases and by a host of lower federal[29] and state court

26. 356 U.S. 271 (1958), rev'g per curiam Harris v. Whiteman, 243 F.2d 563 (5th Cir. 1957).

27. 375 U.S. 34 (1963) (per curiam); accord, Oliver v. Ocean Drilling & Explor. Co., 222 F. Supp. 843 (W.D. La. 1963).

28. 43 U.S.C. § 1333(c) (1970).

29. E.g., Freeman v. Aetna Cas. & Sur. Co., 398 F.2d 808 (5th Cir. 1968); Bodden v. Coordinated Caribbean Transp., Inc., 369 F.2d 273 (5th Cir. 1966); Marine Drilling Co. v. Autin, 363 F.2d 579 (5th Cir. 1966); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966); Biggs v. Norfolk Dredging Co., 360 F.2d 360 (4th Cir. 1966); Lawrence v. Norfolk Dredging Co., 319 F.2d 805 (4th Cir.), cert. denied, 375 U.S. 952 (1963); Bernardo v. Bethlehem Steel Co., 314 F.2d 604 (2d Cir. 1963) (jury verdict that a welder on a floating dry dock was not a seaman or member of a crew of a vessel upheld; Jones Act claim dismissed); Stanley v. Guy Scroggins Constr. Co., 297 F.2d 374 (5th Cir. 1961); Braniff v. Jackson Ave.-Greatna Ferry, Inc., 280 F.2d 523 (5th Cir. 1960) (decedent, a foreman in charge of maintaining a fleet of ferries, often made repairs on the vessels in transit; summary judgment for defendent reversed); Adams v. Kelly Drilling Co., 273 F.2d 887 (5th Cir.), cert. denied, 364 U.S. 845

cases,[30] that the issue of seaman and crew-member status is a question of fact, and is therefore a question for determination by the jury or other fact-finder.

Before exploring further the legal or theoretical questions that may still remain as to how unlimited this discretion entrusted to the fact-finder is, it seems desirable to turn to the factual picture of the extent to which this combination of a relaxation of legal tests and an emphasis on finality of fact-findings has in practice embraced within the "seaman" concept a variety of workers on a variety of "vessels" that would not in earlier years have been considered covered by the Jones Act. With this full background of what is actually happening, one will then be in a better position to raise some questions about the implications of this development with regard to the relationship of the Jones Act to both the Longshoremen's and state compensation acts, as well as the true character of Jones Act remedies within the pattern of fault-based and non-fault systems.

C. *What Is a "Vessel in Navigation?"*

The term "vessel" has come to include a wide range of vehicles, contrivances, and structures, some bearing little resemblance to the picture of a self-propelled ship that the colloquial use of the term might conjure up. Dredges[31] and barges[32] have consistently been recognized as vessels

(1960); Tyndall v. Conduit & Foundation Corp., 269 F.2d 947 (3d Cir. 1959); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959); McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953); Gahagan Const. Corp. v. Armao, 165 F.2d 301 (1st Cir.), cert. denied, 333 U.S. 876 (1948); Schantz v. American Dredging Co., 138 F.2d 534 (3d Cir. 1943); Mroz v. Dravo Corp., 293 F. Supp. 499 (W.D. Pa. 1968), aff'd, 429 F.2d 1156 (3d Cir. 1970); Johnson v. Noble Drilling Co., 264 F. Supp. 104 (W.D. La. 1966); Creel v. The Drill Tender Jack Cleverly, 264 F. Supp. 98 (W.D. La. 1966); Ingram v. Associated Pipeline Contractors, Inc., 241 F. Supp. 4 (E.D. La. 1965); Oliver v. Ocean Drilling & Explor. Co., 222 F. Supp. 843 (W.D. La. 1963); Guilbeau v. Falcon Seaboard Drilling Co., 215 F. Supp. 909 (E.D. La. 1963); Russ v. Delta Drilling Co., 213 F. Supp. 270 (E.D. La. 1962), cert. denied, 382 U.S. 966 (1965).

30. E.g., Arundel Corp. v. Jasper, 219 Md. 519, 150 A.2d 415 (1959); Marino v. Trawler Emil C, Inc., 350 Mass. 88, 213 N.E.2d 238, cert. denied, 384 U.S. 960 (1966); Brannan v. Great Lakes Dredge & Dock Co., 253 Minn. 28, 91 N.W.2d 166 (1958); Brown v. L.A. Wells Constr. Co., 143 Ohio St. 580, 56 N.E.2d 451 (1944).

31. E.g., Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); Lawrence v. Norfolk Dredging Co., 319 F.2d 805 (4th Cir.), cert denied, 375 U.S. 952 (1963); Gahagan Const. Corp. v. Armao, 165 F.2d 301 (1st Cir.), cert. denied, 333 U.S. 876 (1948); Chesser v. General Dredging Co., 150 F. Supp. 592 (S.D. Fla. 1957); Early v. American Dredging Co., 101 F. Supp. 393 (E.D Pa. 1951); Brannan v. Great Lakes Dredge & Dock Co., 253 Minn. 28, 91 N.W.2d 166 (1958). It is interesting that in the Lawrence case, supra, defense counsel admitted that a large dredge was a vessel, evidently having concluded that there was no longer any point in trying to make an issue of the status of a non-self-propelled dredge.

32. Mach v. Pennsylvania R.R., 317 F.2d 761 (3d Cir. 1963) (a coal barge that had no motive power but was maneuvered by cables is a vessel in navigation).

for this purpose. In the process the point was established that a "vessel" did not have to have its own motive power.

Scows in general and a floating pile driver in particular were brought within the "vessel" concept by a relatively early decision.[33] The same was held as to a drill scow being used to deepen a channel in navigable waters[34] and a floating derrick used in connection with pouring concrete into forms in the course of bridge construction.[35] The way was thus prepared for the growing line of more recent cases covering the various special-purpose vessels involved in off-shore oil activities, such as floating drilling platforms and submersible drilling barges,[36] even when they rest on the sea floor. A submersible barge, although it may be fixed to the sea bottom when in operation, is still capable of being refloated and moved. This distinguishes it from a stationary drilling platform that is permanently affixed to the sea bed. Such fixed platforms have been uniformly denied the designation of "vessel."[37] Similarly, the designation "vessel" cannot be stretched to embrace a non-maritime structure being built to become a part of a tunnel,[38] nor a cap-setting crane rig located on piles driven ahead of a partially completed trestle.[39] One simple test has been proposed in which the question asked is whether the person claiming status as a seaman was assigned to a craft "designed to float on water."[40]

But even a craft designed to "float on water" may not necessarily be

33. George Leary Constr. Co. v. Matson, 272 F. 461 (4th Cir. 1921).

34. Brown v. L.A. Wells Constr. Co., 143 Ohio St. 580, 56 N.E.2d 451 (1944).

35. Summerlin v. Massman Const. Co., 199 F.2d 715 (4th Cir. 1952); see Maloney v. State, 207 Misc. 894, 141 N.Y.S.2d 207 (Sup. Ct. 1955), aff'd, 2 App. Div. 2d 195, 154 N.Y.S. 2d 132 (4th Dep't 1956), aff'd, 3 N.Y.2d 356, 144 N.E.2d 364, 165 N.Y.S.2d 465 (1957) (a derrick barge, not self-propelled, used in the repair and maintenance of the state canal system, held to be a vessel engaged in aid of navigation under the Jones Act). See also Spratley v. Tidewater Constr. Corp., 238 F. Supp. 650 (E.D. Va. 1965).

36. E.g., Gianfala v. Texas Co., 350 U.S. 879, rev'g per curiam 222 F.2d 382 (5th Cir. 1955); Marine Drilling Co. v. Autin, 363 F.2d 579 (5th Cir. 1966); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966); Noble Drilling Co. v. Saunier, 335 F.2d 62 (5th Cir. 1964), cert. denied, 380 U.S. 943 (1965); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959); Callendar v. Employers Liab. Assur. Corp. 283 F. Supp. 213 (E.D. La. 1967); Hebert v. California Oil Co., 280 F. Supp. 754 (W.D. La. 1967); Ledet v. U.S. Oil of Louisiana, Inc., 237 F. Supp. 183 (E.D. La. 1964).

37. E.g., Thompson v. Crown Petroleum Corp., 418 F.2d 239 (5th Cir. 1969); Freeman v. Aetna Cas. & Sur. Co., 398 F.2d 808 (5th Cir. 1968); Texas Co. v. Savoie, 240 F.2d 674 (5th Cir.), cert. denied, 355 U.S. 840 (1957); Johnson v. Noble Drilling Co., 264 F. Supp. 104 (W.D. La. 1966); Sirmons v. Baxter Drilling, Inc., 239 F. Supp. 348 (W.D. La. 1965); Ross v. Delta Drilling Co., 213 F. Supp. 270 (E.D. La. 1962), cert. denied, 382 U.S. 966 (1965); Snipes v. Pure Oil Co., 186 F. Supp. 373 (W.D. La. 1960), aff'd, 293 F.2d 60 (5th Cir. 1961).

38. See Hill v. Diamond, 311 F.2d 789 (4th Cir. 1962).

39. See Dixon v. Oosting, 238 F. Supp. 25 (E.D. Va. 1965).

40. Sirmons v. Baxter Drilling, Inc., 239 F. Supp. 348, 350 (W.D. La. 1965).

a vessel if it is permanently affixed when in normal use. Thus, a dry dock, although it had been floated from one place to another for repairs, was held not to be a vessel since it was permanently attached when in use.[41] The court conceded that practically any craft capable of navigation on navigable waters might be a "vessel," and that it did not have to be actually engaged in navigation at the time of injury to make the Jones Act applicable. But to be a vessel the craft must have been "committed to navigation" on navigable waters. As for this dry dock, it either had never been so committed to navigation, or if it had been, this commitment had been discontinued.

As to the "in navigation" part of the "vessel in navigation" test,[42] this of course does not mean that it must have been actually plying the seas at the time in question.[43] What is involved is not the operational activity of the vessel at the particular moment but rather its status as an instrument of commerce and transportation on navigable waters. Accordingly, it remains "in navigation" while moored to a wharf or pier or other fixed mooring,[44] or while being loaded and unloaded at a dock,[45] or while undergoing minor or periodic repairs in preparation for continuation of service on other voyages.[46]

But if a ship is in such condition that it would take a long time to put her in condition to go to sea and if there is not present the intention of putting her into active service, she is not "in navigation."[47] It has also been held in a number of cases that a vessel that has been laid up for the winter is not "in navigation,"[48] so that such work as painting the life pre-

41. Bernardo v. Bethlehem Steel Co.. 314 F.2d 604 (2d Cir. 1963), aff'g 200 F. Supp. 534 (S.D.N.Y. 1961).

42. For cases appyling the "in navigation" test see Mach v. Pennsylvania R.R., 317 F.2d 761 (3d Cir. 1963); Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941); Antus v. Interocean S.S. Co., 108 F.2d 185 (6th Cir. 1939); Van Horn v. Gulf Atl. Towing Corp., 261 F. Supp. 1015 (E.D. Va. 1967), aff'd in part and vacated in part on other grounds, 388 F.2d 636 (4th Cir. 1968); Gillikin v. General Dev. Corp., 1965 A.M.C. 670 (D. Fla. 1964); King v. United States, 22 F. Supp. 992 (E.D.N.Y. 1938); Hunt v. United States, 17 F. Supp. 578 (S.D.N.Y. 1936), aff'd per curiam, 91 F.2d 1014 (2d Cir.), cert. denied, 302 U.S. 752 (1937).

43. See, e.g., Freeman v. Aetna Cas. & Sur. Co., 398 F.2d 808 (5th Cir. 1968); Lawrence v. Norfolk Dredging Co., 319 F.2d 805 (4th Cir.), cert. denied, 375 U.S. 952 (1963); Rousse v. American Ins. Co., 1965 A.M.C. 2629 (Jud. D. Ct. La. 1964).

44. Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941); Tuder v. Material Serv. Corp., 177 F. Supp. 71 (N.D. Ill. 1959).

45. Rousse v. American Ins. Co., 1965 A.M.C. 2629 (Jud. D. Ct. La. 1964).

46. Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599 (2d Cir.), cert. denied, 363 U.S. 844 (1960); Hunt v. United States, 17 F. Supp. 578 (S.D.N.Y. 1936), aff'd per curiam, 91 F.2d 1014 (2d Cir.), cert. denied, 302 U.S. 752 (1937).

47. Gonzalez v. United States Shipping Bd., Emer. Fleet Corp., 3 F.2d 168 (E.D.N.Y. 1924).

48. E.g., Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); Antus v. Interocean

servers[49] or packing the pumps to prevent freezing[50] would not confer seaman's status under the Jones Act.

In the application of the "in navigation" test to dredges and similar craft, practically all the successful cases are authority for the proposition that the amount of actual movement of a dredge is of no relevance, provided it is capable of moving, since typically these vessels do little more than get maneuvered into the position from which they perform their special function. But if the dredge is not in navigable waters at all, this lack may be fatal. All the cases finding seaman status seem to have involved craft which, however cumbersome and unaccustomed to frequent travel, at least could be said to be in navigable waters. Several of the cases rejecting seaman status, however, have been decisively influenced by the weakness of the case on this score. Thus, if the only channel or basin was the one the dredge was cutting for itself,[51] or if the dredge was

S.S. Co., 103 F.2d 185 (6th Cir. 1939); Hawn v. American S.S. Co., 107 F.2d 999 (2d Cir. 1939); Seneca Washed Gravel Corp. v. McManigal, 65 F.2d 779 (2d Cir. 1933); Krolczyk v. Waterways Navigation Co., 151 F. Supp. 873 (E.D. Mich. 1957). For cases which have reached the same result with regard to the special problems involved with moth ball fleets see Roper v. United States, 368 U.S. 20 (1961); Noel v. Isbrandtsen Co., 287 F.2d 783 (4th Cir.), cert. denied, 366 U.S. 975 (1961).

49. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952).

50. Antus v. Interocean S.S. Co., 108 F.2d 185 (6th Cir. 1939).

51. See Fuentes v. Gulf Coast Dredging Co., 54 F.2d 69 (5th Cir. 1931), dismissing a Jones Act action on the local-concern theory. The dredging operation on which plaintiff was working at the time of his injury was for the purpose of pumping silt and sand onto land in order to fill and raise it. The dredge had cut its own channel to this point, and its forward end rested on the ground. The Texas compensation act was said to be the exclusive remedy, since any deepening of the water was not in aid of navigation but was incidental to the improvements being made on land. Id. at 70.

In United Dredging Co. v. Lindberg, 18 F.2d 453 (5th Cir.), cert. denied, 274 U.S. 759 (1927), the action was brought under the Louisiana compensation act. A demurrer on the ground that the case was within the exclusive jurisdiction of admiralty law was rejected since the channel was not yet navigable but was being made navigable by the very operation in question. The court therefore characterized it as being "'of mere local concern.'" Id. at 454.

In Beddoo v. Smoot Sand & Gravel Corp., 128 F.2d 608 (D.C. Cir. 1942), a deck hand employed on a "stripper dredge" was held not to be a "seaman" under the Jones Act or a "member of a crew" under the Longshoremen's Act. The dredge was "in an artificial water-basin created by its own work" on land belonging to the employer, and was engaged in removing soil, mud and clay from the land immediately adjacent to a river. The court doubted that the character of the work being done by the dredge was maritime at all. Id. at 610.

