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MAINTENANCE AND CURE AND FARRELL V. UNITED STATES

STANLEY DONALD MORRISON*

With the recent handing down of the five-four decision in Farrell v. United States1 another page was turned in the development of the ancient remedy of maintenance and cure which the Admiralty awarded to its wards, that is to say "seamen."2 The opinion for the majority of the court was written by Mr. Justice Jackson; the opinion for the minority of the court was written by Mr. Justice Douglas. The facts of the case are unprecedented in the horrendous tale of the pains, woes, and injuries of the maritime employed. These facts tell us that seaman William Farrell, aged but twenty-two, who had enlisted in the Merchant Marine on November 15, 1942, while in Naples, Italy, signed on the S.S. James E. Haviland on December 16, 1943, as a seaman with the grade of an oiler. The vessel was a merchantman, though owned by the United States War Shipping Administration to transport both troops and cargo. On February 5, 1944, the vessel being docked at Palermo, Sicily, Farrell was granted shore leave until 6 P.M. of the same day. He was warned of no danger by the master. Farrell spent his time ashore sightseeing and, obviously, did some drinking—though there was no absolute finding that he was grossly intoxicated from excessive indulgence. At approximately 8 P.M., two hours overleave, with another seaman, he started back to the ship, and in so doing, there being rain and darkness,3 he lost his way and was improperly directed to the wrong gate, all of which placed him about a mile from where the ship lay. Farrell's companion, who was approximately forty to fifty feet away,

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As to who is a "seaman" and for just what purposes one is to be classified as a "seaman" see Int. Steve. Co. v. Haverty, 72 U.S. 50 (1926) a case which was the 'open sesame' to the maritime employed, though it is very questionable whether the begetters of the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1920) ever conceived such a result. See also Robinson, "The Seaman in American Admiralty Law," 16 B.U.L. Rev. 283 (1936). A culmination of Haverty was the five to three decision in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), which opinion is noted in 34 Calif. L. Rev. 601 (1946). For the most complete treatment of the subject of "Who is a Seaman" see I Norris, THE LAW OF SEAMEN (1951) ch. 1. The Haverty decision held a longshoreman injured while working on a vessel in navigable waters to be a "seaman" within the meaning of the Jones Act. But a longshoreman injured while aboard a vessel is not a "seaman" for purposes of maintenance and cure. C. Flanagan & Sons, Inc. v. Carken, 11 S.W.2d 392 (Tex. Civ. App. 1928), noted in 42 Harv. L. Rev. 820 (1929). See Calvino v. Farley, 23 Supp. 654 (S.D.N.Y.) 1938). Though this may appear to be illogical, it is to be remembered that the longshoreman has his compensation if his injury is "maritime" under the Federal Longshoreman's Act, 44 Stat. 1424 (1927), 33 U.S.C. § 901 et. seq. (1927), or if his injury is "local" under the state compensation act, Grant Smith Porter Co. v. Rohde, 257 U.S. 469 (1922). See ROBINSON, ADMIRALTY (1938) § 14. See also, though the injury occurred ashore and was a Jones Act suit, Swanson v. Marra Bros. Inc., 328 U.S. 1 (1946).

3. Palermo, on February 5, 1944, was under wartime conditions of blackout though the Bodaglio Armistice was signed on September 2, 1943. The accounting for this was that Palermo was used as a port to support the advancing front lines and was also the Headquarters of General Eisenhower.
saw Farrell fall over a guard chain into a drydock which was sufficiently lighted for night work then in progress. The consequence of this fall is that William Farrell is now totally and permanently blind. He suffers, and will continue to suffer posttraumatic convulsions, which will probably become more frequent. There is absolutely no possibility of cure. He will continuously require medical care to combat attacks of headaches and epileptic convulsions. Initially, these injuries were treated, without expense to Farrell, in several government hospitals. On June 30, 1944, he was discharged at Norfolk, Virginia, as completely disabled, though he had received the maximum possible cure. The Supreme Court, in affirming the decision of the Second Circuit Court of Appeals, held that the shipowner need not furnish a lifelong maintenance and cure. However, the majority of the court did further say that

The Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it.5

Accordingly no lump sum award could be made.

The result in Farrell represents the culmination of a remedy given for centuries. At least broadly it answers the question of the length of time for which the mariner is entitled to his maintenance and cure. To understand the remedy and its application to Farrell a survey of it is here being undertaken.

Though the remedy of maintenance and cure bears similarity to workmen's compensation legislation, there is a distinction that can be drawn between the two.6 Workmen's compensation is the product of a statutory scheme; but maintenance and cure, in view of the confinement, restriction, and susceptibility to danger of the sailor's life at sea, is of origin comparatively ancient in time.7 Many, though not all,8 of the old maritime codes of the world made provision for it whether the seaman was injured or became ill while in the service of his vessel.9 Of these codes The Laws

5. Supra note 1 at 519.
6. This distinction will be noted later in the body of the article.
7. ROBINSON, ADMIRALTY (1939) § 36.
8. See the Dantzig Ship Laws and the Maritime Laws of the Osterlings in Flanders in IV BLACK BOOK OF THE ADMIRALTY (as edited by Sir Travers Twiss) at pp. 336-383. It is to be observed that the mariner's sea-sickness, disabling him from duty, would see him not receive his wages for the voyage. Art. VII of the Maritime Laws of the Osterlings, IV BLACK BOOK OF THE ADMIRALTY 363. However, if he did receive some part of his wages, and then the disabling sea-sickness occurred, the paid wages would be subject to forfeiture and would be divided in equal portions between the master and the remaining mariners. Laws of Hamburg, IV BLACK BOOK OF THE ADMIRALTY 363, n. 2.
9. The following are the Old Sea Codes which provided for maintenance and cure:
(a) The Laws of the Hanse Towns, Articles XXXV, XXXIX, XLV.
(b) The Laws of Oleron, Articles VI and VII. This law is the foundation of all the European Codes. The earliest French Edition was published in 1485.
4 BENEDICT, ADMIRALTY § 662 (6th ed. 1940).
(c) The Laws of Wisby, Articles XVIII and XIX.
(d) The Marine Ordinances of Louis XIV, Articles XI and XII of Maritime Contracts, Title Fourth, of the Contracts and Wages of Seamen.
of Oleron are "admitted to be the foundation of all the European maritime codes." Articles VI and VII of these Laws, in broadly defining the remedy, made the provisions for maintenance and cure. Another of these ancient sea codes is the Laws of the Hanse Towns — Article XXXV of which was distinguished away by the majority in Farrell — which made provisions for maintenance and cure in the three following articles:

Article XXXV
The seamen are obliged to defend the ship against rovers, on pain of losing their wages; and if they are wounded, they shall be healed and cured at the general charge of the concerned in a common average. If anyone of them is maimed and disabled, he shall be maintained as long as he lives by a like average. (Italics supplied).

Article XXXIX
If any seaman is wounded in the ship’s service, he shall be cured at the charge of the ship, but not if he is wounded otherwise.

Article XLV
If any mariner falls sick of any disease, he shall be put ashore and maintained in like manner as if he was on shipboard, and be attended by another mariner. However, the master is not obliged to stay for him, if he recovers his health, he shall be paid his wages as much as if he had served out the whole voyage; and in case he dies, his heirs shall have what was due him.

(e) The Gotland Sea Laws, Article XXI.
(f) The Amalphitan Table, Article XIV, gives the seaman the right "beyond his aforesaid share . . . if he be taken with any infirmity."
(g) The Purple Book of the Bruges, Articles XXI and XXII.
(h) Sea Laws in Flanders, Article VII.
(i) Ordinances and Customs of the Sea, published by the Consuls of the City of Trani, Article X.

For historical data generally appertaining to these old Sea Codes, to the approximate date of each, and to the geographical location of their promulgators, see 4 BENEDICT, ADMIRALTY 343-358 (6th ed. 1940) and the notes therein.

10. Quoted from 4 BENEDICT, ADMIRALTY § 662 (6th ed. 1940).
11. Article VI: "If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates or fighting and quarreling among themselves, whereby some happen to be wounded in this case the master shall not be obliged to get them cured, or in anything to provide for them, but may turn them and their accomplices out of the ship; and if they make words of it, they are to pay the master besides: but if by the master’s orders and commands any of the ship’s company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship." Article VII: "If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set them ashore, to provide lodging and candlelight for him, and also to spare him one of the ship’s boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship; that is to say, so much as he had on shipboard in his health, and nothing more, unless it please the master to allow it to him; and if he will have better diet, the master shall not be bound to provide it for him, unless it be at the mariner’s own cost and charges; and if the vessel be ready for her departure, she ought not to stay for the said sick party but if he recover, he ought to have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next of kin shall have it."
13. These, as well as other of the Old Sea Codes, are collected in 30 Fed. Cas. 1171-1216; appendices to I and II of Peter’s Admiralty Decisions (1807); Vol’s II,
The first major exposition of the remedy was made by Mr. Justice Story (on Circuit) in the case of *Harden v. Gordon*,¹⁴ which case can well be taken as the American Statement of the Law of Maintenance and Cure. In the *Harden* case, Mr. Justice Story had been unable to find "a single instance in which the maritime laws of any country throw upon seamen disabled or taken sick in the services of the ship, without their own fault, the expenses of their cure."¹⁵

More concretely, however, for present purposes, the early case of *Reed v. Canfield*¹⁶ has greater bearing upon the subject matter of our inquiry as there involved was actually a type of shore leave fact situation, whereas the *Harden* case did not involve such an aggregation of facts. In the *Reed* case, seaman Canfield brought an *in personam* action against Reed and others for compensation for expenses which he had incurred to receive medical cure. Canfield's vessel had just returned to Massachusetts from the Pacific. The mates desired to go ashore (a departure from their duty), taking with them a boat crew who had volunteered for the occasion. Among the boat crew was Canfield. They landed in New Bedford, dined at the home of the boat-steerer, and departed for the vessel. The weather then violently changed, the boat became entangled in ice, and was driven out into the bay where it remained for over twenty-four hours before shore relief could reach it. Canfield's toes were so severely frozen that they had to be amputated: For medical care and aid Canfield brought his libel *in personam*. Mr. Justice Story held Canfield to be "in the service of the ship":

If the maritime law were the same in all respects with the common law, and if the rights and duties of seamen were measured in the same manner, doubtless the cases would furnish a strong analogy. But the truth is that the maritime law furnishes entirely different doctrines upon this, as well as many other subjects, from the common law. Seamen are in some sort co-adventurers upon the voyage; and lose their wages upon casualties, which do not affect artisans at home. They share the fate of the ship in cases of shipwreck and capture. They are liable to different rules of discipline and sufferings from landsmen. The policy of the maritime law, for great, and wise, and benevolent purposes, has built up peculiar rights, privileges, duties, and liabilities in the sea service, which do not belong to home pursuits. The law of the ocean may be said in some sort to be a universal law, gathering up and bind-

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¹⁵ Id. at p. 482.
ing together what is deemed most useful for the general intercourse, and navigation, and trade of all nations.\textsuperscript{17}

He held Canfield not to have been “grossly negligent” — which would have defeated the right to the award — in not returning to the ship at earlier hour, saying that:

> Ordinary negligence, consistent with entire good will and a sober intention to comply with duty, and, much less, slight negligence, ought not to be visited with so severe a forfeiture. Repentance, and a return to duty, even after a fault, are not in the maritime law visited with extraordinary severity. It is rather the tendency to wink at slight offenses, and to punish those which are gross and deeply injurious to the ship’s service. It does not appear to me, that, in the present case, there was any gross negligence or any unreasonable delay, on the part of the boat’s crew, in willful disobedience to orders.\textsuperscript{18}

Thus far we can say that the seaman becomes entitled to his maintenance and cure if his hurt is incurred while “in the service of the ship” and not as a consequence of his own “gross negligence.” In The Osceola,\textsuperscript{19} Mr. Justice H. B. Brown, speaking for a unanimous court, though not in a shore leave fact situation, after a “full review” of all the authorities, said . . . That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of his ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued. (Italics supplied).\textsuperscript{20}

We can also gather from the opinions in the Harden and Reed cases that the remedy is enclasped within the warm embrace of liberality of application, dedicated to the firm purpose of compensating those who perhaps need it most, and used as a vehicle to maintain, not only the dignity, but the manpower worth of the Merchant Marine. Our question, however, then becomes just how liberal is “liberality of application” to be?

A peculiarity of the remedy is that it is more a relational duty of the shipowner to the seaman rather than one sounding in contract or upon delict.\textsuperscript{21} Though similar to workmen’s compensation it is nowhere the product of a statutory scheme save in England.\textsuperscript{22} It does not arise out of tort because there need be no finding of fault upon the vessel.\textsuperscript{23} “Nor is

\textsuperscript{17} Id. at 428. It is interesting to compare this last sentence of Justice Story with the language of Mr. Justice Holmes in the Western Maid, 257 U.S. 419, 432 (1922) that “There is no mystic overlaw to which even the United States must bow.” The decision in the Western Maid was sharply criticized by Judge Hough. The decision is to be compared with a later opinion of Mr. Justice Holmes in The Thekla, 266 U.S. 328 (1924). The writer in 38 Harv. L. Rev. 679 (a note) finds the cases indistinguishable.

\textsuperscript{18} 20 Fed. Cas. 426, 430 (1832).

\textsuperscript{19} 189 U.S. 158 (1903).