Tuder v. Material Serv. Corp., 177 F. Supp. 71 (N.D. Ill. 1959), is a rare example of a post-Senko holding which ruled out seaman status as a matter of law. The site of the injury was a sand and gravel processing plant consisting of three barges permanently joined in a line, with crushers, conveyors, screens, and pumps installed in fixed positions. The dredge used to scoop up the material was on the defendant's own land in an artificial water basin created by its own work. The plant was firmly attached to the bottom of the pit. Plaintiff was not connected with the plant on a permanent basis, but was employed as an ordinary laborer. Plaintiff was thus denied a Jones Act recovery. Id. at 74.

not so much operating in navigable waters as incidentally creating a basin of water while in the process of pumping up sand, gravel, silt, or fill,[52] the element of "in navigation" has been found to be lacking.

A fortiori, if the craft is not intended to be moved at all in its regular operation, like a permanently attached dry dock,[53] or if it is actually incapable of being moved, like a structure affixed to pilings,[54] it cannot be said to be "in navigation" as long as those words are to be accorded any meaning at all.

D. *"Permanent Connection" with the Vessel*

Under the second legal test of seaman status there must be a more or less permanent connection with the vessel.[55] The most important question in this area is whether the worker's connection with the work of the vessel is reasonably sustained as distinguished from being sporadic or incidental. In most of the successful cases the connection seems to have been more or less continuous, and in some this factor is separately identified and stressed. The object here is to rule out the kind of situation in

A state court reached a similar decision in Sikes v. Fort Meyers Constr. Co., 191 So. 2d 265 (Fla. 1966). Claimant was injured while working on a dredge cutting canals from a river into a housing development. The dredge required a tug for propulsion and made no provision for sleeping or eating. The court held that since claimant lived and ate on shore and was paid an hourly wage he could be found not to be a crew member, and that the dredge was not on navigable waters while creating a navigable canal. Id. at 266.

A series of appeals in Orleans Dredging Co. v. Frazie involved the question of whether a dredge cutting a channel across a strip of land in order to shorten the river for maritime commerce was to be considered as operating in navigable waters. On the first (173 Miss. 882, 161 So. 699 (1935), cert. denied, 296 U.S. 653 (1936)) and second (179 Miss. 188, 173 So. 431 (1937)) appeals the court held that it was not in navigable waters and that state law, not the Jones Act, applied; on the third appeal (182 Miss. 193, 180 So. 816 (1938)) the case was sent back for a trial of the issue of whether the channel had previously had the character of a navigable channel.

52. Covington v. Standard Dredging Corp., 61 So. 2d 644 (Fla. 1952). Plaintiff worked on a dredge engaged in filling land for a public park. He was held not entitled to maintain a Jones Act action, since "'[t]he dredge was not at the time concerned in anywise with navigation.'" Id. at 645.

See also Beddoo v. Smoot Sand & Gravel Corp., 128 F.2d 608 (D.C. Cir. 1942); Fuentes v. Gulf Coast Dredging Co., 54 F.2d 69 (5th Cir. 1931); Tuder v. Material Serv. Corp., 177 F. Supp. 71 (N.D. Ill. 1959).

53. See Bernardo v. Bethlehem Steel Co., 314 F.2d 604 (2d Cir. 1963), aff'g 200 F. Supp. 534 (S.D.N.Y. 1961).

54. See cases cited notes 36–39 supra.

55. For cases involving this test see LiMandri v. Brasileiro, 316 F.2d 3 (2d Cir. 1963) ("seaman" status denied to a cargo checker); Gahagan Const. Corp. v. Armao, 165 F.2d 301 (1st Cir.), cert. denied, 333 U.S. 876 (1948); A.L. Mechling Barge Line v. Bassett, 119 F.2d 995 (7th Cir. 1941); Maryland Cas. Co. v. Lawson, 94 F.2d 190 (5th Cir. 1938); Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951); Brannan v. Great Lakes Dredge & Dock Co., 253 Minn. 28, 91 N.W.2d 166 (1958).

which an essentially land-based worker, such as a mechanic, welder,[56] carpenter,[57] crane operator,[58] or laborer,[59] comes aboard a vessel to do a particular repair job or other piece of work, in the course of which he is injured.[60] In one of these cases, the court found significant the fact that the carpenter, unlike the typical member of a dredge or barge crew, never traveled with the floating pile driver when it was moved from place to place.[61]

Note that seaman status is not ruled out by the fact that the worker divides his time between duties afloat and ashore, provided the elements of true seaman status are otherwise present. In *Weiss v. Central Rail-*

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56. E.g., Thibodeaux v. J. Ray McDermott & Co., 276 F.2d 42 (5th Cir. 1960). The plaintiff here was a land-based welder who lived and slept at home. He was not attached to any particular vessel. His connection with the barge on which he was working was strictly temporary. On the ground that the requirement of permanent assignment to a vessel or performance of a substantial part of his work on the vessel had not been satisfied, a directed verdict for the defendants in a Jones Act action was upheld, and the Longshoreman's Act was said to be his only remedy. Id. at 47.

In Bernardo v. Bethlehem Steel Co., 314 F.2d 604 (2d Cir. 1963), a jury verdict that a welder on a floating dry dock was not a seaman or member of a crew of a vessel was upheld and a Jones Act action dismissed. Id. at 610.

57. E.g., In re Spearin, Preston & Burrows, Inc., 190 F.2d 684 (2d Cir. 1951). The injured employee was a member of a dock-building gang and of a carpenters' union. He worked on a floating pile driver which had no eating or sleeping accomodations. He did not remain on the craft when it was moved from place to place. The finding of the court below that the employee was not entitled to maintain a Jones Act action was upheld. Id. at 687.

58. E.g., Bellomy v. Union Concrete Pipe Co., 297 F. Supp. 261 (S.D.W. Va. 1969), aff'd per curiam, 420 F.2d 1382 (4th Cir.), cert. denied, 400 U.S. 904 (1970). Plaintiff normally operated a crane located on a dock and used for unloading floating cargo barges. Occasionally he was required to go on board a barge to help move it to another position at the dock. It was while doing so that he was injured. The court held that although the work being done at the time of the injury was ordinarily performed by crew members, it was only an incidental part of his job, and therefore he was not entitled to remedies under the Jones Act, or to maintenance and cure. Id. at 265.

59. Tuder v. Material Serv. Corp., 177 F. Supp. 71 (N.D. Ill. 1959).

60. See Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941); Perez v. Marine Transp. Lines, Inc., 160 F. Supp. 853 (E.D. La. 1958); Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951); Brannan v. Great Lakes Dredge & Dock Co., 253 Minn. 28, 91 N.W.2d 166 (1958). But cf. Matherne v. Superior Oil Co., 207 F. Supp. 591 (E.D. La. 1962). In the Matherne case a truck driver employed by a construction company delivered a truck load of pipes to the defendant oil company. Part of the trip required traveling to the delivery site on the oil company's barge across navigable water. The truck driver drowned on the return trip when he stepped out of his truck and fell off the barge. The court stated that unloading the barge (actually unloading the truck which was on the barge) was a service performed by the truck driver in furthering the purpose of the vessel, thus entitling him to protection as a seaman. Defendant's motion to dismiss Jones Act proceedings was denied. Id. at 594.

61. In re Spearin, Preston & Burrows, Inc., 190 F.2d 684 (2d Cir. 1951).

road,[62] the plaintiff seeking maintenance and cure was hired by the operator of ferryboats crossing the Hudson River on an "extra man" basis to replace absentees, whether on the ferries or on the docks. In the time he had worked for the defendant, the plaintiff had spent seven days as a deck hand or wheelsman and six days doing shore jobs connected with the docking of ferries. He slept and ate most of his meals ashore. The court, upholding a judgment of maintenance and cure, said:

> We know of no authority, however, for holding that a seaman is not entitled to the traditional privileges of his status merely because his voyages are short, because he sleeps ashore, or for other reasons his lot is more pleasant than that of most of his brethren.[63]

E. *"Primarily Aboard to Aid in Navigation"*

The third test—whether the worker was aboard primarily to aid in navigation[64]—has, of the three tests, probably undergone the most stretching of what would appear to be its literal scope. The Supreme Court seemed to have softened the requirement somewhat in *Senko v. LaCrosse Dredging Corp.*[65] by rephrasing it as calling for "a significant navigational function"[66]—a phrase that has quite properly been said to be less exacting than "aboard naturally and primarily in aid of navigation."[67] Even more meaningful than the choice of words was the total fact situation supporting the finding of crew status:

> Because there was testimony introduced by petitioner tending to show that he was employed almost solely on the dredge, that his duty was primarily to maintain the dredge during its anchorage and for its future trips, and that he would have a significant navigational function when the dredge was put in transit, we hold there was sufficient evidence in the record to support the finding that petitioner was a member of the dredge's crew.[68]

"Aiding in navigation," then, is not confined to those who "hand, reef, and steer" but extends to all workers more or less permanently connected

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62. 235 F.2d 309 (2d Cir. 1956).

63. Id. at 313.

64. For cases interpreting this test see Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953); Gahagan Const. Co. v. Armao, 165 F.2d 301 (1st Cir.), cert. denied, 333 U.S. 876 (1948); Schantz v. American Dredging Co., 138 F.2d 534 (3d Cir. 1943); Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951); Brannan v. Great Lakes Dredge & Dock Co., 253 Minn. 28, 91 N.W.2d 166 (1958).

65. 352 U.S. 370 (1957).

66. Id. at 374.

67. Offshore Co. v. Robison, 266 F.2d 769, 777 (5th Cir. 1959).

68. 352 U.S. at 374.

with the ship whose duties pertain to the "welfare and operation of the vessel,"[69] or assist in forwarding its enterprise.[70]

The explanation of the broadening of the image of the seaman to include a miscellany of assorted workers doing odd jobs on all sorts of funny-looking floating contraptions is not to be found in a surge of permissiveness on the part of courts so much as in a fundamental change in the nature of sea-going activities. For a start, the advent of steam-powered vessels and luxury liners ushered in a period in which a large proportion of the jobs to be done on board were quite unrelated to "navigation" in the usual sense. Then, to complicate matters further, there appeared all kinds of special-purpose craft that, apart from the fact that they floated, bore little resemblance to the conventional picture of a vessel—dredges, barges, floating derricks, floating hoisters, floating pile drivers, drill scows, and, most recently, various kinds of submersible barges and other rigs used for offshore oil drilling. If the idea behind "seamen's" remedies was that those who were subjected to the hazards of life and work at sea should be entitled to special kinds of protection, it was not inappropriate to let the remedies follow the hazards. But in the process, considerable strain was placed on the second two of the three classical tests. As to "attachment" to the vessel, while this was a natural enough requirement for a ship with its crew at sea, it raised problems if interpreted too literally in the case of dredges, derricks, and similar vessels that might not even have living quarters. Even more emphatically, the words "naturally and primarily aboard to aid in navigation" were bound to get in the way of any extension of these remedies to those who oiled the pumps on dredging scows, or who operated the pile drivers on floating pile-driver platforms, or who worked on oil drilling machinery in submersible barges.

Although some courts still dutifully announce the three classical tests as their beginning point, it seems desirable to substitute for the second two tests what might be called the "*Robison* tests," enunciated by Judge Wisdom in the leading case of *Offshore Co. v. Robison*:[71]

(1) [I]f there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) *or performed a substantial part of his work on the vessel;* and (2) if the capacity in which he was employed or the duties which he performed *contributed to the function of the vessel or to the accom-*

69. Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953); Schantz v. American Dredging Co., 138 F.2d 534 (3d Cir. 1943); Brannan v. Great Lakes Dredge & Dock Co., 253 Minn. 28, 91 N.W.2d 166 (1958).

70. Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951).

71. 266 F.2d 769 (5th Cir. 1959).

plishment of its mission, or to the operation *or welfare* of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.[72]

The italicized portions contain the principal points at which the tests are adapted to contemporary conditions. Performance of a substantial part of the worker's work on the vessel is equated with "more or less permanent connection with the ship." And, since these current "vessels" have so many functions beyond mere navigation, the third test replaces "navigation" with contributing to the vessel's functions or missions whatever they may be, and to its welfare and maintenance as well as its navigation. Although the fact that the worker performed some navigational functions when a vessel such as a dredge was moved is always exhibited when available as added support for the finding of seaman status, it is not indispensable, and earlier cases denying seaman status because, for example, a dredge worker's job was operating the pipeline used in suction dredging operations[73] have not been followed.[74] Here again, the chief practical effect of the test is to continue to exclude activities such as construction and carpentry in connection with which the location of the activity aboard some floating craft is incidental to the main character of the employment.

In the application of the third test, the character of the work being done at the precise moment of injury is not decisive.[75]Thus, in *Tyndall v. Conduit & Foundation Corp.*,[76] a worker with established status as a regular crew member of a dredge was engaged at the time of the injury in repairing car floats at his employer's instruction. Nevertheless, a finding of seaman status was held to have been supported by the evidence.[77] Nor, in spite of the word "primarily" in the original statement of the test ("primarily on board to aid in navigation") should seaman status be denied merely because a mathematical preponderance of his time is spent on land-based rather than nautical duties, provided his work on the vessel is at least "substantial."[78]

72. Id. at 779 (footnote omitted) (emphasis added).

73. E.g., Andersen v. Olympian Dredging Co., 57 F. Supp. 827 (N.D. Cal. 1944). The barge on which plaintiff worked was an "elbow barge," serving the function of supporting an engine and winch used in suction dredging operations. It was held that plaintiff's primary duties concerned operation of the pipeline used in the dredging process, and that, since he was not primarily on board to aid in navigation, he could not maintain a Jones Act action. Id. at 828.

74. See, e.g., Noble Drilling Corp. v. Smith, 412 F.2d 952 (5th Cir. 1969). Plaintiff was a mud-pumper on a self-propelled tender. Although his job did not aid in navigation, it directly contributed to the fulfillment of one of the functions of the tender. A Jones Act recovery was thus allowed.

75. See Brannan v. Great Lakes Dredge & Dock Co., 253 Minn. 28, 91 N.W.2d 166 (1958).

76. 269 F.2d 947 (3d Cir. 1959).

77. Id. at 949.

78. E.g., Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957) (sufficient evidence of

F. *Offshore Oil Workers as "Seamen"*

In recent years, the most prolific category of cases applying the above-discussed tests of seaman status has been that involving members of the crew of submersible oil drilling barges or mobile oil drilling platforms. Beginning with *Gianfala*, the cases have now clearly established the proposition that such workers are seamen entitled to remedies under the Jones Act and maritime law.[79]

Perhaps the strongest case in this group is the Fifth Circuit's decision in *Producers Drilling Co. v. Gray*,[80] which went farther than merely affirming a jury finding of seaman status and actually affirmed a directed verdict for plaintiff, who was a roustabout injured in the course of drilling operations on a submersible inland drilling barge. The plaintiff's duties included maintenance of the barge and its equipment, chipping and painting, assistance in raising and lowering the barge, and handling mooring lines, as well as helping with well-drilling. He did not sleep or eat aboard the barge, but was transported back and forth each day by a crew boat. In concluding that he could be held to be a seaman as a matter of law, the court had to deal with its own decision of six years earlier in *Adams v. Kelly Drilling Co.*[81] In *Adams*, the district court had first denied plaintiff's motion for a directed verdict. Then, when the case had gone to the jury, the jury had decided in favor of the defendant. The Fifth Circuit affirmed on the ground that since there was evidence to support the jury's finding it was final. The court declined to accept the plaintiff's interpretation of *Robison* as embodying "a sort of general declaration or decision that, in all cases where it is alleged that plaintiff, working on a submersible drilling barge, is a seaman and member of a crew, a verdict for plaintiff is demanded . . . ."[82] The facts were quite similar to those in both the earlier *Robison* case and in the later *Gray* case. Indeed,

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seaman status to go to jury in case of handyman who usually worked on shore, but who did an occasional maintenance job on swamp dredge); Mach v. Pennsylvania R.R., 317 F.2d 761 (3d Cir. 1963) (worker who spent one to five hours of his eight-hour day handling barges and the rest on land-based duties allowed seaman status for injury which occurred in the course of his barge activities).

79. E.g., Gianfala v. Texas Co., 350 U.S. 879, rev'g per curiam 222 F.2d 382 (5th Cir. 1955); Marine Drilling Co. v. Autin, 363 F.2d 579 (5th Cir. 1966); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966); Noble Drilling Corp. v. Saunier, 335 F.2d 62 (5th Cir. 1964) (per curiam), cert. denied, 380 U.S. 943 (1965); Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959); Callendar v. Employers Liab. Assurance Corp., 283 F. Supp. 213 (E.D. La. 1967); Hebert v. California Oil Co., 280 F. Supp. 754 (W.D. La. 1967); Ledet v. United States Oil, Inc., 237 F. Supp. 183 (E.D. La. 1964); Guilbeau v. Falcon Seaboard Drilling Co., 215 F. Supp. 909 (E.D. La. 1963). See also Tipton v. Socony Mobil Oil Co., 375 U.S. 34 (1963); Oliver v. Ocean Drilling & Explor. Co., 222 F. Supp. 843 (W.D. La. 1963).

80. 361 F.2d 432 (5th Cir. 1966).

81. 273 F.2d 887 (5th Cir.), cert. denied, 364 U.S. 845 (1960).

82. Id. at 890.

the court in *Gray* observed that no substantial distinction on the facts could be drawn between *Gray* and *Adams*. Thus, by holding that the *Gray* facts could supply no reasonable evidentiary basis to support a jury finding of non-seaman and non-crew-member status, the court appears to have implicitly overruled *Adams*.

With the law as to workers on mobile drilling barges and platforms thus reasonably clear, the troublesome area narrows down to activities associated with fixed drilling platforms.

It might seem that the status of such platforms as being in themselves not "vessels in navigation" would be beyond question—and indeed this is very nearly so. Every decision dealing explicitly with the question has ruled that they are not such vessels.[83] The only reason for pausing even for a moment over this question is the United States Supreme Court's decision in *Grimes v. Raymond Concrete Pile Co.*[84] This case left the door open for anyone so disposed to persist in the attempt to draw fixed platforms within the concept of "vessel." It will be recalled that this was one of the series of cases nailing down the doctrine of finality of a jury finding of seaman status. In the process of holding that there was some evidence supporting that finding, the Court necessarily had to say, in effect, that there was some evidence that there was a vessel of which plaintiff could be a crew member.[85] However, it did not identify which facts it had in mind as supplying that evidence. One has to turn to Mr. Justice Harlan's dissent to see the dilemma left by this cryptic per curiam disposition of the matter. Harlan pointed out that the man-made island, or Texas Tower, to which plaintiff was regularly assigned, could hardly have supplied the necessary element of a "vessel," having been permanently affixed to the ocean floor for six days before the time of injury.[86] On the other hand, if the Court had been relying on the fact that the plaintiff had worked for a few hours on the unmanned supply barge just before the trip by tug back to the tower in the course of which he was injured, there was the formidable difficulty that neither under the classical nor the *Robison* tests could plaintiff meet the requirement of connection with that vessel. Certainly he was not "more or less permanently attached" to the barge, nor could it be said that a substantial portion of his duties were on the supply barge, since at most he spent only six hours there. Harlan might have added that the majority could conceivably have had in mind plaintiff's connection with the barge on which the tower had originally been towed to sea, since the fact statement is at pains to point out

83. See cases cited note 37 supra.
84. 356 U.S. 252 (1958) (per curiam).
85. Id. at 253.
86. Id. at 254–55 (dissenting opinion).

that plaintiff's duties on that journey, in the course of which he had lived on the barge, included various duties on the tower and assistance in keeping the barge in safe tow, thus "contributing to the mission" of that barge. The only trouble with this third hypothesis is that the entire episode was a closed book, and for six days plaintiff's attachment had been to a man-made island. The ragged impression thus left has led at least one court to speculate in *In re United States Air Force Texas Tower No. 4*[87] whether the case is authority for holding a fixed platform to be a vessel, particularly in view of the fact that the Supreme Court had always construed the Jones Act liberally so far as the definition of "vessel" is concerned.[88]

Of course, it could be argued that as a matter of policy there is no substantial basis for distinguishing between oil rig workers on submersible drilling barges and those on fixed platforms since both are subject to much the same kind of hazards. However, there are limits to what can be done in the name of policy considerations and liberal construction, and so far the consensus seems to be that turning a man-made island into a vessel in navigation is a task beyond those limits.[89]

The closer questions as to workers on fixed drilling platforms are those in which some auxiliary kind of craft is involved which is clearly a vessel and with which the plaintiff may have some greater or lesser connection. There are essentially two kinds of fixed drilling platforms, presenting in

87. 203 F. Supp. 215 (S.D.N.Y. 1962).

88. The district court actually held that the Texas Tower which had collapsed in this case was not a vessel within the Jones Act.

89. Cf. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969), noted in 41 Miss. L.J. 168 (1969). This case caused some surprise by holding that the remedy in actions involving deaths of workers on artificial island drilling rigs was under Louisiana law, made applicable by the Outer Continental Shelf Lands Act, (43 U.S.C. §§ 1331, 1333 (1970)) and that an action under the Death on the High Seas Act (46 U.S.C. § 761 (1970)) would not lie. One student commentator has said: "Another mild surprise of Rodrique [sic] lies in the fact that many might have supposed that the Court would extend the Jones Act coverage to these fixed offshore structures. Of course, the petitioners did not seek recovery under the Jones Act, but in view of the enlarged scope of this highly beneficial statute, the Court might, by its own initiative, have extended seaman's coverage to Dore and Rodrique [sic]." 41 Miss. L.J., supra at 174.

It is true that the Supreme Court has, on occasion, shown itself capable of feats of interpretation and initiative no less spectacular than this, particularly when the case has a maritime flavor. See, for example, what has happened to the exclusive liability defense of a shipowner who employs longshoremen directly. 2 A. Larson, The Law of Workmen's Compensation § 76.43(c) (1970) [hereinafter cited as Larson]. It is also true that the Supreme Court has not addressed itself to the exact issue as of the time of this writing and has thus left in Grimes a foothold for anyone who wants to make the try, as the plaintiffs in Rodrique evidently did not. But, "[u]nfortunately for Dore's and Rodrique's [sic] beneficiaries the case law has been almost uniformly away from the extension of the Jones Act to workers on fixed platforms." 41 Miss. L.J., supra, at 175.

differing degrees the kind of problem here under discussion. First, there is the large, substantially self-sufficient platform, not only housing the drilling rig and related equipment, but containing room for living quarters and supplies. Second, there is a smaller type of platform designed to accomodate only the drilling rig and equipment. A tender is used to house personnel, store supplies, and carry equipment. Obviously the chances of any significant connection with a true vessel are less in the self-contained platform, although they are not altogether nonexistent, since a service craft will normally be used to transport the worker to and from the platform, and from one platform to another. This was the situation in *Texas Co. v. Savoie*,[90] where the court expressly held that the mere use of a water-taxi from time to time was not enough to convert the worker into a seaman. But in the course of bolstering this conclusion, the court made an observation that might or might not contain a hint as to how such a worker might qualify as a seaman under slightly different circumstances. The court pointed out that the worker had no duties whatever in connection with the operation of the water-taxi—not even throwing a rope or assisting in mooring. This might be dismissed as a mere make-weight, or as a detail added in the interest of completeness in the statement of facts. On the other hand, there might be squeezed from it a negative implication that the result might have been different if the worker had indeed performed substantial services connected with the operation of the service craft.

A clear example of the second type of fixed installation—one with a tending vessel containing living quarters—is supplied by *Johnson v. Noble Drilling Co.*[91] Here, although the worker ate and slept aboard the tender, it was held that he was not a seaman and that his exclusive remedy was under the Longshoremen's Act. The case appears to be authority for the conclusion that it is the locus of the worker's duties that controls, since here his duties were almost entirely on the fixed platform and any duties aboard the tender were at best irregular and incidental.

The same result has been reached even when the injury actually occurred in the course of these infrequent duties aboard the tender. In *Ross v. Delta Drilling Co.*[92] the worker was a roughneck who used a converted LST *Humble* ST-6 for his living quarters and meals. He was injured while mixing cement on the deck of this vessel—a task he performed only once or twice a month. He was otherwise more or less permanently assigned to the fixed drilling platform where his normal duties were performed. The court held that this still added up to insufficient

90. 240 F.2d 674 (5th Cir.), cert. denied, 355 U.S. 840 (1957).
91. 264 F. Supp. 104 (W.D. La. 1966).
92. 213 F. Supp. 270 (E.D. La. 1962), cert. denied, 382 U.S. 966 (1965).

connection with a vessel to support seaman status,[93] and that plaintiff's exclusive remedy was under the Longshoremen's Act.

The fact that it is the location of plaintiff's duties that controls was confirmed by the holding in *Creel v. The Drill Tender Jack Cleverly*,[94] decided by the same district in the same year as *Johnson*. In this instance seaman status was accorded a member of a drilling crew because his services were performed almost exclusively aboard the drill tender that serviced a stationary drilling platform.

If one takes Judge Wisdom's *Robison* tests literally and applies them to these facts, the results in *Savoie*, *Johnson*, *Ross*, and *Creel* are logical and consistent. Under the first of those tests there must be either a more or less permanent attachment to the vessel or the performance of a substantial portion of the worker's duties on the vessel and, under the second, these duties must contribute to the mission or function of the vessel. Thus the emphasis on the location of the worker's duties is an accurate reflection of the *Robison* tests. At the same time, it must be remembered that Judge Wisdom's formulation, significant as it was in adapting the seaman tests to modern conditions, was not phrased with the problem of drill tenders in mind, nor is it a piece of statutory language that cannot be further adjusted to accommodate contemporary situations.

When a worker, by the nature of his job, is required to live at sea, should the locus of his active working duties be conclusive? Suppose a worker is injured by a storm while asleep on the tender. He is unquestionably within the course of his employment in the workmen's compensation sense.[95] If, then, he is in the course of his employment on a vessel (although performing no duties as such) during a very considerable part, if not indeed the larger part of the twenty-four hours of the day, an argument could be made that this should make him as much a seaman as a pile driver operator who works seven or eight hours on a dredge and spends the rest of his life ashore. The misfortune of *Johnson* and *Ross* was that their "connections" were divided in such a way as to dilute their compliance with the *Robison* tests considered separately. By their residence they were connected with a vessel; by their duties they were connected with a non-vessel. But the fact remains that they were at all times in the course of their employment. This is most clear as to injuries in any way related to the hazards involved in their enforced residence at sea.

It may thus be concluded that, although there seems to be no way in

93. It may be significant that the case was at first allowed to go to the jury on these facts, although the case was subsequently tried before a judge by stipulation.

94. 264 F. Supp. 98 (W.D. La. 1966).

95. See 1 Larson §§ 24–25.

which a worker who both works and lives aboard a man-made island can be called a seaman and member of the crew of a vessel without demolishing the meaning of the words altogether, there is no insuperable obstacle to achieving such an extension to workers who live aboard a tender and work on a fixed platform. The end result would be the embracing within the long arms of the Jones Act of all offshore oil-field workers except those who live and work on the large self-contained platforms.

G. *Current Law-Fact Relation in "Seaman" Issue*

After the heady exhilaration attending the first sweeping proclamations of finality of jury findings, the sober realization inevitably comes that the freedom of juries and administrators to find or deny seaman status cannot be absolutely unbounded. Limits must be set by rules of law. Although the question before the court changes from "do I agree with this finding?" to "is there a reasonable evidentiary basis for this finding?,"[96] the necessity for a legal judgment informed by legal guidelines cannot be sidestepped. The exercise of this legal function will necessarily cut in both directions. That is, in appropriate cases, the court may find it necessary to direct a verdict for the defendant, or for the plaintiff, or to overturn a jury's finding for the defendant or the plaintiff. Naturally, whenever a court undertakes any of these actions, it may expect to be met by the loser's protest—"But the Supreme Court has said that this is a question for the jury." Nevertheless, since the Supreme Court initiated this rule in 1955, examples of assertion of the court's authority in both directions have emerged and survived.

In 1957, right in the midst of the Supreme Court's decisions making seaman status an issue of fact, the Court denied certiorari to a case that apparently was considered so one-sided as to justify the appellate court's overturning of a jury's verdict in favor of the plaintiff. This was the case of *Texas Co. v. Savoie*,[97] in which the only vessel encountered by an off-shore oil worker in his employment was the water-taxi that took him from one fixed drilling platform to another. The court observed that whether there was substantial evidence to support the jury's finding was itself a question of law. Even if there was no conflict in the evidence, a jury question was presented provided reasonable minds could fairly draw different inferences from that evidence. In *Savoie*, however, the

96. See, e.g., Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957), where the Court stated: "Our holding there [in Bassett] that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate." Id. at 374.

97. 240 F.2d 674 (5th Cir.), cert. denied, 355 U.S. 840 (1957).

facts were undisputed, and there was no room for conflicting inferences. Accordingly, the court held that as a matter of law there was no substantial evidence to support a jury finding that plaintiff was a member of a crew of a vessel.

Similarly, in several cases verdicts have been directed for the defendant on the ground that there was not enough evidence of seaman status to go to the jury, and that the plaintiff was a non-seaman as a matter of law. In *Thibodeaux v. J. Ray McDermott & Co.*,[98] the plaintiff was a land-based welder who lived at home and who worked on various vessels, with no particular attachment to any of them. By this time the Fifth Circuit had behind it its own clear set of *Robison* tests and, pursuant to a straightforward checking of these requirements, could conclude that the test of attachment to a vessel or performance of a substantial part of the work on the vessel was not satisfied. Therefore the worker's only remedy was under the Longshoremen's Act. The same result was reached in a similar case, *Rotolo v. Halliburton Co.*,[99] which also involved a welder who occasionally did repair work on the defendant's vessels. A directed verdict for the defendant was sustained on largely the same grounds, *i.e.*, that the worker's relation to the vessel on which he was killed, or with any of the vessels, was only transitory. It is worth noting in passing that certiorari was again denied in this case.

In a case arising in Illinois, *Tuder v. Material Service Corp.*,[100] a directed verdict for the defendant was dictated principally, although not entirely, by the rather conspicuous failure of the craft involved to come within the meaning of the term "vessel." The "vessel" here was a string of three barges permanently joined together into a 470-foot-long sand and gravel plant, with conveyors, crushers, screens, pumps and machines installed in fixed positions. The whole contraption was firmly fastened to the bottom of the "wet pit" by means of spuds and pilings. Moreover, plaintiff's "attachment" to this plant was not "more or less permanent."[101] He was employed as a laborer and was a member of a labor union whose work had to do with the screening of sand and gravel. The court recognized the normal rule, well settled by this time, that the factual determination was usually one for the jury, but concluded that, on these facts, there was insufficient evidence to go to the jury and that the plaintiff as a matter of law was not a "member of the crew of a vessel."

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98. 276 F.2d 42 (5th Cir. 1960).

99. 317 F.2d 9 (5th Cir.), cert. denied, 375 U.S. 852 (1963). See also Boatel, Inc. v. Delamore, 379 F.2d 850 (5th Cir. 1967).

100. 177 F. Supp. 71 (N.D. Ill. 1959).