\textsuperscript{20} Id. at p. 175. A master is also a “seaman” for purposes of the remedy as well as a “seaman” within the meaning of the Jones Act. However, cf. §§ 901 and 903(1) of the Federal Longshoreman’s Act, 44 Stat. 1424, which expressly excludes the master and crew of a vessel from its provisions.


\textsuperscript{22} Merchant Shipping Act, 17 and 18 Vict., Ch. 104, § 228.

\textsuperscript{23} In Cresci v. Standard Fisheries Co., 7 F.2d 379 (N.D. Cal. 1925), the court rejected the tort limitation though having its choice between the tort and contract provisions for limitation.
it strictly contractual in the sense that its incidents are written into the articles." It is a duty arising from the employment, but "contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident." Thus, it attaches to a status, but a status begotten by the signing of articles—a contractual relation in form, though the articles and the Federal statutes thereon say nothing as to maintenance and cure. But as the remedy can be said to be an implied condition of contract and, at least, having some roots in contract, it was not without difficulty that in the recent case of Sperbeck v. A. L. Burbank & Co. it was held that a claim for maintenance money did not abate when the seaman died before trial. Though there was no precise authority in point, it is submitted that the result reached is sound though in its rationality it is aggravating nomenclature which in fact does not exist. To say, as the court did, that the remedy was "sufficiently contractual" to avoid abatement is to arbitrarily select words with purpose of reaching a result only. "Sufficiently contractual" is not tantamount to actual "contract." A better solution would be that as the seaman's wages do survive—and this is historically supported—then so should his maintenance and cure, the latter including as one of its elements a claim for wages. Yet is not to be forgotten that the shipping articles expressly provide for wages but not for maintenance and cure. But whatever logic is used to support the result in the Sperbeck case, the liberality of the bestowing of the remedy calls for the extension that there was made.

Insofar as the remedy is not a delictual one, it is only some gross act of indiscretion or culpable misconduct of the seaman that will bar the

28. Laws of the Hanse Towns, Art. XLIV. In II Law and Custom of the Sea (Mars, ed.) of the British Navy Records Society at p. 52 it is said: "That care shall be taken for the defraying of the charges of the sick and wounded as aforesaid, and for the relief of widows, children, and impotent parents of such as shall be slain in the service at sea..." By statute in England, wages do survive the death of a seaman lost with his ship. Merchant Shipping Act of 1894, 57 and 58 Vict. Ch. 60, Sec. 174. See, in general, Williams and Bruce, Admiralty Practice, Ch. IX (3d ed. 1902).
29. See Enochasson v. The Freeport Sulphur, 7 F.2d 674 (S.D. Tex. 1925).
application of the remedy. But, with specificity, it is difficult each time to say what will amount to such an act. For sure, the contracting of venereal diseases will amount to such misconduct. But injuries received as a result of intoxication, though now largely qualified "recognizing the classic predisposition of sailors ashore," have to be received as a result of such hopeless and blinding drunkenness before the remedy will not be applied. The rare finding of this culpable misconduct, save the venereal disease cases, are further testified to be the fact that the ordinary common law defenses of contributory negligence, the fellow-servant rule, and assumption of risk cannot stop the mariner from receiving his maintenance and cure. Beyond this we step into an area where utter mysticism prevails, where matters of degree are largely determinative of result, and where the most reasonable of men could easily differ. Thus, where a seaman ashore stepped out to an unprotected ledge and took hold of an iron rod which he did no more than superficially examine, it was held that this was not such a gross act of indiscretion to stop him from receiving the remedy for a broken leg.


34. ROBINSON, op. cit. supra note 2 at 294. And see Sullivan v. United States, 179 F.2d 924 (2d Cir. 1949), where a seaman, after having indulged in 18-20 beers, was not found to have sustained injuries due to his own vice. But see Oliver v. Calmar S.S. Corp., 33 F. Supp. 356 (E.D. Pa. 1940) where a seaman was denied maintenance and cure for injuries received after falling when attempting to cross between moving freight cars, though admittedly under the influence of liquor. And the aggressor of a fistic altercation, and injured thereby, will be denied the remedy because of his own culpable misconduct. Kable v. United States (No. 2), 175 F.2d 17 (2d Cir. 1949). See also Kable v. United States (No. 1), 169 F.2d 90 (2d Cir. 1948). And see further Brock v. Standard Oil Co. of N.J., 33 F. Supp. 353 (E.D. Pa. 1940) where a seaman broke his hand in an altercation after a dispute and was held not to be "in the scope of employment" and, therefore, not entitled to maintenance and cure because of his own willful misconduct. The results in the Oliver and Brock cases are now highly dubious. For discussion of the Kable cases see 3 N.A.C.C.A.L.J. 250 (1949).

35. Earlier law, however, did see the entrance of these defenses to defeat recovery in cases of the unseaworthiness of the vessel. But this was not the case in the action for maintenance and cure. The defense of contributory negligence never barred total recovery as the Admiralty followed the rule of divided damages. The rule was stated as follows: "By the maritime law the mere negligence of the seaman though that be the sole cause of the accident makes no difference in his right to be cured at the ship's expense and to his wages to the end of the voyage." The City of Alexandria, 17 Fed. 390, 396 (S.D.N.Y. 1883). See also 38 ILL. L. REV. 193 (1944); Reed v. Canfield, 20 Fed. Cas. 426, Fed. Cas. No. 11,641 (Gir. Ct. D. Mass. 1832); Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724 (1943).

36. See the opinions of Judge Swan in Warren v. United States, 1950 A.M.C. 263 (2d Cir. 1950); Justice Frankfurter dissenting in Warren v. United States, 340 U.S. 523 (1951), and Justice Douglas for the majority in the same case.
sustained after he grabbed the iron rod which came off and he fell. But this result was not free from a dissenting opinion and necessitated a reversal of the Second Circuit Court of Appeals. But where a seaman returned to the ship intoxicated and assaulted another member of the crew, during the course of which he sustained personal injuries, he was not allowed to recover his maintenance and cure, his act being one of “willful misconduct.” And where a seaman willfully conceals physical deficiencies which he does have, this will be termed “culpable misconduct” if his injury or illness is received as a consequence of this failure to disclose, but will not be so called if the injury or illness is different than the one that was not disclosed and willfully concealed. Yet the failure to leave shore for the ship at an earlier hour than was done was held in the Reed case not to be a gross act of indiscretion or negligence, though had Canfield returned at an earlier hour, it is inescapable that he would never have had to suffer the removal of his toes. It thus appears that the words “culpable misconduct” or “gross act of indiscretion” are words that can only be applied in a vacuum, where the words used state only a conclusion and not any method of logical deduction or reasoning. Such result has not been abated by the Shipowners’ Liability Convention, as proclaimed by the President on September 29, 1939, which in Article 2, Subsections (b) and (c) provides that national laws may remove the liability of the shipowner for maintenance and cure in respect of “(b) injury or sickness due to the willful act, default, or misbehavior of the sick, injured or deceased person;” and “(c) sickness or infirmity intentionally concealed when the engagement is entered into.” The Second Article of the Convention has been held to be self-executing.

From the opinions in the Reed and Osceola cases it will here be recalled that to receive maintenance and cure the seaman must have been injured or taken ill when “in the service of the ship.” How narrowly or how broadly are we to define the requirement? Let us examine the cases. The Reed case has already been discussed. The liberal tradition of the Admiralty there announced by Mr. Justice Story for its wards was largely adhered to by later courts until 1931 when severe inroads on the Reed case were made. Thus, before 1931, it had been held that a seaman, who was sent ashore to put a line on a spike, and there injured — ashore — could

42. In connection with Reed see Ringsgold v. Crocker, 20 Fed. Cas. 813, Fed. Cas. No. 11,843 (S.D.N.Y. 1848) holding that a seaman will not be denied maintenance and cure if his injuries were not sustained aboard the ship. The remedy is not limited to the ship proper.
recover maintenance and cure though his action in tort for the ship's negligence was dismissed, it not being within admiralty jurisdiction. However, by the year 1931, the "in the service of the ship" requirement began to plague the courts and then began the process of circumscribing the liberality with which the requirement had been treated. At least arguably, to find the means of limitation the courts pounced upon the principles of workmen's compensation legislation. Though maintenance and cure is recoverable if the illness is present, but latent and unknown when articles were signed, workmen's compensation statutes require that the "accident (arise) out of and in the course of employment." Thus, workmen's compensation requires causation, i.e., "arise out of the employment." Maintenance and cure is not so limited as the policy behind it is different. "It is insurance attaching to a status." But armed with this peg of workmen's compensation, application was easy.

In Meyer v. Dollar S.S. Line, a young seaman, Bernard Meyer, who had signed on for two months, a day before the arrival of the vessel in Honolulu, engaged in a friendly scuffle on the after port with a few of his shipmates. He was not on duty but was subject to call. In the course of this good-natured scuffle, which occurred on November 27, he received a leg injury. It was necessary that he leave the ship and enter the Marine Hospital in Honolulu on November 28. He had had maintenance and cure, but was denied wages after November 28. The court had to define the "in the service of the ship" requirement; it likened it to the "line of duty" requirement of the Navy and cited for this proposition was the Naval Courts and Boards, Chapter 12, further saying that by the good-natured scuffle Meyer created an "extraneous circumstance; he brought about an intervening cause that directly affected his relation to his employers and to his ship. If the appellant had been sitting on a deck reading and something accidentally had fallen on his knee, thus causing an injury similar in type to that which actually occurred, it might be properly held that the accident had occurred 'in the service of the ship.' But the instant case must be differentiated therefrom."

Here then was being introduced a concept entirely new and unprecedented, especially where the injury occurred on ship-board and not on shore or while a seaman was on shore leave. No cases were cited for the

43. The Montezuma, 15 F.2d 580 (S.D.N.Y. 1926).
44. As an example of this requirement in workmen's compensation schemes see Part 1 of McKinney's Consolidated Laws of New York, Anno., Workmen's Compensation Law, Part 1, Art. 1, § 2 (7). See also Sims v. United States, 1950 A.M.C. 714 (N.D. Cal. 1949) where the words "in the course of his employment" also crept into the decision.
45. 38 I.L.L. Rev. 193, 199.
46. 49 F.2d 1002 (9th Cir. 1931). See also Brock v. Standard Oil Co. of N.J., 33 F. Supp. 355 (E.D. Pa. 1940); Jackson v. Pittsburg S.S. Co., 131 F.2d 668 (6th Cir. 1940); and Wahlgreen v. Standard Oil Co. of N.J., 42 F. Supp. 992 (S.D.N.Y. 1941), where a seaman engaged upon his own personal affairs, and there injured, could recover maintenance and cure.
47. 49 F.2d 1002, 1003 (1931).
“intervening cause doctrine.” One could well wonder at the direct applicability of the techniques of Naval Courts when the vessel upon which Meyer sailed was privately owned and not at all subject to the jurisdiction of the Navy. Furthermore, it is interesting to note, and question, why seaman Meyer was given his wages until November 28 (when he was placed ashore in Honolulu) and not up to when he was injured, and incapacitated, which day was on November 27. Certainly, on that basis, he was no more “in the service of the ship” than when he was in the Honolulu hospital — indeed, he was probably a burden to the “service of the ship” that one day. But the court supplied us with no answer. One could well wonder if Meyer, incapacitated and injured, had to remain a month aboard the vessel as to the result the court would have reached.

In the President Coolidge case,\textsuperscript{48} the claimant was injured while going ashore to answer an expected long distance telephone call from his wife. To do so he dropped his task, but had not left the ship. Maintenance and cure was denied on the intervening cause doctrine as his injury was not received while engaged in his employment, \textit{i.e.}, “in the line of duty” as being tantamount to “in the service of the ship.”

But the “new doctrine” began to find new allies and new champions. Among such was the Southern District Court of New York in Collins v. Dollar S.S. Lines.\textsuperscript{49} In the Collins case, seaman Collins signed aboard on July 29, 1936, for a voyage around the world and return to San Francisco in the capacity of a fireman. In September of the same year, while the ship was in Singapore, Collins was given shore leave and, with others, proceeded to a park to engage in a game of baseball for amusement. While so engaged he sustained serious and permanent personal injuries. He was compelled to leave the ship. He sought to recover maintenance and cure. This was denied. Relied on was, of course, the Meyer case from which the Collins opinion liberally quoted to the effect that a seaman will be responsible

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\ldots\text{for an intervening cause if (1) it consisted in his own willful misconduct, or (2) it was something which he is doing in pursuance of some private avocation or business, or (3) it is something which grows out of relations unconnected with the service or is not the logical incident of provable effect of duty in the service. Therefore, being on shore leave, Collins was doing something unconnected with his service and not a logical incident of duty in the ship's service. For the time being the libellant was entirely on his own, entirely free from control or the supervision of the ship's officers.}\textsuperscript{50}
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\text{It is here interesting to note that in 1937 — one year before — the Southern District Court of New York, in a brief memorandum opinion, awarded a seaman maintenance and cure for an injury received on shore}

\textsuperscript{48} 23 F. Supp. 575 (N.D. Wash. 1938).
\textsuperscript{49} 23 F. Supp. 395 (S.D.N.Y. 1938).
\textsuperscript{50} Id. at p. 397.
\textsuperscript{51} 1938 A.M.C. 685 (S.D.N.Y. 1937).
while he was approaching his vessel to go on watch. But the *Hogan* case was not even cited in *Collins*.