101. Id. at 75.

As for directing a verdict for the plaintiff on the ground that seaman status has been established by the evidence as a matter of law, the lead seems to have been taken by the Fourth Circuit. In *Lawrence v. Norfolk Dredging Co.*[102] plaintiff was a foreman or "deck captain" on a dredge. The court's problem was narrowed by the fact that defense counsel admitted that the dredge was a "vessel"—a point which some years earlier might have been disputed. There remained only the question of plaintiff's duties and his relation to the dredge. The facts here were also quite persuasive. As "deck captain," plaintiff tended lines, posted lights, and handled and maintained the pipelines that conveyed the earth from harbor bottom to shore. Moreover, the character of plaintiff's accident was about as nautical as could be imagined—a 1500 pound anchor fell on his legs. The court instructed the jury that as a matter of law the plaintiff was a seaman and crew member. The defendant appealed on the ground that the issue was a question of fact for the jury, but the Fourth Circuit affirmed, on the ground that the admitted facts as to the nature of the plaintiff's work left no room for conflicting inferences.

The Fifth Circuit has also held that, in an "appropriate case," a verdict may be directed in favor of the plaintiff. In *Producers Drilling Co. v. Gray*[103] the plaintiff was a roustabout who worked on a submersible drilling barge and whose duties included the maintenance of the barge and its equipment and assistance in raising and lowering the barge in addition to his regular work in connection with oil drilling. Seven years had passed since *Robison*, and the court evidently felt that by this time the main outlines of seaman status for offshore oil workers on mobile oil drilling barges were sufficiently stabilized to permit treating a run-of-the-mill case as a question of law. The defendants made the argument (usually heard from plaintiffs) that seaman status was a question of fact for the jury, relying heavily on *Adams v. Kelly Drilling Co.*[104]—a case with similar facts that had gone to the jury and resulted in a verdict for the defendants.[105] The court, in view of developments in the

102. 319 F.2d 805 (4th Cir.), cert. denied, 375 U.S. 952 (1963). See also Bryer v. Erie R.R., 1 Misc. 2d 422, 145 N.Y.S.2d 847 (N.Y. City Ct. 1955), in which the court ruled as a matter of law, taking the question away from the jury, that the plaintiff was a seaman and crew member under the Jones Act, and hence not eligible for compensation under the Longshoremen's Act. Plaintiff was permanently attached to a barge, performing both maintenance and navigational tasks, although he did not sleep aboard the barge.

103. 361 F.2d 432 (5th Cir. 1966).

104. 273 F.2d 887 (5th Cir.), cert. denied, 364 U.S. 845 (1960).

105. Id. at 888. In spite of the cynical assumption that sending a case to a jury is always tantamount to a verdict for the plaintiff, jury verdicts for the defendant are not altogether unknown. See Bernardo v. Bethlehem Steel Co., 314 F.2d 604 (2d Cir. 1963), aff'g 200 F. Supp. 534 (S.D.N.Y. 1961) (a jury finding that a welder on a floating dry dock was not a seaman or member of a crew of a vessel was upheld).

six years since *Adams*, in effect overruled *Adams*[106] by holding that there was no reasonable basis on which the plaintiff in the instant case could be held to be a non-seaman. The conclusion must be drawn that if the court had *Adams* to decide over again it would have to direct a verdict for the plaintiff, since its facts were not significantly distinguishable from those in *Gray*.[107]

The following year a district judge went a step further by granting a plaintiff's motion for summary judgment on the issue of seaman status in the unreported case of *Daws v. Movible Offshore, Inc.*[108] The court, observing that the circumstances justifying directed verdicts and summary judgments are essentially alike, relied on *Marine Drilling Co. v. Autin*[109] in concluding that a summary judgment was in order here, since it was obvious before the trial that there was no factual dispute and it did not appear that any evidence would be introduced at the trial that would create a dispute on the facts. The craft involved (a movable derrick barge) was clearly a vessel under a well-settled line of decisions, and the plaintiff's relation to it, as crane operator, unquestionably contributed to the purpose and mission of the vessel under the *Robison* tests.

When the case takes the form of a claim for benefits under the Longshoremen's Act, and the claimant's object is therefore to demonstrate that he was *not* a member of a crew of a vessel, there are also limits on the finality of the findings of fact by the commissioner. As was mentioned above, it was *South Chicago Coal & Dock Co. v. Bassett*, a case in this category, that formed the foundation upon which the Supreme Court rested its line of decisions entrusting the determination of seaman status under the Jones Act to the jury.[110] It should also be noted, before too much absolutism is attributed to the jury's fact-finding function under that line of decisions, that *Bassett* itself was promptly followed by a Su-

106. See text accompanying notes 81-82 supra.

107. See Marine Drilling Co. v. Autin, 363 F.2d 579 (5th Cir. 1966), decided by the Fifth Circuit shortly after Gray. The case involved an oil field worker on a submersible drilling barge. The jury found for the plaintiff, but on appeal the respondent contended that the judge's instructions to the jury amounted to a directed verdict. The Fifth Circuit found that the instructions were proper and did not amount to a directed verdict, but went on to observe that it is permissible in a proper case for a district judge to direct a verdict on the status of an offshore oil worker.

In Magnolia Towing Co. v. Pace, 378 F.2d 12 (5th Cir. 1967), the court said, in regard to the pilot of a tugboat: "We think that the law has developed to the point where it would have been proper for the district court to charge the jury as a matter of law that [plaintiff] was a 'seaman' at the time of his injury." Id. at 13 (footnote omitted).

108. No. 14,978 (E.D. La., March 3, 1967).

109. 363 F.2d 579 (5th Cir. 1966).

110. See text accompanying note 20 supra.

preme Court decision, *Norton v. Warner Co.*,[111] which made it clear that the entire job had not been abdicated in favor of the deputy commissioner. In *Norton* the injured man was a boatman on a barge who took general care of the barge and was, in fact, a one-man crew. He was permanently attached to the vessel and had all the characteristic duties of a member of a barge crew. The Supreme Court reversed the commissioner's award of compensation under the Longshoremen's Act, saying that, while in *Bassett* it had defined the term "crew" to include "those 'who are naturally and primarily on board' the vessel 'to aid in her navigation,' "[112] this was not to be construed as limited to navigation and operation, but embraced other duties essential to the operation of the vessel.

The Fifth Circuit assumed a comparable role in *Daffin v. Pape*,[113] decided a few years later. In this case, the decedent worked in his employer's radio station as a handyman while also working around his employer's yacht when it was in port—painting, cleaning, storing supplies, and so on. He went along on cruises and helped with tending bar and cooking, occasionally relieving the captain at the helm. He was killed by an explosion while filling the gas tanks in preparation for a voyage. The deputy commissioner awarded compensation. The district court enjoined enforcement of the award and the court of appeals affirmed over a dissent which contended that under *Bassett* the commissioner's decision was final.[114] Similarly, a deck hand on a towboat used to pull fishing boats to and from scows for a cannery had his Longshoremen's Act award set aside by a district court,[115] with the Ninth Circuit affirming the district court's action. By contrast, *Bassett* has been held to rule out a reversal of the commissioner's determination that a member of a fishing crew was not a member of the crew of a vessel.[116]

III. Seamen Engaged in Land Activity

Until 1943, seamen's remedies were restricted to injuries actually occurring on navigable waters on the theory that such remedies in general and the Jones Act in particular must have been intended to be confined to what was then conceived to be the area of admiralty jurisdiction.[117]

111. 321 U.S. 565 (1944).

112. Id. at 572 (citation omitted).

113. 170 F.2d 622 (5th Cir. 1948).

114. Id. at 626 n.2.

115. Alaska Packers Ass'n v. Alaska Indus. Bd., 88 F. Supp. 172 (D. Alas. 1950), aff'd, 186 F.2d 1015 (9th Cir. 1951).

116. Hartford Accident & Indem. Co. v. Schwartz, 89 F. Supp. 83 (E.D.N.Y. 1946).

117. E.g., O'Brien v. Calmar S.S. Corp., 104 F.2d 148 (3d Cir.), cert. denied, 308 U.S. 555 (1939); Todahl v. Sudden, 5 F.2d 462 (9th Cir. 1925).

But in that year the United States Supreme Court established a new test in *O'Donnell v. Great Lakes Dredge & Dock Co.*[118] wherein the Jones Act was held to apply also to inland injuries if they were in the course of employment and related to the vessel's activities. In the same year a similar test was affirmed as to the remedy of maintenance and cure in *Aguilar v. Standard Oil Co.*[119] The warranty of seaworthiness[120] underwent a similar expansion in scope, and has been applied liberally because of the "status" of those involved in the ship's service regardless of the situs of the injury.[121]

Before examining the swift and far-reaching expansion of the reach of seamen's remedies for injuries ashore, it should be pointed out that the effect of this expansion, like the effect of the comparable expansion of the concepts of "vessel" and "seaman," is not only the affirmative conferral of seamen's remedies in a much wider range of cases, but quite probably a corresponding constriction of the workmen's compensation remedies available. Since the federal jurisdiction thus assumed has been exclusive of both longshoremen's and state compensation acts, most compensation applications for inland injuries to seamen have been denied. Thus, when a member of a crew whose vessel was temporarily in the home port was killed by a train while walking the tracks to town to buy a faucet for the boat, state compensation was denied, since the errand was directly related to his service on the boat and was undertaken pursuant to express orders of the master.[122]

In *O'Donnell* a deck hand had been ordered ashore to assist in the repair of an unloading device, and while so engaged was injured. The Supreme Court held that the Jones Act was applicable and that as so applied it was constitutional. The Jones Act itself expressly provides an action at law for any seaman who suffers injuries "in the course of his employment."[123] Mr. Chief Justice Stone, speaking for the Court, said:

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118. 318 U.S. 36 (1943).

119. 318 U.S. 724 (1943).

120. The warranty of seaworthiness is a form of strict liability of shipowners which today has become the principal vehicle for personal injury recovery, even for those persons not strictly classified as "seamen." See Horn v. Cia de Navegacion Fruco, S.A., 404 F.2d 422 (5th Cir. 1968), cert. denied, 394 U.S. 943 (1969); In re Marine Sulphur Transp. Corp., 312 F. Supp. 1081 (S.D.N.Y. 1970).

121. See Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303 (9th Cir. 1970), noted in 39 Fordham L. Rev. 757 (1971).

122. Rudolph v. Industrial Marine Serv., Inc., 187 Tenn. 119, 213 S.W.2d 30 (1948); accord, Apperson v. Universal Servs., Inc., 153 So. 2d 81 (La. Ct. App. 1963) (steward of an offshore drilling rig, conceded to be a "seaman," held not entitled to state compensation benefits for injuries received on land during an employment errand); Hardt v. Cunningham, 136 N.J.L. 137, 54 A.2d 782 (Sup. Ct. 1947).

123. 46 U.S.C. § 688 (1970).

There is nothing in the legislative history of the Jones Act to indicate that its words "in the course of his employment" do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters.[124]

The new test was expressed in the following passage:

The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.[125]

The Supreme Court reaffirmed the new rule in several later Jones Act cases. *Senko v. LaCrosse Dredging Corp.*,[126] one of the leading cases making seaman status a jury question, is also relevant in this area because the harm occurred in the course of plaintiff's work ashore. The Court in *Senko* ruled that the fact that the injury occurred on land was not material. More significant, since the issue was given specific attention and the rule was elaborated somewhat, was *Braen v. Pfeifer Oil Transportation Co.*,[127] decided in 1959. The injured worker was a mate on a work barge which was in a repair yard. He had been ordered to perform some carpentry on a raft which was ordinarily used for painting and repairing the employer's vessels, but was not at that time being used to repair the plaintiff's barge. He was injured due to the collapse of a faulty catwalk of a lighter which was between the raft and the barge. The Supreme Court, reversing the Second Circuit, held that under *O'Donnell* the test was whether the injury occurred while the employee was in the course of his employment, whether on or off his barge. It is significant that the court also cited two maintenance and cure cases, *Aguilar* and *Warren v. United States*,[128] observing that, while they were not Jones Act cases, they made it clear that the scope of a seaman's employment or of the activities that are related to the vessel "are not measured by the standards applied to land-based employment relationships."[129] The cases "also supply relevant guides to the meaning of the term 'course of employment' under the [Jones] Act since it is the equivalent of the service of the ship formula used in maintenance and cure cases."[130]

In *Hopson v. Texaco, Inc.*[131] it became abundantly clear that physical proximity to or remoteness from the vessel had nothing to do with the

124. 318 U.S. at 39.
125. Id. at 42-43.
126. 352 U.S. 370 (1957).
127. 361 U.S. 129 (1959).
128. 340 U.S. 523 (1951).
129. 361 U.S. at 132.
130. Id. at 132-33.
131. 383 U.S. 262 (1966) (per curiam).

case, so long as the accident occurred in the course of the seaman's employment. Hopson became ill and had to be repatriated to the United States from Trinidad, where his tanker was in port. This required a trip to the office of the United States consul, thirty-eight miles away. Respondent engaged the taxi in which Hopson, accompanied by the ship's master, was riding on his way toward the consul's office when he was severely injured in a collision with a truck. The Supreme Court reinstated a jury verdict in favor of Hopson, saying, "These seamen were in the service of the ship and the ill-fated journey to Port of Spain was a vital part of the ship's total operations."[132]

If one takes a cue from the language in *Braen* and adds the Supreme Court maintenance and cure cases, the stage is well set for the surge of lower court decisions liberalizing the reach of seamen's remedies in all landward directions. In four such cases granting this remedy for injuries during shore leave there may be detected a progressively broadening willingness to extend both the geographical and the circumstantial range of fact situations covered. In *Aguilar* and a consolidated case, *Waterman Steamship Corp. v. Jones*,[133] the respective injuries occurred during shore leave. In *Aguilar* the seaman was injured by a motor vehicle on premises he was crossing to reach the ship on his return from shore leave. In *Waterman Steamship* the seaman, leaving his ship for shore leave, fell into an open ditch at a railroad siding. *Farrell v. United States*[134] went somewhat further when it allowed maintenance and cure to a seaman who had overstayed his shore leave by two hours, had entered the shorefront by the wrong gate a mile from where his ship was moored, and had fallen over a guard chain into a dry dock. Then came the famous *Warren* case in which a seaman on shore leave drank a bottle of wine, leaned over an unprotected ledge in a room adjoining a dance hall, and lost his balance and fell, breaking his leg, when an iron rod he was using as a rail came loose. Maintenance and cure was awarded.[135]

The language used by the Supreme Court in *Aguilar* is of unusual importance in identifying the original rationale behind these cases, particularly as the concept of "seaman" expands beyond the traditional sailor who lives and sails to far places aboard a conventional ship:

> To relieve the shipowner of his obligation in the case of injuries incurred on shore leave would cast upon the seaman hazards encountered only by reason of the voyage. The assumption is hardly sound that the normal uses and purposes of shore leave are

132. Id. at 264.
133. 318 U.S. 724 (1943).
134. 336 U.S. 511 (1949).
135. 340 U.S. at 524.

'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship, without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew would be taken if it could never obtain it. Even more for the seaman than for the landsman, therefore, 'the superfluous is the necessary . . . to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion.[136]

The court granted relief for a shore leave mishap in *Marceau v. Great Lakes Transit Corp.*,[137] where a cook who was on shore leave, but who had been ordered to return late that night to provide a night lunch, slipped on a pile of flour which had been unloaded from the vessel within about three to five feet of the ship's ladder. In *Walton v. Continental Steamship Co.*,[138] a seaman returning from shore leave injured when he mistook a coal chute for the gangway was also granted relief.