To show the extraordinary limits to which a precedent, once begun, can go, in 1941 there appeared upon the scene the case of *Smith v. American South African Line, Inc.*, in which case the claimant, Smith, a member of the crew, was given shore leave when the vessel was in an African port. In returning to the vessel, on a public street, but at a distance of two miles away from the ship, Smith was struck by a motorcycle and severely injured. The court held that Smith could not recover maintenance and cure as he was not engaged "in the service of the ship" while on shore leave. The defendant contended that Smith could not recover wages if there was no valid claim for maintenance and cure. The court agreed citing *Meyer, President Coolidge*, and *Collins* over the contention of Smith that wages is a different matter and have their origin in the ship's articles.

At this point we can interject the question, which naturally follows from the results of *Meyer, Collins, President Coolidge, and Smith*, though no cases came up after those decisions, as to when does shore leave begin and end if no maintenance and cure is to be awarded if the injuries are sustained during shore leave. Surprisingly, the cases are few in number in view of the very vexatious question. In *The Scotland* case, a seaman coming aboard to join the crew was injured when he fell off the ladder. In *The Michael Tracy*, a seaman who had been discharged at the end of the voyage and paid fell off a ladder when leaving the ship. In both cases maintenance and cure was awarded. The results are consonant with the liberal spirit of the admiralty tradition. With the *Meyer* history one could only speculate as to whether the results would have been the same or, were the cases presented, whether a process of erosion would have been under way on *The Scotland* and *The Michael Tracy*.

But the paralysis upon admiralty thinking, as begun in *Meyer*, began to press upon the door of the United States Supreme Court. Practically total ignorance of the Reed case was displayed in the entire *Meyer* history. To which of the two would the Supreme Court adhere?

The opportunity came in the case of *Aguilar v. Standard Oil Co. of N.J.*, where the Supreme Court reconsidered its previous denial of certiorari and granted it because of the conflict of Circuits between *Aguilar* and the decision of the Third Circuit Court of Appeals in *David Jones v.*

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52. 37 F. Supp. 262 (S.D.N.Y. 1941).
53. For other cases in the *Meyer* line see note 45, *supra*, and the cases denying maintenance and cure where the injury occurred on property over which the shipowner had no control, *Todahl v. Sudden and Christensen*, 5 F.2d 462 (9th Cir. 1925) and *Lilly v. U.S. Lines*, 42 F. Supp. 214 (S.D.N.Y. 1941).
54. 42 Fed. 925 (S.D.N.Y. 1890).
56. 38 I.L.R. Rev. 193 (1944).
57. 318 U.S. 724 (1943).
58. 317 U.S. 622 (1942).
59. 130 F.2d 154 (2d Cir. 1942).
In Aguilar, the seaman was struck by a motor vehicle while walking over the premises of a subsidiary of Standard Oil (his employer), through which it was necessary for him to pass in returning to his ship from shore leave. He sued for maintenance and cure; the Supreme Court, speaking through Mr. Justice Rutledge, in reversing the Second Circuit in Aguilar while affirming the result of the Third Circuit in the Jones case, awarded it to him and, in so doing, overturned the Meyer line. Hence, a seaman on shore leave, and there being injured, was still to be considered “in the service of the ship.” Oddly enough, the Court placed very little reliance on the Hogan case, citing that case once and that only in an immaterial aspect. Yet the Hogan case is indistinguishable from the facts in Aguilar. On analogy from the cases involving workmen’s compensation the same result could have been reached, for if the employee is injured on a street, not public, constituting a means of access to the place of employment, many states have not denied compensation. But the Court did not feel itself constrained to principles of workmen’s compensation and stated a far broader doctrine based on the historical growth of the remedy and held that seamen were entitled to the same protection while on shore leave as well as on the ship, on the ground that it was the ship’s business which subjected the seaman to the risks of relaxation in strange surroundings, Mr. Justice Rutledge saying that

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 . . . The shipowner owes the protection regardless of whether he is at fault; the seaman’s fault, unless gross, can not defeat it; unlike the statutory liability of employers on land. It is not limited to strictly occupational hazards or to injuries which have an immediate causal connection with an act of labor.

Thus, the broad doctrine of Aguilar is that the seaman’s being on shore leave does not mean that he is not “in the service of the ship.” Yet it is to be remembered that the Aguilar result, in the specific application of its facts, though no doubt intending and stating a far broader doctrine, held only that the remedy will be applied when the seaman is leaving the ship to go on shore leave or is returning to the ship from it; that is, on the premises or the immediate shore area surrounding the vessel. Whether the principle would go further was left for many recent decisions.

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60. 130 F.2d 797 (3d Cir. 1942).
62. 318 U.S. 724, 734 (1943).
63. In Sicilano v. United States, 56 F. Supp. 442 (S.D.N.Y. 1944), the court limited Aguilar to injuries suffered on or near the dock area. In the case the seaman was assaulted, but as the locality of the attack was not identified and as it may have been remote from the ship, the owner was not held liable for maintenance and cure. To the same effect limiting Aguilar to its facts are Taylor v. United Fruit Co., 71 N.Y.S.2d 22 (1st Dept’ 1947) and Smith v. United States, 1947 A.M.C. 481 (E.D. Va. 1946), the latter case being reversed in 167 F.2d 550 (4th Cir. 1948). But these cases can no longer be regarded as controlling as seamen have been held to be “in the service of the ship” while ashore and injured in bar-room brawls, Nowery v. Smith, 161 F.2d 732.
In Gaynor v. United States, the libellant, Gaynor, when his ship was in the port of Charleston, South Carolina, was granted shore leave which was to expire two days later. He spent the night in Charleston and on the following afternoon took a bus out of Charleston, intending to spend the night with his brother-in-law who lived fifty miles away. When the bus was about thirty-five miles out of Charleston there was a collision and Gaynor suffered a fracture of his right leg. It was held that Gaynor could recover his maintenance and cure, the court reading Aguilar as not limiting the remedy to the fortuitous chance of the locus of the accident, but granting the remedy to the seaman on shore leave "wherever he may be."

Were there any doubt as to the result in Gaynor, it was certainly resolved by the United States Supreme Court in the very recent decision in Warren v. United States. In the Warren case, the seaman went ashore in Naples, Italy; did some sightseeing and drinking, whereupon he went to a dance hall. A room adjoining the dance hall overlooked the ocean but also had an unprotected ledge. He went onto this ledge, grabbed an iron rod after a very superficial examination, and leaned over. The rod snapped off and Warren fell to a ledge below, thereby sustaining a broken leg. The Supreme Court in deciding the case split three ways with Mr. Justice Douglas writing the majority opinion and holding that Warren was "in the service of the ship," reading Aguilar as applying to injuries received during the actual shore relaxation as it does to injuries received while going to or returning from that shore relaxation. But Justices Jackson and Clark dissented, feeling that Warren was not "in the service of the ship." Their reading of Aguilar was narrower, that is to say applying that case so far as the facts dictated. Hence, they reasoned, the choice of a place of relaxation

(3d Cir. 1947); Moss v. Alaska Packers Ass'n, 1945 A.M.C. 493, 160 P.2d 224 (Cal. App. 1945); in public street brawls, Stanley v. Weyerhauser S.S. Co., 1947 A.M.C. 411 (Super. Ct. Cal. 1947) (at a distance of seventeen miles from the ship); Grovell v. Stockard S.S. Co., 78 F. Supp. 931 (E.D. Pa. 1948) (assault by Italian hackie in Italian port while on shore leave—thus showing that if the injury occurs in a foreign port that is no basis of limiting the application of the remedy); and at places some distance from the vessel, Ellis v. American-Hawaiian S.S. Co., 165 F.2d 999 (9th Cir. 1948) (seaman injured while on shore leave by diving into a swimming pool); Smith v. United States, 167 F.2d 550 (4th Cir. 1948) (where the seaman was given leave to return to his home for some personal business. He went to his home and then to a friend's house where he spent the night. The next day he left to return to the ship—a distance of seven miles. While so leaving, he turned his ankle in the driveway of his friend's house); Petersen v. Marine Trans. Lines, Inc., 1948 A.M.C. 544 (Super. Ct. Cal. 1948); and Dasher v. United States, 59 F. Supp. 742 (S.D.N.Y. 1945). The most interesting of all these cases is Petersen v. Marine Trans. Lines, Inc., where a seaman, having just joined a vessel in the Philippine Islands, was a short time later given shore leave. On the same evening he was assaulted ashore. Exactly at what point away from the vessel he was the report does not disclose for want of knowledge. He then returned to the vessel, worked six days, but then had to be hospitalized. It was held that he was "in the service of the ship" under Aguilar. Thus, when joining a vessel and not doing a moment's work aboard the ship, then being injured while on valid shore leave, though being a member of the crew, would see one "in the service of the ship." Though the result is consonant with Aguilar, it goes far beyond what was probably intended early as the meaning of the "in the service of the ship" requirement.

was the sailor's own. If there injured the sailor could not avail himself of the fruit of the remedy. Mr. Justice Frankfurter also dissented, but in an aspect of the case here immaterial.

So with the return to the humanitarian spirit of the Admiralty neither is the nature of the seaman's pursuit while on shore leave to be regarded as a deterrent to the application of the remedy. Thus, in Koinstinen v. American Export Lines, a seaman, in Yugoslavia, after imbibing a few drinks, was lured to a prostitute's room, and upon consummating his activities there, he refused to pay her what she felt to be her just deserts. In consequence, she locked him in her room. A man then appeared and in the choice of either the man or a nearby window as a means of egress, he chose the latter, from which fall he sustained injuries requiring hospitalization, but for all of which he was not denied his maintenance and cure. However, if the seaman is injured ashore, and inconsequential of the nature of his activities, without having obtained authorized shore leave or having actually deserted the ship, he is not considered to be "in the service of the ship," and, therefore, cannot recover maintenance and cure. But the case of where the seaman overstay valid shore leave, at least for two hours, brings us to the threshold of the fact situation in the Farrell case, but which case would see the overstay of leave as no bar to the recovery of maintenance and cure. Thus we have the conclusion that one on a totally unauthorized shore leave can not recover for injuries sustained while on shore leave whereas one leaving on authorized shore leave, but overstay that leave for two hours, can recover.

The seaman becoming ill or injured in the service of the ship is under a duty to accept care and treatment in the marine hospital inasmuch as these hospitals are maintained by the Government for the benefit of seamen. If the seaman refuses the marine hospital care he can not then turn about and sue the shipowner for his expenses incurred in his maintenance and cure. The duty of the ship is discharged by tendering to the injured seaman a certificate of entry into either a marine hospital or any other hospital. If the seaman voluntarily leaves the hospital not against the advice of the attending physician the recovery will not be denied. But unreasonable leaving of the hospital may see the seaman recover no mainte-

66. 83 N.Y.S.2d 287 (N.Y.City Ct. 1948).
nance and cure.\textsuperscript{72} Nor can seamen who do not avail themselves of the facilities of an available hospital recover medical expenses incurred by them outside the hospital unless they would not have been confined to the hospital had they gone there.\textsuperscript{73} However, in Brionkman v. Oil Transfer Corp.,\textsuperscript{74} an infant-seaman who was working on the defendant's tug and tow through the New York Barge Canal, and who in that capacity was injured, but whose maintenance and cure had been furnished by his parents, the latter having made payments without any express agreement providing for reimbursement, was not denied recovery. The court distinguished the above fact situations in that there the seaman \textit{deliberately} refused a designated hospital whereas here the owner did not even suggest a hospital and the seaman, in good faith, went elsewhere. The distinction, it is submitted, is sound, though there is no authority for it as made elsewhere.

We are now brought to the second of the requirements announced by Mr. Justice Brown in \textit{The Osceola}. This requirement was that the owner would be liable for wages and maintenance and cure "at least so long as the voyage is continued." The apparent difficulty with this statement is that it does not say when wages and/or maintenance and cure cease.\textsuperscript{75}

Treating the words literally it can be said that the right to wages extends not beyond the end of the voyage.\textsuperscript{76} Thus, in \textit{McManus v. Marine Transport Lines},\textsuperscript{77} the libellant sustained a scratch which was later found to lead to an ulcerous condition of the shin which would require medical treatment. It was held that an award of wages \textit{after} the end of the voyage, and \textit{in addition} to maintenance and cure, could not be supported. However, it is here well to observe that in the Meyer case the wages were not allowed to the end of the voyage, and were not given in accordance with the articles which the seaman signed, but this was so because Meyer was not "in the service of the ship"\textsuperscript{78} and, therefore, a condition was read into the contract that if the seaman did not work then he could not be paid his wages. No doubt there is that as to wages this was never intended to be the law. \textit{The Osceola} statement says that the wages are to be given until the end of the