On the other hand, injuries in the course of personal activities during a protracted vacation may not be covered. Thus, in *Haskell v. Socony Mobil Oil Co.*,[139] it was held that the right of maintenance and cure did not extend to an injury incurred in an automobile accident in the course of a personal errand during a 46-day vacation leave to which the seaman was entitled under his union contract. It is not always easy to tell where covered shore leave activities end and uncovered vacation activities begin. Thus, maintenance and cure were allowed to a seaman who broke an ankle while visiting at a friend's home in *Smith v. United States*,[140] and to a seaman injured in the course of a bus journey to visit a relative in *Gaynor v. United States*.[141]

Closely intertwined with many of the shore leave cases is the going-and-coming issue. Up to a point, the issue resembles the situation in compensation cases, since that part of the journey which is in issue must be found to have been in the course of the worker's employment. There is a familiar ring to the test applied in *Marceau*, for example, which is that a man is in the course of his employment when going and coming upon the employer's premises or upon adjacent premises if this is a customary access route.[142] Accordingly, going-and-coming injuries on the dock are usually covered.[143]

136. 318 U.S. at 733-34 (footnote omitted).
137. 146 F.2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).
138. 66 F. Supp. 836 (D. Md. 1946).
139. 237 F.2d 707 (1st Cir. 1956).
140. 167 F.2d 550 (4th Cir. 1948).
141. 90 F. Supp. 751 (E.D. Pa. 1950).
142. 146 F.2d at 418.
143. E.g., McDonough v. Buckeye S.S. Co., 103 F. Supp. 473 (N.D. Ohio 1951), aff'd per

However, the plaintiff in a Jones Act case has a problem that does not trouble the compensation claimant; he must also prove that his employer's negligence was operative at the point of the accident. This would be true even on the employer's premises. It was therefore the issue of the employer's duty to provide a safe passageway, not the issue of course of employment, that occupied the court's attention in *Chesapeake & Ohio Railway v. Newman*,[144] a case involving a fall on an icy incline on a pathway customarily used by the ship's personnel while going from the ship to the defendant's shore office 150 feet away. Since the entire 90 acres surrounding the site of the accident belonged to the defendant, the case easily fell within the premise rule for course of employment purposes. But defendant argued that it was obviously impossible for it to keep the entire 90 acres free of snow and ice and that it therefore owed its employees no duty to do so. The court rejected this argument, saying that no one really expected quite such a Herculean performance, but that at least the defendant "had the duty of keeping open a reasonably safe passage-way of the 150 feet from the ship to the marine office."[145]

However, if the injury occurs off the premises, obvious difficulties are presented in ascribing negligence to the employer. Thus, in *Dangovich v. Isthmian Lines, Inc.*,[146] it was held that the ship owner is not liable to provide a safe entranceway to the ship beyond the gangway, and that the ship owner was therefore not liable in a Jones Act unseaworthiness action for injuries suffered by a seaman when he fell from a railroad trestle catwalk en route back from shore leave.

When the injury takes the form of an assault, the employer's responsibility can of course in appropriate circumstances be shown to extend to incidents at a distance from the ship or from the employer's premises.[147] A colorful example of this rule in practice is *Kyriakos v. Goulandris*.[148] The villain in this story was one Bouritis, a vicious character and hashish addict. Bouritis attempted to bring a woman aboard the ship while Kyriakos was on watch. Another member of the crew objected,

curiam, 200 F.2d 558 (6th Cir. 1952), cert. denied, 345 U.S. 926 (1953) (intoxicated seaman returning on a dock from shore leave); Valle v. Stockard S.S. Corp., 130 N.Y.S.2d 550 (Sup. Ct. 1953).

144. 243 F.2d 804 (6th Cir. 1957).

145. Id. at 809.

146. 218 F. Supp. 235 (S.D.N.Y. 1963), aff'd, 327 F.2d 355 (2d Cir. 1964).

147. See, e.g., Monteiro v. Paco Tankers, Inc., 93 F. Supp. 93 (E.D. Pa. 1950) (crewman assaulted by his superior officer a short distance from the ship, after the captain had ordered him ashore as soon as the ship was docked and his services were terminated); Nowery v. Smith, 69 F. Supp. 755 (E.D. Pa. 1946), aff'd per curiam, 161 F.2d 732 (3d Cir. 1947) (seaman, while on shore leave, injured in a fist fight with the chief engineer of the ship).

148. 151 F.2d 132 (2d Cir. 1945).

whereupon Bouritis beat him and bit him in the back of the neck. At this point Kyriakos, responding to his fellow crew member's cry for help, separated the two and, since he had orders from the captain to let no one aboard without a pass, conscientiously insisted on taking the woman ashore, in spite of Bouritis' threat: " 'Don't take that woman off the boat, I will kill you.' "[149] The captain, informed of the incident, sent for Bouritis and, instead of doing something about Bouritis' known vicious tendencies, winked at him and said, " 'Did they take your Missus off the boat?' "[150] The next evening while Kyriakos was ashore purchasing supplies for the voyage, he joined some other crew members at a coffee house, and as he was on his way from the coffee house to the ship, he was assaulted by Bouritis, who stabbed him repeatedly with a knife. The distance from the ship may have been anything between two hundred yards and a mile. The court said:

> If Bouritis had drawn his knife and attacked the libellant when and where the expulsion took place, there could have been no doubt that libellant would have been injured in the discharge of his duties. We think that it made no difference that Bouritis waited until he could ambush the libellant ashore. Neither the short lapse of time, nor the distance from the ship's side, was relevant. So long as the resulting assault was not too causally remote—and here it clearly was not—the libellant was injured in the course of his employment when the assault was the consequence of action taken in discharge of his duty.[151]

When a crew member is ordered to make a long journey especially to rejoin the ship, the journey is clearly in the course of employment if the employer provides the transportation. Thus, in *Magnolia Towing Co. v. Pace*,[152] plaintiff, a tugboat pilot who had been off duty for several days in Baton Rouge, was called by his employer and ordered to board one of the company's tugboats at Vicksburg, Mississippi. He went part of the way by bus and was then picked up in one of the company's cars driven by a co-employee for the balance of the journey, in the course of which he was injured in an accident. The Fifth Circuit affirmed a Jones Act judgment. Even air travel may become a hazard of maritime employment, what with shipping companies increasingly resorting to air transport to convey their crew members to or from distant ports in emergencies.[153] And, as in compensation, a journey may be employment-connected by virtue of the fact that the plaintiff was carrying supplies for the employer during the journey.[154]

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149. Id. at 135.

150. Id.

151. Id. at 138.

152. 378 F.2d 12 (5th Cir. 1967) (per curiam).

153. See McCall v. Overseas Tankship Corp., 222 F.2d 441 (2d Cir. 1955).

154. E.g., Berner v. Oil Transp. Co., 126 So. 2d 731 (La. Ct. App. 1961). A member of the ship's crew, after being off duty for thirty days, was ordered to drive a station wagon

All these developments bring us down to the case that suddenly and sharply reminds us of the possibly far-reaching implications of combining a swift expansion of the category of seamen to include many land-based workers with an equally swift expansion of the range of land-based injuries covered. That case is *Williamson v. Western-Pacific Dredging Corp.*,[155] decided by the federal district court in Oregon in 1969. The decedent was employed as a mate on a dredge. The dredge did not provide sleeping quarters, and consequently the decedent was required to live ashore. By virtue of the union contract, each employee was allowed four dollars a day for "travel pay," and defendant had a policy, which was not enforced, that each employee should use his own automobile in going to and coming from work. In this instance, decedent was riding to work in a car driven by a fellow-employee at the time of injury that resulted in his death. The district court held that decedent was a seaman in the "service of the ship" at the time of the accident, and that the appropriate remedies were therefore maintenance and cure and Jones Act damages, not workmen's compensation under either the Longshoremen's Act or the Oregon compensation act.[156]

The court, acutely conscious of the fact that it was breaking new ground in more than one respect, relied heavily on shore leave decisions holding that seamen are in the course of their employment if they are answerable to the call of duty during such leave. The decedent, argued the court, was as much answerable to the call of duty at the time of the injury as were the seamen in the shore leave decisions and, indeed, was serving his ship better than the seamen who in the pursuit of their own relaxation and pleasure got involved in various picturesque mishaps. In addition, as to the Jones Act count, the court stressed that in the circumstances the journey to work had been brought within the course of employment:

> Although a finding for plaintiff on this record is invading virgin territory, yet untouched by judicial decision, the courts must recognize the monumental march of our present civilization, particularly in the transportation sphere. Inasmuch as defendant found it to its advantage to pay to its employees a fixed transportation fee, rather than provide quarters aboard the ship, it cannot now escape liability by claiming that decedent and Ferguson were not employees in the course of their employment.[157]

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containing ship's supplies from New Orleans, Louisiana, to Greenville, Mississippi, where he was injured while loading a welding machine onto the vessel. The court held that plaintiff's cause of action was under the Jones Act and therefore no cause of action under the state compensation law could be maintained.

155. 304 F. Supp. 509 (D. Ore. 1969), aff'd, 441 F.2d 65 (9th Cir. 1971).

156. The benefits of the Oregon Workmen's Compensation Law (Ore. Rev. Stat. § 656.001 (1969)) are not available to any workmen "for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States." Id. § 656.027(4).

157. 304 F. Supp. at 518.

Actually, the decision in *Williamson*, like the decisions in the various other Jones Act cases cited as expanding the range and variety of on-shore activities covered, is not as startling as courts and commentators have sometimes seemed to think—at least if they are judged against developments in general workmen's compensation law, instead of always being treated as somehow utterly unique and different because they arose under maritime law. Part of the blame for this situation must be placed on language in Supreme Court cases stressing this difference. Thus, in *Braen*, the Court said that "the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships."[158] Evidently the Court thought that in making this statement it was adopting a more liberal concept of course of employment for maritime injuries than would apply in state workmen's compensation cases. If that was so at some earlier time, it certainly is not so now. Thus *Williamson*, if it had been handled as a state workmen's compensation case, would have been seen to be a run-of-the-mill example of bringing the going-and-coming journey within the course of employment by virtue of paying for the expense of travel.[159] In the same way, *Pace* would have appeared as such a routine case of employer-furnished transportation[160] that few workmen's compensation defendants would consider it worth contesting, much less appealing.

The nub of the problem is that the maritime cases got started on a basis strongly influenced by the special situation of the true seamen who lived aboard a true ship. And so the Supreme Court in *Aguilar* could paint an eloquent word-picture of the sailor "cooped up" aboard ship for such long periods that his shore-based relaxation was a positive necessity to the efficient operation of the ship.[161] However, the "seaman" category has now been expanded to include all kinds of workers who are not "cooped up" at all, but who live normal landbased lives, and differ from other workers only in that they spend their working hours on a dredge or floating pile driver on navigable waters. Once this fact is absorbed, it is apparent that nothing reasonable can flow from persisting in carrying out to the hilt the fiction that such land-based seamen must be accorded all the special concessions that were found appropriate for cooped-up sailors. But this does not mean that their treatment should become less generous than that of seamen generally—only that it should be based on a rationale that reflects their real situation and not a fictitious one.

158. 361 U.S. at 132.
159. See 1 Larson § 16.30.
160. Id. § 17.
161. See text accompanying note 136 supra.

The optimum solution in these cases—and one may be sure that many more variants of the *Williamson* problem will continue to arise—is not complicated. It is merely to treat all seamen the same for Jones Act "course of employment" purposes as for compensation "course of employment" purposes in the more advanced states—making full allowance for the special concessions that have been made to compensation claimants who are in residence, or on call, or engaged in travel, and especially in appropriate cases recognizing the sweeping expansion of course of employment standards that has occurred for the benefit of camp show workers, workers on overseas projects and bases, and travelers who have to live under unusual conditions. It will quickly be discovered that any Jones Act or maintenance and cure-course of employment expansion as yet achieved can easily be matched and out-matched by workmen's compensation cases involving workers whose residential, travel, or on-call position is comparable. With the assault in *Kyriakos*, compare the assault in *Meo v. Commercial Can Corp.*,[162] similarly separated from the employment in both space and time. With the award of maintenance and cure to a seaman who slipped in the shower at home while on call between trips,[163] compare the many awards to on-call resident employees injured while showering or bathing.[164] With the shore leave recreation cases, compare the almost unlimited compensation coverage of recreation in the case of workers on overseas bases and construction projects,[165] including a private secretary's parking on a breakwater in Guam with her employer who was supposed to be returning her to the women's quarters.[166] With the case of the seaman who turned his ankle in the driveway of a friend he was visiting during shore leave,[167] compare *Caney v. Straight*,[168] granting compensation to a cook in a summer resort who fell on the steps of a co-employee's cottage while returning a book during a rest period, or *De Santis v. U.S.O. Camp Shows, Inc.*,[169] in which a musician was struck by an automobile while returning to his hotel from a night out at the opera.

The point, then, is not that a sharp distinction should be drawn between course of employment, seaman-style, and course of employment, non-seaman-style. The line should be drawn according to the residential, on-call, traveling, or other facts of the case, since these are the true

162. 80 N.J. Super. 58, 192 A.2d 854 (1963) (compensation award to a plant superintendent assaulted at home during a strike).

163. Palmer v. Boat Edith L. Boudreau, Inc., 352 Mass. 179, 223 N.E.2d 919 (1967).

164. See 1 Larson § 24.21 nn.13-16.

165. Id. § 24.30.

166. Self v. Hanson, 305 F.2d 699 (9th Cir. 1962).

167. Smith v. United States, 167 F.2d 550 (4th Cir. 1948).

168. 274 App. Div. 1077, 85 N.Y.S.2d 626 (3d Dep't 1949) (mem.).

169. 275 App. Div. 880, 88 N.Y.S.2d 732 (3d Dep't 1949) (mem.).

considerations underlying both the expansion of shore-leave and other coverage of conventional seamen and the expansion of coverage of land-based workers under compensation acts in the on-call, residential, travelling and similar categories. If this is not done, there will be a temptation to try to stretch rules designed for cooped-up sailors briefly turned loose in Trinidad to cover dredge workers living in split-level houses in Oregon suburbs. Does this dredge worker have to be covered whenever he gets drunk in some nearby bar in order to maintain the efficiency of the dredge?[170] The recognition of the propriety of a carry-over of course of employment standards, with appropriate adjustments for the on-call, residential and other factors mentioned, between compensation law and maritime law would not only forestall such absurdities as the one just indicated, but would place the rich body of precedent that has been worked out and tested by experience in hundreds of comparable cases under state compensation acts at the disposal of maritime law at a time when the latter is certain to be confronted with a growing number of cases that, by any standard, actually have more in common with the cases arising under land-based compensation law than with cases involving sailors shaking off that cooped-up feeling by carousing in romantic foreign ports.

IV. The Twilight Zone of Maritime Compensation

A. *The Local-Concern Doctrine and Seamen*

The classic local-concern or maritime-but-local doctrine is that, notwithstanding the maritime nature of a tort resulting in the injury or death of an employee, local rather than maritime law may apply when the activity of the employee and the vessel on which he was employed is a mere matter of local concern, provided the application of local law would not work material prejudice to the characteristic features of the general maritime law or interefere with the former harmony and uniformity of the law in its international and interstate relations.[171]

The current relevance of the doctrine to the areas of conflict here under discussion is largely limited to one category of cases: those involving affirmative claims for state workmen's compensation in possible competition with seamen's remedies.

The local-concern doctrine appears to have lost all vitality when the

170. Cf. Thurnau v. Alcoa S.S. Co., 229 F.2d 73 (2d Cir. 1956) (employer has no duty to provide safe transportation between the ship and a place of amusement).

171. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922), enunciated the "maritime but local" doctrine by holding that a shore based carpenter injured while working in the hold of a partially completed vessel lying in navigable waters could recover under state compensation laws. See Miller's Indem. Underwriters v. Braud, 270 U.S. 59 (1926); Alaska Packers Ass'n v. Alaska Indus. Bd., 88 F. Supp. 172 (D. Alas. 1950), aff'd, 186 F.2d 1015 (9th Cir. 1951).

competition is between the Longshoremen's Act and state acts. That this is so when the issue arises under a Longshoremen's Act claim is made completely clear by *Calbeck v. Travelers Insurance Co.*[172] When the issue arises under a state act claim it is less clear, but in practice no state claim in forty years has been turned away by the United States Supreme Court on the ground that the maritime activity involved was not sufficiently "local."[173]

When one turns to conflicts between the Jones Act and state acts, one once more finds that the relevance of the local-concern doctrine has been sharply constricted, this time by the fact that the doctrine is of no importance when the case arises as an affirmative Jones Act claim. The outer boundaries of the Jones Act, as shown by the cases discussed in the previous section, have been almost entirely fixed by asking, not the constitutional question, "does this invade the local-concern area?," but the statutory question, "does this invade an area where the water is not navigable, or the craft is not a vessel, or the worker was not a seaman or crew member, or the seaman was not in the course of his employment?"

The earlier leading case, and quite possibly the last case, invoking the local-concern doctrine to deny a Jones Act remedy is *Fuentes v. Gulf Coast Dredging Co.*,[174] decided in 1931. It was relied on and followed in *Covington v. Standard Dredging Corp.*,[175] decided in 1952, but the court in *Covington* did not itself use local-concern language. Both of these were dredge cases that could have been decided quite readily without resort to the local-concern argument. A federal district court in Florida[176] has since pointed out that the local-concern doctrine as applied in *Fuentes* has been ignored since 1931, and has expressed the opinion that *Fuentes* has in effect been overruled.[177]

To understand where the local-concern doctrine properly fits in this field of conflict, one must remind oneself that it is a constitutional, not a statutory, doctrine. However, for a brief period it also became a statutory boundary by adoption when the outer limits of the Longshoremen's Act were placed at the point where state acts may (which can only mean constitutionally may) apply. The boundary thus adopted was the line that had been judicially drawn between situations that were maritime-but-local and those that were not, under decisions already well established

172. 370 U.S. 114 (1962); see Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969), noted in 38 Fordham L. Rev. 545 (1970). See also 3 Larson § 89.25.

173. See 3 Larson § 89.40.

174. 54 F.2d 69 (5th Cir. 1931).

175. 61 So. 2d 644 (Fla. 1952).

176. Chesser v. General Dredging Co., 150 F. Supp. 592 (S.D. Fla. 1957).

177. The court based this on two later holdings: Gianfala v. Texas Co., 350 U.S. 879 (1955), and McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953).

before the Longshoremen's Act was passed. The Longshoremen's Act, then, simply adopted and crystallized the local-concern doctrine as already developed. It should also be remembered that the purpose of the local-concern doctrine was entirely one of enlarging, not diminishing, the range of remedies available to waterfront workers. In the absence of a valid compensation act for waterfront workers injured on navigable waters before 1927, the courts did the best they could to soften the absoluteness of the doctrine of maritime uniformity by carving out the local-concern exception.

In the case of the Jones Act, however, the history is quite different. Its boundaries were set by statutory terms such as "seaman," "vessel," "member of a crew," and "course of employment." It did not incorporate into itself the local-concern doctrine, as the Longshoremen's Act did. There was therefore no occasion to resort to the doctrine at all for purposes of deciding whether an affirmative action would lie. If one assumes that Congress has the constitutional power to provide remedies for "seamen" and "members of a crew of a vessel" injured in the course of their employment, the question of the coverage of an affirmative Jones Act claim becomes entirely a statutory one.

This, however, leaves one remaining area—that of affirmative claims under state acts, resisted on the ground that they invade the exclusive province of federal seamen's remedies. In this category there have been a number of cases holding that the doctrine of local concern sustained the applicability of state workmen's compensation laws.[178] However,

178. E.g., United Dredging Co. v. Lindberg, 18 F.2d 453 (5th Cir.), cert. denied, 274 U.S. 759 (1927); Cordova Fish & Cold Storage Co. v. Estes, 370 P.2d 180 (Alas. 1962) (crab fisherman injured while moving pots on a boat deck); City of Oakland v. Industrial Accident Comm'n, 198 Cal. 273, 244 P. 353 (1926) (city civil service employee injured while working as a deck hand on an anchor barge used as a tender to a city dredge); United Dredging Co. v. Industrial Accident Comm'n, 92 Cal. App. 100, 267 P. 763 (Dist. Ct. App. 1928) (injury to dredge deckhand); Dourrieu v. Board of Comm'rs, 158 So. 581 (La. Ct. App. 1935) (worker drowned while employed on a suction dredge removing silt from the bottom of a canal); Herbert's Case, 283 Mass. 348, 186 N.E. 554 (1933) (involving a fall overboard by a sweeper on a scavenger scow); Toland's Case, 258 Mass. 470, 155 N.E. 602 (1927) (involving an engineer on a dredge engaged in digging into the land side of a harbor to enlarge a dock); Schacht v. Nicolaisen, 283 App. Div. 902, 129 N.Y.S.2d 871 (3d Dep't 1954) (mem.) (diver examining sunken barge in preparation for raising it held to be within the compensation act); Mark v. Portland Gravel Co., 130 Ore. 11, 278 P. 986 (1929) (involving an engineer on a dredge); Zubik v. Bethlehem Steel Co., 144 Pa. Super. 13, 18 A.2d 441 (1941) (involving a lifeguard patrolling waters under an intra-state bridge in the process of being built); Southern Sur. Co. v. Crawford, 274 S.W. 280 (Tex. Civ. App. 1925), cert. denied, 270 U.S. 655 (1926) (involving an employee on a dredge boat); Garrisey v. Westshore Marina Associates, 2 Wash. App. 718, 469 P.2d 590 (1970) (worker injured in the construction of a floating

the state claim has been barred by the exclusiveness of the federal remedy, since the situation was not local enough to fall within the local-concern exception.[179]

B. *Jones Act-State Compensation Twilight Zone*

Since it was the local-concern doctrine that the Supreme Court acted upon when it decreed a twilight zone in state-Longshoremen's Act conflicts,[180] and since the expansion of the seaman concept and of the range of covered landward activities is markedly increasing the area of potential state-Jones Act overlap, the possibility of applying the twilight zone technique to the latter deserves serious attention. Indeed, the problem is, if anything, more urgent in the Jones Act area. Between the Longshoremen's Act and a state compensation act the worst that can happen to a claimant is that he might get the lesser of two benefit scales. But if a gap is left between the Jones Act and state compensation acts, the claimant may get nothing, as when the widow and children of a worker instantly killed without employer negligence find that they have no Jones Act remedy, no maintenance and cure, and—if too strict a line is drawn, say, as to land-based "seamen" killed on a landward errand—no workmen's compensation.

The Fifth Circuit has met this issue head-on and held that the twilight zone treatment can be applied to the borderland between the Jones Act and a state compensation act. In *Maryland Casualty Co. v. Toups*[181] the decedent was the captain and crew of a forty-six foot vessel which he used to carry pilots out to sea-going ships. While sitting on a dock making fenders for use on his boat, he fell into the water and was drowned. His widow sought compensation under the Texas act, and the court held that the state act could be applied. The court stressed that

marina for an inland lake held to be bound to election of workmen's compensation because of local concern doctrine).

179. See, e.g., Valley Towing Co. v. Allen, 236 Miss. 51, 109 So. 2d 538 (1959). In a clear case of regular maritime employment, there can be no twilight zone or local-concern exception. Here the deceased died of a heart attack in his cabin in a river vessel on navigable waters. His work was exclusively that of a seaman. The court took note of the twilight zone doctrine, but added that "in no case in the Supreme Court, in which the injured person was a seaman performing a seaman's duties on navigable water, has state law been held applicable." Id. at 65, 109 So. 2d at 543.

180. Davis v. Department of Labor & Indus., 317 U.S. 249 (1942).

181. 172 F.2d 542 (5th Cir. 1949). The only other case clearly adopting the twilight zone solution in a Jones Act-state compensation act conflict, Beadle v. Massachusetts Bonding & Ins. Co., 87 So. 2d 339 (La. Ct. App. 1956), was overruled in Apperson v. Universal Servs., Inc., 153 So. 2d 81 (La. Ct. App. 1963). See also Schacht v. Nicolaisen, 283 App. Div. 902, 129 N.Y.S.2d 871 (3d Dep't 1954).

the widow, if left to seamen's remedies, would have received nothing—there was no negligence on which to base a Jones Act suit, and the remedy of maintenance and cure does not arise in death cases. The court's reasoning is exactly that of the state-versus-longshoremen's cases. It said that the accident was a matter of local concern, and that to afford compensation protection would not interfere with the uniformity of the maritime law. It conceded that if there had been negligence a Jones Act suit could have been brought, but concluded that since no such remedy was actually available on the present facts, the compensation remedy should be provided.

Theoretically, there are two possible impediments to a twilight zone doctrine for state-Jones Act areas of overlap. One is constitutional: the concept of maintaining the uniformity of maritime law.[182] The other is statutory: the argument that by passing the Jones Act Congress has preempted the area so covered, thus excluding state remedies from that area *even if they are merely of local concern.*

The short answer to the first problem is that the entire rationale of *Davis v. Department of Labor & Industry*[183] in creating the twilight zone in the first place is just as applicable to the Jones Act as to the Longshoremen's Act. The constitutional problem is the same. Both have to do with the constitutional concept of uniformity of maritime law. If this concept is not offended by a twilight zone applicable to the maritime power as expressed in the Longshoremen's Act, it is no more offended by a twilight zone applicable to the same power as expressed in the Jones Act.

The more difficult problem, in the case of the Jones Act, is the second —that of statutory preemption of the field. This problem did not exist under the Longshoremen's Act, since by its terms it expressly did *not* preempt the field but stopped short of the point at which states "may" provide coverage.

Did Congress in passing the Jones Act intend to drive out and destroy

182. This argument was relied on by the court in Apperson v. Universal Servs., Inc., 153 So. 2d 81 (La. Ct. App. 1963). See also Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966), where the court stated: "Jurisdiction to award compensation and Jones Act jurisdiction, however, do not overlap. The doctrines of maritime but local and the twilight zone, which apply to cases of competing compensation schemes (the Longshoremen's and Harbor Worker's Compensation Act . . . and state acts), have not been extended to cases involving the Jones Act and a compensation scheme." Id. at 651. However, the above cases establish this proposition only as between the Jones Act and the Longshoremen's Act, and as between the Jones Act and the FELA. They do not establish it as to the Jones Act and state acts.

183. 317 U.S. 249 (1942).

all existing state compensation remedies within its reach?[184] To answer this question, one must reconstruct the mood and purpose of Congress during the period in question. Everything points to the fact that Congress was bent on increasing the remedies available to injured seamen, not limiting them. The Jones Act itself was passed with the object of getting rid of the fellow-servant defense in suits by the employee against his employer. Just before this, and just after, in 1917 and 1922, Congress had made two unsuccessful attempts to turn the whole harbor worker compensation field over to the states. Moreover, in passing the Jones Act Congress did not displace other non-fault seamen's remedies for maintenance and cure and for unseaworthiness.[185]

A Congress that had tried so persistently to delegate as much of the compensation job as possible to the states, and that was bent on augmenting the injured seaman's right at every point where it touched them can scarcely be presumed to have intended the obliteration of large areas of non-fault protection under state acts, particularly in borderline situations where severe hardship would result to the worker and his family. It should be recalled that, in the early years of the Jones Act, the concept of "seaman" was much narrower, and the act was thought not to apply to land injuries at all. Consequently, land injuries to seamen were routinely treated as compensable under state acts,[186] with no perceptible damage to maritime uniformity or constitutional integrity. But would the Congress of 1920, with the record just described, be likely to have intended to demolish the non-fault state compensation protection of the family of a land-based dredge worker killed on his way to work in an automobile?[187]

If this line of argument is accepted, there still remains the problem of setting some bounds on state jurisdiction. The effect of the present contention is to say where the boundary should *not* be. Thus, the

184. There is no Supreme Court holding on this point. In Lindgren v. United States, 281 U.S. 38 (1930), there is dictum to the effect that the Jones Act "covers the entire field of liability for injuries to seamen" and that is "paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject." Id. at 47. The actual holding of the case was that the Jones Act preempts the area of a state wrongful death statute, even though the deceased's representatives had no cause of action under the Jones Act for lack of actionable negligence. It is quite another matter to say that a federal statute concerned only with fault-based employer liability was intended to displace state social insurance schemes based not on fault but on social policy.

185. Panama R.R. v. Johnson, 264 U.S. 375 (1924).

186. Turner v. City of New York, 249 App. Div. 790, 292 N.Y.S. 375 (2d Dep't 1936) (mem.).

187. See text accompanying notes 155-57 supra. For cases in which there has been a denial of state compensation for landward injuries to seamen see note 122 supra.

boundary of state compensation coverage should *not* begin only at the outermost limits to which judicial decisions have pushed the statutory concepts of "vessel," "seaman," "crew member" and "course of employment" under Jones Act decisions. The theoretical legal reasons noted above for cutting into state jurisdiction this severely—the constitutional argument and the preemption argument—can be seen, in the light of modern modes of legal thought, to be all conceptualism and no real substance. The substance of the matter lies in three things: First, the need to avoid hardships caused by gaps in coverage; second, the desirability, as in the longshoremen's area, of avoiding the administrative burdens and uncertainties of having to decide every borderline case on its facts, with endless litigation, appeals and expense; and third, the recognition, under contemporary conflicts theory, of the valid interest of a state in the welfare and financial plight of injured workers within its boundaries. As more and more cases of land-based workers injured on land or in marginal maritime activities, and of even sea-based workers injured far from their vessels on inland errands arise, it will become increasingly plain that states which find on their hands these injured, helpless, and perhaps penniless "seamen" or their bereaved families cannot say that they have no legitimate interest in seeing that these persons have adequate compensation protection.

Where, then, should the line be drawn beyond which the state cannot extend compensation protection? One cannot, perhaps, do better than to go back to *Moores's Case*[188] and conclude that the essence of the test of twilight zone coverage is the very fact of doubt. There is, of course, such a thing as a doubt-free case of maritime employment obviously beyond state reach, exemplified by the conventional seaman who has signed seamen's articles and who is occupied with maritime duties on the seas or navigable waters. Thus, in *Valley Towing Co. v. Allen*,[189] the Mississippi court held that when the master and pilot of a vessel, who had been a river man all his life and whose work was exclusively that of a seaman, died of a heart attack in his cabin in a river vessel on navigable waters, there was no room for any possible twilight zone and the state compensation act could not apply by any conceivable stretch of the doctrine of local concern.

But, apart from such one-sided cases, the best approach would seem to be to allow the trier of fact the same kind of broad discretion as in the longshoremen's conflicts cases, allowing for the broadest interpreta-

188. 323 Mass. 162, 80 N.E.2d 478, aff'd per curiam sub nom. Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948).

189. 236 Miss. 51, 109 So. 2d 538 (1959).

tion of the doctrine of local concern with a minimum of interference by appellate courts as long as errors of law are avoided.