\textsuperscript{72} The Santa Barbara, 261 Fed. 369 (2d Cir. 1920); Baker v. Waterman S.S. Corp., 103 F.2d 987 (5th Cir. 1939).
\textsuperscript{73} Emma Marie, 1933 A.M.C. 432 (D.C. Mass. 1932).
\textsuperscript{74} 1950 A.M.C. 341 (N.Y. Ct. of Appeals 1949).
\textsuperscript{75} See the language of Judge Hough in \textit{The Bunker No. 2}, 241 Fed. 831, 833 (2d Cir. 1917), \textit{cert. denied} 245 U.S. 647 (1917), where he could find "neither controlling authority nor complete consensus of opinion as to the point left open in \textit{The Osceola}, nor has our attention been directed to any decision dealing with the cost or reasonable expense of attempted cure."
\textsuperscript{76} The William Penn, 1925 A.M.C. 1316 (E.D.N.Y. 1925). Other cases holding that wages are to be given to the end of the voyage are Ward v. American President Lines, 1951 A.M.C. 1585 (N.D. Cal. 1951); Ziegler v. Marine Transport Lines, 78 F. Supp. 216 (E.D. Pa. 1947); Jones v. Waterman S.S. Corp. 155 F.2d 992 (3d Cir. 1946); and \textit{The Betsy Ross}, 145 F.2d 688 (9th Cir. 1944).
\textsuperscript{77} 149 F.2d 969 (2d Cir. 1945). See also \textit{Great Lakes S.S. Co. v. Geiger}, 261 Fed. 275 (6th Cir. 1931).
\textsuperscript{78} But see \textit{The William Penn}, supra note 75. See also O'Byrne v. United States, 1925 A.M.C. 943 (S.D.N.Y. 1925).
voyage. Thus, on analogical principles a few earlier cases held that maintenance and cure could then only last until the voyage was terminated. However, this rule of some of the earlier cases has been abandoned and it is now fairly settled law that the expenses of maintenance and cure last, at least, until a reasonable time after the end of the voyage. That reasonable time depending upon the facts and injury or illness involved.

Mr. Justice Story in the course of his decision in the Harden case had cause to utter the following language:

The award of a lump sum in anticipation of the continuing need of maintenance and cure for life or an indefinite period, is without support in judicial decision. Awards of small amounts to cover future maintenance and cure of a kind and for a period definitely ascertained or ascertainable have occasionally been made. . . . The duty does not extend beyond the seaman's need. . . . Furthermore, a duty imposed to safeguard the seaman from the danger of illness without succor, and to safeguard him, in case of illness, against the consequences of his own improvidence, would hardly be performed by the payment of a lump sum to cover the cost of medical attendance during life.

Thus,

The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained.

Ushered in now is the problem of the length of time for which the owner is liable for the seaman's maintenance and cure. That cure has been defined as follows:

The word cure (from the Latin, cura) is used, however, in its original meaning of care and means of proper care, not positive cure which may be impossible. The duty, which must have arisen before termination of the voyage and wage relation continues thereafter for a reasonable time determinable in each case by reference to the facts.

With so broad a definition perception will dictate that, application to

80. This was the original doctrine announced by Mr. Justice Story in Reed v. Canfield. It was followed in The Bouker No. 2 supra note 74; Saunders v. Luckenbach S.S. Corp., 62 Fed. 845 (S.D.N.Y. 1919); The Eastern Dawn, 25 F.2d 322 (E.D. Pa. 1928); The Ipswich, 46 F.2d 136 (D.C. Md. 1930); Triantafilos v. United States, 1950 A.M.C. 96 (3d Cir. 1950). Contra: The Tuscany, 47 Fed. 822 (N.D. Cal. 1891) and The City of Alexandria, 17 Fed. 390 (S.D.N.Y. 1883). See also 1 BENDICT, op. cit. supra p. 254, n. 31.
81. See also Fitz-Henry Smith, Jr., Liability in the Admiralty For Injuries to Seamen, 19 HARRY R. REV. 418, at p. 419, in which he says that "Some Courts . . . have held that the liability of the ship is completed 'at least so far as ordinary medical care extend.'" See cases cited in note on p. 419. The quote within the quote is from Reed v. Canfield.
specific facts is not free from difficulty. Where the illness is incurable the duty to afford maintenance and cure has been held not to extend beyond a fair time after the voyage has ended, in short until the seaman has been given the maximum possible medical cure—which is to be distinguished from an absolute cure. Cases to such effect are many. So, in the case of illness incurred in the service of the ship, the award of a lump sum recognizing a need for maintenance and cure for either an indefinite period, or for life, has not been supported by the cases on the problem. Thus, in Calmar S.S. Corp. v. Taylor, Taylor, while in the employ of the Calmar Lines, following an injury to his foot, was found to be afflicted with an incurable illness called Buerger’s disease, but which disease was found not to be caused by the injury. Though amputation of the affected parts could halt the advance of the disease, medical opinion was to the effect that the disease was progressive and would ultimately cause death. Taylor suffered four amputations and was paid small sums of maintenance and cure. He then sued in Admiralty, as the illness was incurable, for a lump sum award based on his life expectancy. As the disease was progressive requiring care to arrest its progress, the Third Circuit Court of Appeals awarded Taylor a lifelong maintenance and cure to be given in one lump sum. But this was undone by the United States Supreme Court in an opinion by Mr. Justice Stone. In answering the two questions presented by the review, Mr. Justice Stone issued forth the following dictum, presciently if not prophetically:

In answering the first we lay to one side those cases where the incapacity is caused by the employment. As to them considerations not present here may apply, which might be thought to require a more liberal application of the rule than we think is called for in this case. (Italics supplied.)

And then continued on to say:

But we find no support in the . . . doctrine for holding that it imposes on the shipowner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease which manifests itself, during the employment, but is not caused by it. . . . We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage.

83. Lindquist v. Dilkes, 127 F.2d 21 (2d Cir. 1942) (urinary trouble); Interocean S.S. Co. v. Behrenden, 128 F.2d 506 (6th Cir. 1942) (intestinal trouble); and Loverich v. Warner, 118 F.2d 690 (3d Cir. 1941) (cancer). See also Murnaga v. United States, 172 F.2d 318 (2d Cir. 1949) and Robinson v. United States, 177 F.2d 582 (5th Cir. 1949). See further the following: The Josephine and Mary, 120 F.2d 459 (1st Cir. 1941); Lindgren v. Shepard S.S. Co., 168 F.2d 806 (2d Cir. 1940); Skolar v. Lehigh Valley, 60 F.2d 893 (2d Cir. 1932); Kikisch v. Misetich, 140 F.2d 812 (9th Cir. 1944); Montilla v. United States, 70 F. Supp. 181 (S.D.N.Y. 1946); and Lynskey v. Great Lakes Transit Corp., 42 F. Supp. 816 (S.D.N.Y. 1942). To the same effect is the Shipowners’ Liability Convention of 1936, 54 Stat. 1693 (1936) of which Article IV says that “The shipowner shall be liable to defray the expenses of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character.” This Convention became effective on October 29, 1939.

84. 303 U.S. 525 (1938), noted in 24 Va. L. Rev. 920 (1938).

85. 92 F.2d 84 (3d Cir. 1937).

86. 303 U.S. 525, 530 (1938).
in which to effect such improvement in the seaman's condition may be expected to result from nursing, care, and medical treatment. 87

And, secondly, as to the lump sum award refused its award on the basis of the above quotations from the pen of Mr. Justice Story in the Harden case.