The area of potential overlap between the Jones Act and state acts would thus correspond roughly to the differences between the outer statutory limits of the Jones Act as determined by interpretation of such terms as "seaman," "vessel," and "course of employment," and the outer constitutional limits of state power under a generously-construed local-concern doctrine. To this must be added the reminder that the essence of the twilight-zone approach is not substantive at all but, in effect, procedural. That is, its operative mechanism is that of according finality to a finding by the fact-finder that the facts are such as to confer jurisdiction. The Jones Act has helped itself to a generous and widening slice of the overlap area through the device of finality of jury findings. By the same token, there is no reason why the state acts should not assert their legitimate interest in the overlap area through the same device of finality of commission findings, backed by the *Davis* principle, on which the twilight-zone holding rested, *i.e.*, that there is a heavy presumption in favor of the constitutionality of a state statute when applied according to its terms.[190]

C. *Jones Act-Longshoremen's Act Twilight Zone*

It is quite clear that, in any substantive sense, there can be no twilight zone between the Jones Act and the Longshoremen's Act, since the latter expressly and intentionally draws a sharp, hard line between the two by use of the "master or member of a crew" test. The United States Supreme Court expressly addressed itself to this question in a footnote in *Norton v. Warner Co.*:[191]

> In *Davis v. Department of Labor* . . . we were dealing with the problem of determining whether a so-called harbor worker could be compensated under a state act or must come under the Longshoremen's and Harbor Workers' Act. That problem was embarrassed by the fact that the line between federal and state domain had been drawn with reference to the rule of the *Jensen* case. There are no such complications here. In this case the line is one which Congress has drawn between two mutually exclusive federal systems.[192]

The nearest thing to a twilight zone effect here would be the fact that, since a presumption of finality attaches to administrative or jury findings of fact under both acts, dissimilar holdings in different cases on similar sets of facts may very well stand side by side by virtue of the

190. Davis v. Department of Labor & Indus., 317 U.S. 249, 257-58 (1942).

191. 321 U.S. 565 (1944).

192. Id. at 569 n.3 (citation omitted).

refusal of appellate courts to interfere with them. Suppose, for the sake of illustrating the point, that there were two identical sets of facts involving injury on navigable waters to two land-based dredge workers, *A* and *B*. Suppose *A* proceeds under the Jones Act because he can make out a case of employer negligence, and suppose *B* proceeds under the Longshoremen's Act because he cannot. The jury finds that *A* was a crew member and seaman and awards Jones Act damages. The commissioner finds that *B* was not a member of a crew of a vessel, and awards compensation under the Longshoremen's Act. The former will be affirmed under the *Gianfala-Senko-Grimes-Butler* doctrine while the latter will be affirmed under *Bassett*. This is where the matter will rest, since there is no current legal theory or mechanism by which the defendant in either case could protest to some higher court that inconsistent results were being produced. As long as there was evidence to support the result in *his* case, that is an end of the matter.

D. *Successive Awards Involving the Jones Act*

The much more common way in which an overlap issue arises is when a Longshoremen's Act claim and a Jones Act action are brought in the same case. Analytically, the successive-recovery problem could occur in connection with the Jones Act in four permutations—(1) Longshoremen's Act followed by Jones Act; (2) state compensation act followed by Jones Act; (3) Jones Act followed by Longshoremen's Act; and (4) Jones Act followed by state compensation act.

In practice, since a successful Jones Act recovery would normally be more generous than either type of compensation act recovery, there would be no occasion for a subsequent compensation claim. Accordingly, one rarely encounters the problem in this sequence, although on occasion a peculiar combination of circumstances may give rise to it. The bulk of the problem, then, takes the form of the making of compensation claims or the acceptance of compensation benefits, followed by a Jones Act action.

The cases in which compensation, whether state or longshoremen's, has been followed by a Jones Act procedure have varied according to the degree of claimant initiative and of administrative formality and finality involved in the compensation recovery.

Beginning with the minimum in initiative and formality, it can be taken as universally accepted that the mere acceptance of compensation payments will not bar a Jones Act suit.[193] The compensation benefits

193. See, e.g., Tipton v. Socony Mobil Oil Co., 375 U.S. 34 (1963) (reversible error to let the jury in a Jones Act suit know that plaintiff had accepted benefits under the Long-

are of course credited against the Jones Act recovery.[194]

If the quantum of claimant's initiative is increased by adding the fact that he actively claimed compensation benefits, a new possible legal argument is added—the argument of election of remedies. However, here again a substantial majority of the cases hold that the claiming[195] of compensation benefits does not in itself bar a subsequent Jones Act suit, whether or not followed by acceptance of some benefits.[196]

shoremen's Act); Boatel, Inc. v. Delamore, 397 F.2d 850 (5th Cir. 1967) (claimant not estopped from claiming under Jones Act after voluntary payment of benefits under the Longshoremen's Act); Gahagan Const. Corp. v. Armao, 165 F.2d 301 (1st Cir.), cert. denied, 333 U.S. 876 (1948); Kibadeaux v. Standard Dredging Co., 81 F.2d 670 (5th Cir.), cert. denied, 299 U.S. 549 (1936); Sims v. Marine Catering Serv., Inc., 217 F. Supp. 511 (D. La. 1963) ("messman" employed by a catering service to work on the third party's quarterboat plying between offshore drilling sites and the shore entitled to maintenance and cure despite payment under state act); Mach v. Pennsylvania R.R., 198 F. Supp. 471 (W.D. Pa. 1960); Garland v. Alaska S.S. Co., 194 F. Supp. 792 (D. Alas. 1961) (dictum); Lawrence v. Norfolk Dredging Co., 194 F. Supp. 484 (E.D. Va. 1961), aff'd, 319 F.2d 805 (4th Cir.), cert. denied, 375 U.S. 952 (1963); Chesser v. General Dredging Co., 150 F. Supp. 592 (S.D. Fla. 1957).

Of course, if acceptance of benefits is accompanied by a release of Jones Act liability, a totally different question is presented, but naturally no such release is implied from the mere acceptance of compensation benefits. Biggs v. Norfolk Dredging Co., 360 F.2d 360 (4th Cir. 1966); Toland v. Atlantic Gahagan Joint Venture Dredge, No. 1, 57 N.J. 205, 271 A.2d 2 (1970). And, when a seaman's purported release is involved, "such releases are subject to careful scrutiny" under the wardship theory. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

194. Williams v. Offshore Co., 216 F. Supp. 98 (E.D. La. 1963). Practically all of the cases involving a prior compensation recovery are authority for this proposition. One of the rare cases in which a Jones Act recovery was not allowed following a compensation act award can be explained on this basis. In Ouzts v. A.P. Ward & Son, Inc., 146 F. Supp. 733 (N.D. Fla. 1956), it appeared that the total value of compensation already accepted exceeded any possible amount that might be recovered in the subsequent maintenance and cure action. For this reason it was held that the suit could not continue.

195. Because of differences in compensation administration, the word "claim" in this context can cover a wide variety of actions, although under these cases the differences have not affected the outcome. Thus, in Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966), the record showed that plaintiff "made a claim" under the New York compensation act. But, as the court pointed out, under New York procedure, since payments are automatically made in uncontroverted cases, this might mean only that the claimant gave his employer notice of injury. Ambiguity on this point sometimes makes it difficult to assess the significance of a decision. Thus, in one of the very few cases apparently contra, Rackus v. Moore-McCormack Lines, 85 F. Supp. 185 (E.D. Pa. 1949), the court stated only that the plaintiff had "exercised his right to compensation under" the Longshoremen's Act. A subsequent Jones Act suit was held barred, but it is not clear whether there was a claim, an award, or conceivably even a release.

The Longshoremen's Act, like the New York act, authorizes a voluntary payment procedure in uncontroverted cases; consequently the receipt of benefits under the Longshoremen's Act does not in itself prove that an affirmative claim was filed. Longshoremen's Act § 914.

196. See, e.g., Boatel, Inc. v. Delamore, 379 F.2d 850 (5th Cir. 1967); Biggs v. Norfolk

As to an election between the Jones Act and the Longshoremen's Act, the defense has been rejected on the technical ground that the doctrine of election applies only when the two remedies are coexistent.[197] Since these two remedies are not coexistent, but mutually exclusive, and since plaintiff's remedy legally must be only under one act or the other, he cannot be deemed to have made a valid election.[198]

A more fundamental answer to the election defense, and one that applies as well to state compensation acts, is the argument that the doctrine of election simply has no place in modern social insurance law. Whatever may have been its justification in the process of setting up ground rules for private adversary legal contests, it makes no sense when applied to protective systems created to serve public as well as private purposes. The community has decided that injured workmen and their families shall have as a minimum recovery the security that goes with non-fault compensation. It is not for the individual, once he is part of that system, to elect whether its protection is a good idea for him or not. If he accepts or claims its benefits, this is not an election but merely the setting in motion of a protective process ordained by the state. This being so, it

Dredging Co., 360 F.2d 360 (4th Cir. 1966) (prior benefits under the Virginia act did preclude recovery under the Jones Act); Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966) (the mere claim and receipt of benefits made voluntarily, without any litigation, did not bar a Jones act claim); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953); Marceau v. Great Lakes Transit Corp., 146 F.2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945); Oliver v. Ocean Drilling & Explor. Co., 222 F. Supp. 843 (W.D. La. 1963); Robertson v. Donovan, 219 F. Supp. 364 (E.D. La. 1963); Boyles v. Humble Oil & Refining Co., 209 F. Supp. 857 (E.D. La. 1962); Matherne v. Superior Oil Co., 207 F. Supp. 591 (E.D. La. 1962) (filing of state workmen's compensation claim did not effect an election barring a maritime tort (Jones Act suit based upon the unseaworthiness of a barge).

In Garrisey v. Westshore Marina Associates, 2 Wash. App. 718, 469 P.2d 590 (1970), there was not only a claim but an award and acceptance of state compensation benefits, followed by a Jones Act action. The court appears to have concluded that, as a matter of law, the plaintiff was not a seaman under the Jones Act. If this is so, its further statement that the plaintiff was barred by his election of state compensation might seem to be superfluous and in the nature of dictum. Moreover, the court makes the curious statement that, under Davis and the twilight zone rule, a claimant electing state compensation is thereafter barred from receiving not only Jones Act but Longshoremen's benefits—apparently overlooking the substantial line of cases, beginning with Calbeck itself, in which Longshoremen's benefits have followed state benefits with the election argument being expressly rejected. The court seems to be confusing the initial process of election by which employees in some states theoretically come under the compensation act in the first place, and the ad hoc election of a particular remedy in a particular case by an employee once he is generally under the act.

197. Marceau v. Great Lakes Transit Co., 146 F.2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).

198. Mach v. Pennsylvania R.R., 198 F. Supp. 471 (W.D. Pa. 1960).

would undermine and prejudice the operation of this protective public program if the claimant were put in the position of risking the loss of other valuable rights, such as those under the Jones Act, by the mere fact of invoking or accepting the benefits of this basic system of compensation protection. It is the nature of compensation, as distinguished from damage actions, that it is intended to be both prompt and reliable, in order to perform its function of caring for the immediate economic and medical needs of an injured worker and his family. If, then, he accepts or claims compensation as his first move, perhaps fully intending to follow this with a Jones Act action, this should not be thought to be sinister, deceitful, or avaricious on his part. He is setting out to ensure that he gets the minimum social insurance protection to which he may be entitled. If it turns out later that he is entitled to a more generous award under a different system, there has been no serious harm done, since the compensation award will be credited against the larger award.

When the compensation process has gone beyond acceptance of benefits, and even beyond the filing of a claim, to the point at which a formal award has been entered, a far more formidable defense looms—that of res judicata or collateral estoppel.[199]

Most of the cases that have found it unnecessary to apply the bar in longshoremen's cases have reached this result, not by attacking the applicability of res judicata in this context head-on, but by finding that for some reason the facts fall short of full compliance with the exacting requisites of that doctrine.

It may be noted that the defense has been rejected when the award was made ex parte[200] and also when an award was made in spite of claimant's efforts to withdraw his claim.[201] Cases that are sometimes cited carelessly as generally ruling out the res judicata defense must be carefully scrutinized, for they will often be found to turn on some feature that spared the court the necessity of confronting the validity of the defense itself in these cases. Thus, in *Mike Hooks, Inc. v. Pena*,[202] which is sometimes loosely cited in this manner, the award of the Industrial Accident Board of Texas was held not to be res judicata as to the barge worker's status as an employee under the state act, rather than a seaman under the Jones Act, since the employer was said not to be a real party to the

199. Although there are important legal distinctions in the use of these terms, for the sake of simplicity res judicata will be used throughout this article to encompass both meanings.

200. Smith v. Service Contracting, Inc., 236 F. Supp. 492 (E.D. La. 1964).

201. Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir.), cert. denied, 346 U.S. 817 (1953).

202. 313 F.2d 696 (5th Cir. 1963).

award. The court laboriously arrived at the remarkable conclusion that the Texas Workmen's Compensation Act[203] involved only the employee and the insurance carrier, with no "obligation, direct or indirect, primary or secondary, resting on the employer."[204] The result then found by the court was that a formal state compensation award, including payment of benefits, did not estop the worker from bringing a subsequent action under the Jones Act against the employer. One of the most frequently cited cases in this area, *Briggs v. Norfolk Dredging Co.*,[205] although it did authorize a Jones Act suit following a formal Longshoremen's Act award that had been contested by the employer, managed to do so while side-stepping the res judicata issue.[206] This was accomplished by relying completely on *Reed v. The Yaka*,[207] which had held that, when the shipowner employed longshoremen directly, an unseaworthiness action would lie against him in spite of the exclusive remedy clause of the Longshoremen's Act, and in spite of the actual receipt of benefits under that act. The court apparently felt so completely swept along by this precedent that it could not linger over any distinction between the mere receipt of benefits and a formal award of benefits.

Another variation on the theme of how to avoid the res judicata defense is exemplified by *Toland v. Atlantic Gahagan Joint Venture Dredge, No. 1*.[208] Plaintiff, a crew member on a barge, claimed compensation benefits in New Jersey, which were awarded after an appeal. He then sought to recover against his employer on the basis of admiralty remedies. The superior court held that the compensation award did not bar the admiralty action on the theory that New Jersey never at any time had jurisdiction over the case at all. On appeal, the New Jersey Supreme Court sustained the result[209] but not the reasoning—which will be returned to presently in the final analysis of a solution for the problem in state compensation cases.

Of all the variants, the most important has to do with the issue of whether the question of seaman or crew member status was specifically passed upon by the fact-finder in the course of making the compensation award. There is authority for the view that such an award is not res

203. Tex. Rev. Civ. Stat. art. 8306-07 (1967).

204. 313 F.2d at 701.

205. 360 F.2d 360 (4th Cir. 1966).

206. The court below had held that the compensation order was res judicata, barring the Jones Act claim. Biggs v. Norfolk Dredging Co., 237 F. Supp. 590 (E.D. Va. 1965), rev'd, 360 F.2d 360 (4th Cir. 1966).

207. 373 U.S. 410 (1963).

208. 109 N.J. Super. 186, 262 A.2d 886, aff'd, 57 N.J. 205, 271 A.2d 2 (1970).

209. 57 N.J. 205, 271 A.2d 2 (1970).

judicata if the compensation tribunal's finding and award do not disclose that the crew member question was put in issue and directly ruled upon in support of the tribunal's jurisdiction. *Mike Hooks, Inc. v. Pena*,[210] relied upon this ground. The majority rule was also applied in *Guidry v. Ocean Drilling & Exploration Co.*:[211]

> In light of these authorities we hold that in circumstances such as we find here where the Deputy Commissioner's finding and award do not disclose any facts upon which his jurisdiction existed, the rule should be and is that complainant's right to determine his status as a seaman under the Jones Act . . . is not prejudiced thereby, and these questions are not subject to a plea of res adjudicata under the Longshoremen's and Harbor Workers' Compensation Act . . . .[212]

The leading case where the opposite result was reached is *Hagens v. United Fruit Co.*[213] The claimant had brought suit under the Jones Act, but the deputy commissioner had previously taken jurisdiction of his claim and had made an award to him under the Longshoremen's Act. The court held that the award could not be collaterally attacked, and rejected plaintiff's contention that the deputy commissioner had not made explicit findings that plaintiff was not a "member of the crew," having merely found that he was injured " 'while performing service as a member of the shore staff for the employer and engaged in shifting the S.S. "Mayari" from drydock.' "[214]

Whatever the general rule may be as to the degree of specificity needed to confer res judicata power on an administrative decision, for purposes of the present problem it seems clear that a mere award of longshoremen's benefits, without more, should not of itself be construed as a finding that the claimant was not a crew member. The reason is that the finding is not a positive one such as is necessary to support any award, but a negative one such as is sometimes necessary to deal with a special defense. Compensation acts contain many specific exclusions and defenses, of which crew member status in the Longshoremen's Act is only one. There may be exclusions of government employees, of domestic servants, of employees of charitable organizations, of farmers, and so on. There may be defenses of intoxication, self-injury, suicide, violation of law and the like. In a routine case, it would not be expected that the findings would painstakingly enumerate the catalog of conceivable exclusions and de-

210. 313 F.2d 696 (5th Cir. 1963) The rule was reaffirmed by the Fifth Circuit in Boatel, Inc. v. Delamore, 379 F.2d 850 (5th Cir. 1967). Note that, in the Boatel case itself, the final result was a holding that as a matter of law the plaintiff was not a crew member.

211. 244 F. Supp. 691 (W.D. La. 1965).

212. Id. at 692 (citation omitted).

213. 135 F.2d 842 (2d Cir. 1943).

214. Id. at 843.

fenses and expressly hold each one inapplicable. It is one thing to say that the very fact of an award is a holding that there was an injury in the course of employment; it is quite another to say that the bare fact of an award means that the tribunal ruled that the claimant was not a government employee or was not drunk, when no one may have even brought up the question. This is not a mere technicality—indeed, it is the only way to give effect to the ultimate justification of the doctrine of res judicata. That justification is that no one has a right to demand that the same issue be litigated and decided twice between the same parties. This certainly does not mean that a person cannot demand that the issue be genuinely litigated and decided once.

But when all of the cases in which for assorted reasons the requisites of a true res judicata defense were incomplete are set to one side, there remains the basic rule that if the deputy commissioner has made a valid and specific finding of non-crew member status in a case in which this question has been put in issue and in which the parties have had an opportunity to address themselves to the matter, that finding should be res judicata on the issue of crew member status and should bar a subsequent Jones Act proceeding.[215] The same rule should apply to a similarly specific finding by a state tribunal that the claimant was not a seaman under the kind of statute, such as that of Texas, which expressly excludes seamen from the coverage of the compensation act. Perhaps surprisingly, there seem to be no clear-cut cases on this point as of the time of this writing, but the rule itself as here stated is no more than an application of the well-settled overall rule that decisions of compensation tribunals are res judicata in subsequent damage actions between the same parties.[216]

215. A decision that claimant is a longshoreman made in a damage action, after full consideration, is res judicata of the same issue in a subsequent damage action differing only in its form or in the forum. In Larsen v. The M/V Teal, 193 F. Supp. 508 (D. Alas. 1961), the plaintiff could not bring an action in rem against the vessel after an adverse decision on the merits in a suit brought in personam against the vessel owners. A stipulation in the first suit that the plaintiff was a longshoreman barred any recovery under the Jones Act against his employer. The court held that the suit should be dismissed on the principle of res judicata. Plaintiff's available recovery was under the Longshoremen's Act.

In Rivers v. Norfolk, B. & C. Line, Inc., 210 F. Supp. 283 (E.D. Va. 1962), the employee had previously brought a common-law action against the defendant in a Virginia state court. The action was dismissed, with prejudice, on the ground that the employee's exclusive remedy lay under the Longshoremen's Act. In the instant case the employee brought an action under the Jones Act. The court held that the state court decision was res judicata on the facts which indicated the only appropriate proceeding for the employee's exclusive remedy.

216. See 3 Larson § 79.71. For a case applying this principle to a Jones Act action following a compensation hearing and decision on an issue other than seaman status see Trupasso v. McKie Lighter Co., 79 F. Supp. 641 (D. Mass. 1948). In the compensation proceeding,

It should be carefully noted, however, that the application of the rule just stated was limited to findings of crew member status under the express crew member exclusion of the Longshoremen's Act, and findings of seaman status under the occasional statute, like that of Texas, containing an express exclusion of seamen. If, however, there is nothing more in the record than an award by a state compensation tribunal to a worker whose status may have been recognized by the tribunal as falling within the twilight zone between the state act and the Jones Act, this should not stand as res judicata of non-seaman status for Jones Act purposes. The reason is that, if it is once accepted that there may be an overlap area, as urged above, it follows that a finding of non-seaman status for state act purposes is not necessarily incompatible with a finding of seaman status for Jones Act purposes, the boundaries of the two zones of coverage being drawn according to different principles—the one constitutional and the other statutory. This is in effect the 1970 holding of the Supreme Court of New Jersey in *Toland v. Atlantic Gahagan Joint Venture Dredge, No. 1*[217] This is the case in which the court below had met the res judicata problem by declaring that there never had been jurisdiction to make the prior state compensation award. The court questioned this rationale, saying instead:

> We note that there are instances in which state workmen's compensation laws and federal maritime remedies give rise to concurrent jurisdiction. . . . We need not decide whether in the circumstances here the Division had jurisdiction. In either case the result is the same. Assuming, as defendants contend, the Appellate Division erred in holding that the Division lacked jurisdiction, it was nonetheless correct in granting the plaintiff the right to pursue his federal remedies. Our compensation statute does not deprive a seaman of his historic federal claims. . . . The elective provisions of our statute . . . were only intended to deny employees their traditional common law tort remedies.[218]

The court concluded with a pragmatic rationale, recalling its "legitimate interest" approach in *Hansen v. Perth Amboy Dry Dock, Co.*[219] and stressing protective rather than the conceptual considerations along the lines of the argument advanced in this article:

> We recognize that this result gives rise to additional litigation, but that is because of

there had been a thorough airing of the question of whether the decedent had met his death in the course of employment and the final holding was that any such finding would be based on pure speculation. In the subsequent Jones Act action, the court ruled that this was res judicata on the issue of whether the death was suffered "in the course of employment" under the Jones Act. Id. at 642.

217. 57 N.J. 205, 271 A.2d 2 (1970).

218. Id. at 207, 271 A.2d at 2-3 (citations omitted).

219. 48 N.J. 389, 226 A.2d 4, cert. denied, 387 U.S. 934 (1967).

the peculiar situation a member of a crew finds himself in when he is injured on navigable waters while engaged in an activity which may have sufficient connection with the interest of a state to give rise to a compensation claim. In order to insure maximum protection, he must pursue both state compensation and federal maritime remedies. Moreover, since the latter often depend upon a determination of fault (*e.g.*, Jones Act, unseaworthiness) his injuries may go completely uncompensated unless he also presses his claim of a state remedy. In these circumstances, an award of compensation, which will nearly always come first, cannot bar pursuit of federal relief.[220]

Since recoveries under the Jones Act are typically more generous than those under compensation acts, the successive-award problem is seldom encountered in the sequence of a Jones Act recovery followed by a compensation claim. However, when the Jones Act suit has been unsuccessful and the claimant then turns to the Longshoremen's Act or a state compensation act, controversy may arise as to whether the first attempt has in any way prejudiced or barred the second.

It is possible to find sweeping statements like the following one from *Teichman v. Loffland Brothers*[221] which would seem to dispose of the whole problem in a single sentence:

It has been consistently held both in the Supreme Court and in the circuit courts that an unsuccessful action in a Jones Act case is not inconsistent with and does not prevent a subsequent act [sic] for compensation.[222]

A moment's reflection would reveal that everything depends on the question: *Why* was the prior Jones Act suit unsuccessful? If it failed because the plaintiff was found not to be a seaman, this finding—far from hurting the compensation claim—would actually support it. But suppose the Jones Act suit failed for some other reason. There are two defenses that might be attempted—election and res judicata.

As to election, all the reasons why the elections defense has been disfavored in other situations would apply here; that is to say, if election is out of place as to social insurance remedies when the compensation remedy is tried first, it is equally out of place when it is tried last. Indeed,

220. 57 N.J. at 208, 271 A.2d at 3.

221. 294 F.2d 175 (5th Cir.), cert. denied, 368 U.S. 948 (1961).

222. Id. at 178. The court, however, cited five cases which do not support this holding: Norton v. Warner Co., 321 U.S. 565 (1944); Davis v. Department of Labor & Indus., 317 U.S. 249 (1942); Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409 (9th Cir. 1952); Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 963 (4th Cir. 1952); Massachusetts Bonding & Ins. Co. v. Lawson, 149 F.2d 853 (5th Cir. 1945). The statement in Teichman was quoted with approval in Boatel, Inc. v. Delamore, 379 F.2d 805 (5th Cir. 1967). Unfortunately the statement was again supported with two equally inapplicable cases: Smith v. Service Contracting, Inc., 236 F. Supp. 492 (E.D. La. 1964); Robertson v. Donovan, 219 F. Supp. 364 (E.D. La. 1963).

the Longshoremen's Act itself expressly recognizes the practice of attempting a damage suit first, followed by a compensation claim if the damage suit fails on the exclusive remedy defense, by providing that the statute of limitations on the compensation claim shall run only from the date of termination of the suit.[223] It is therefore no defense to a subsequent compensation claim that the claimant, by his unsuccessful Jones Act bid, made a binding election of remedies, or that he cannot be heard to deny that he is a seaman, having once asserted that he was a seaman in his Jones Act attempt.[224]

Whether res judicata should be available as a defense depends on whether the standard requisites of the defense are present. Here again, in practically all of the reported cases in which the defense has been put forward, something has been found missing. In *Teichman* the omission was quite glaring—the compensation claim was actually for a different injury, occurring immediately after the incident on which the Jones Act suit was based. Since the suit failed because the jury found that the first injury had never occurred, this could plainly have no bearing on the issue whether the second injury occurred. The defendant was, therefore, driven back to the necessity of relying on the argument just discussed—inconsistency in the claimant's own statements about his seaman status—rather than on res judicata.

In two subsequent cases, however, involving findings in the prior suit that the plaintiff had not sustained the injury complained of, there was no such easy way out.[225] Both courts were quick to point out that *Teichman* really did not control, so far as its actual facts were concerned, because of its dual-injury feature. But both went on to reject the res judicata defense on another ground, which is that the defense does not apply if the standard of proof in the former litigation was stricter than that in the latter. The Fifth Circuit summed up the differences between administrative and court proceedings for present purposes as follows:

> We again point out that the proceeding before the Deputy Commissioner is quite distinct from the ordinary civil suit before a jury. Unlike a judge in a civil suit, the Deputy Commissioner is not bound by common law or statutory rules of evidence or formal rules of procedure. . . . In addition, certain presumptions, not elsewhere indulged, are recognized in a hearing brought in accordance with the Longshoremen's and Harbor Workers' Compensation Act. . . .
>
> Finally, and most significantly, the burden of proof for the petitioner in a compensation hearing is less stringent than in a civil suit. Whereas, in a civil suit the

223. Longshoremen's Act § 913(d).

224. Teichman v. Loffland Bros., 294 F.2d 175 (5th Cir.), cert. denied, 368 U.S. 948 (1961).

225. Strachan Shipping Co. v. Shea, 406 F.2d 521 (5th Cir.), cert. denied, 395 U.S. 921 (1969); Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969).

petitioner must prove his case by a preponderance of the evidence in a hearing before the Commissioner all doubtful questions of fact are to be resolved in favor of the injured employee. . . .

The doctrine of collateral estoppel is inapplicable to the situation here presented.[226]

It need hardly be added that this passage would apply with equal force to almost any state compensation proceeding.

While it was observed earlier that in the ordinary nature of things a successful Jones Act suit is not likely to be followed by a compensation claim, there has appeared one case in which this sequence has been presented. In *Jones v. Baton Rouge Marine Contractors*[227] a longshoreman sought recovery in the federal court under the Jones Act or, in the alternative, in maritime tort, and filed suit for state workman's compensation concurrently in order to toll the statute of limitations applicable to suits in the state court. The district court sustained the defendant's motion to dismiss the Jones Act suit for lack of jurisdiction and the longshoreman appealed. Prior to the circuit court hearing, the longshoreman settled the federal suit for $2,000 and moved to dismiss it. The motion was granted with prejudice. The state court held that the settlement and prejudicial dismissal in the federal court was a "consent judgment" which was binding, conclusive, and res judicata on all actions, and that the state compensation claim was therefore barred. The rationale of the decision is confusing in the extreme, since the court scrambled together three distinct issues. The first is whether there was a valid compromise of the compensation claim. The court said:

We find no merit in plaintiff's contention that the compromise and settlement of his federal court action does not bar his suit for workmen's compensation in the courts under the laws of this state because said settlement was, in essence, a compromise of a compensation claim without judicial sanction and approval contrary to the expressed provisions of our workmen's compensation statutes.[228]

At this point, where one would normally expect to find why no merit was found in this argument, the court imperceptibly switched to the doctrine of election:

Plaintiff herein has elected to pursue and has, in fact, pursued the federal remedy to ultimate conclusion thereby destroying the single cause of action which existed in his favor and eliminating any basis for a suit under the workmen's compensation laws of this state.[229]

And then, just as imperceptibly the court switched again to res judicata,

226. Strachan Shipping Co. v. Shea, 406 F.2d 521, 522 (5th Cir.), cert. denied, 395 U.S. 921 (1969) (citations omitted).

227. 127 So. 2d 58 (La. Ct. App. 1961).

228. Id. at 60.

229. Id.

concluding: "The plea of res judicata was properly sustained . . . ."[230] In short, the court said that the unapproved settlement was binding because there was an election, and because there was res judicata. In the interests of clarity, it might have been better to take the issues one at a time.

The question of whether the unapproved settlement was binding is a serious objection that was never answered by the court. A settlement without commission or court approval, in states requiring such approval, amounts to nothing more than a voluntary payment of compensation.[231] Although there was here what purported to be a release of all claims growing out of the incident, such a release without the approval of the compensation tribunal is normally treated as void, and the opinion in this case gives no answer to the plaintiff's argument based on this familiar rule.

As to the election theory, one may once again refer to the discussion of the arguments against the use of this doctrine in compensation cases. The election to pursue a compensation remedy, even when accompanied by payments, does not ordinarily bar a subsequent Jones Act proceeding; there is no reason why the rule should not work the same way in both directions.

Finally, as to the res judicata point, the court does not discuss the merits of the issue at all. The only res that was adjudicated was, if anything, exactly the opposite of what the court held. The district court had dismissed the Jones Act suit for lack of jurisdiction. It is true that the case was still open by virtue of the appeal at the time it was dismissed pursuant to the settlement. But such adjudication as there was remained a decision supporting, not negating, claimant's compensation position; and, whatever the effect of claimant's nominal settlement might have been, it certainly was not equivalent to an adverse decision of a competent tribunal on the same issues as those in the compensation proceeding.

Generally, then, in those rare instances in which a "successful" Jones Act proceeding might precede a compensation claim, the normal principle ought logically to be that the same rules apply as in the much more numerous cases in which the sequence is reversed.

V. Conclusion

In summary, it may be observed that the dramatic expansion of seamen's remedies to persons, vessels, and places far beyond those covered only a few years ago is defensible only so long as it does not lose sight

230. Id.

231. 3 Larson § 82.60 n.53.

of the justification for the expansion, which lies in the appropriateness of special rules and remedies for persons who are indeed subjected to special employment conditions and hazards. Nor should it be forgotten that the object of these legislative and judicial liberalizations is to enhance the protection of the worker and his family, not to constrict it. Accordingly, within the limits allowed by sound legal doctrines, the concepts of "twilight zone," conclusiveness of fact findings, availability of successive awards, election, and res judicata should be so applied as to ensure that the beneficent purposes of both the maritime and the compensation systems are served.