But be Calmar as it may, the denial of a lifelong maintenance and cure would not prevent the bringing of a later suit for any further expenses incurred in obtaining relief of a curative nature. 88 At that time, the owner would be precluded from asserting the defense of splitting the claim. 89 However, if the owner denies owing maintenance and cure at that time, or even in the initial action, the court will not order the money to be paid while the cause is pending. 90

With the above reservation of opinion by Mr. Justice Stone in Calmar, we are brought again to Farrell. In short, in Farrell the injury was caused by the employment while Farrell was in the service of the ship; in Calmar, the illness arose during the employment, but its cause was wholly unrelated to the employment save its appearance therein. The facts and holding of Farrell have already been presented with the inception of this writing. Before discussing the reservation of Mr. Justice Stone in Calmar other matter is initially compelling.

Discussion has already been made of the shore leave line of cases and its culmination in Aguilar, Gaynor, and Warren. Cases have been cited to show that a seaman injured while upon an unauthorized shore leave can not recover maintenance and cure. 91 Some brief reference was made to the fact that in Farrell the seaman was on authorized shore leave, but was two hours overdue. This fact alone did not militate against his recovery, though to say that he was "in the service of the ship" when overdue, does somewhat strain Aguilar though not convincingly so when he was still "subject to the call of the ship." 92 But then, are not seamen on unauthorized shore leave still "subject to the call of the ship?" The phrase is very difficult of precise definition and application. But Mr. Justice Jackson for the majority in Farrell said that

He must, of course, at the time be in the service of the ship, by which is meant that he must be generally answerable to its call to duty rather than actually in performance of routine tasks or specific orders. 93

Now can this be taken to say that the result would have been the hours? Could it possibly have made any difference inasmuch as Farrell was returning overdue to the ship when the catastrophic fall occurred? What

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87. Ibid.
89. Cervo v. Isbrandtsen Co., Inc., 178 F.2d 919 (2d Cir. 1949).
91. See note 66 supra.
92. Cf. 23 So. Calif. L. Rev. 81 (1949), which says that "Literally, a seaman is not subject to call when he is absent overdue, or when returning therefrom overdue."
93. 336 U.S. 511, at pp. 515-516. With this language it is difficult to comprehend Mr. Justice Jackson's dissenting opinion in Warren v. United States, 340 U.S. 523 (1931).
if he was not? In line with the above quotation from the opinion of the majority, which embraces a seaman who is returning overleave to his ship, then does it not also embrace a seaman who is returning to his ship having left it on an unauthorized shore leave? The time overleave, for sure, is the same as an unauthorized leave period. But to the question, Farrell supplies us utterly not with answer. Arguably, the nature of Farrell’s injuries may have prevailed upon the court to extend Aguilar this far. But what limitations are there upon this extension? To be logical, to hold the owner liable for maintenance and cure if the seaman is injured while he is overleave, would necessitate holding him whenever the seaman returns and however late. Then what is left of the duty of seamen not to overstay their leaves? As a matter of discipline, what, if any, would be a substantial enough breach thereof? Questions can only be raised aloft with the very precarious extension which the entire court did make in Farrell.

Historically speaking, the only ancient sea code which expressly provides for a lifelong maintenance and cure is Article XXXV of the Laws of the Hanse Towns, quoted in the first part of this writing, and which provision the majority in Farrell attempted to distinguish, or rather to show its disuse to the world of 1914. This Article principally provides that “... If any one of them is maimed and disabled he shall be maintained as long as he lives by a like average.” (Italics supplied.) A literal reading of this sentence could have seen Farrell reach the opposite result that it did, though it would be inapposite for purposes of Calmar, at least arguably so. In short, the provision is aimed at injured seamen who have been cursed with an incurable illness. But Mr. Justice Jackson, as spokesman for the five man majority, felt the provision inapplicable as it was written when pirates were real dangers and the seaman would be called upon at a moment’s notice to ward them off to save the ship and cargo. In the Farrell case no such fact situation was present. Though there were no pirates, the vessel was the legitimate target for enemy craft; however, at the time of the injury, no enemy attack was in progress. Then Mr. Justice Jackson continued by saying that

Even if we pass all this and assume the ship always to have been in potential danger and in need of defense, this seaman at the time of his injury had taken leave of her and he is in no position to claim that he was a sacrifice to her salvation. Far from helping to man the ship at the moment, he was unable to find her... we can find no rational basis for awarding lifetime maintenance against the ship on the theory that he was wounded or maimed while defending her against enemies.94

It appears that the majority limits the word “fighting” to actual combat, perhaps an unnecessary limitation in view of the fact that Farrell was a member of the “fighting armed forces.” Though there were no pirates (for which the Article read) with the changes of time so does the Article adopt

a new meaning to fit the change. Though the Bodaglio Armistice was signed in September, 1943, still Italy was not in toto Allied. By February 5, 1944, the Southern parts of Italy, particularly Sicily, were subject to heavy aerial bombardment and in Palermo strict conditions of blackout had to be observed. Thus, there was a constant state of danger in which the seaman would have to stand by the ship to save her. However, the majority is willing to concede this much. But even, they claim, going this far, there is no basis to award the recovery as Farrell, at the time of his injury, was on shore leave and in no position to claim that he was a sacrifice to the salvation of the vessel. Yet the majority then extends the principle of the shore leave cases to hold Farrell ‘in the service of the ship.” Thus, that Farrell was “in the service of the ship” and in constant state of danger seem to be admissions of no force. But to avoid awarding recovery because Farrell was on shore leave and then to admit that he was “in the service of the ship” seems an alien principle if not amounting to inconsistency. In giving so literal a construction to the Article they are writing it off the books—overlooking, for whatever its value, the principle of liberal application of the old sea codes.

Secondly, as to the reservation of opinion made by Mr. Justice Stone in the Calmar case where the ‘incapacity is caused by the employment,” there was no compulsion on the court to say that a different rule must apply. But the majority in Farrell felt that a different measure of maintenance could not be applied saying:

We think no such distinction exists or was premised in the Calmar case. . . . For any purpose to introduce a graduation of rights and duties based on some relative proximity of the activity at the time of injury to the ‘employment’ or ‘service of the ship’ would alter the basis and be out of harmony with the spirit and function of the doctrine and would open the door to the litigiousness which has made the landsman’s remedy so often a promise to the ear to be broken to the hope.95

But obviously, such a distinction was the premise upon which Mr. Justice Stone answered Calmar as he did. There an illness not caused by the employment could not see Taylor the beneficiary of a lifelong maintenance and cure. In Farrell, the injury was caused by and during the service or employment. The effect of the majority argument is to overrule the reservation made by Mr. Justice Stone in Calmar. Yet the Court’s majority made no express declaration of overruling this reservation of opinion.

Thirdly, in denying Farrell’s claim, Mr. Justice Jackson came forth with the following interesting language:

If we should concede that large measure of maintenance is due those whose injury is caused by the employment, it would seem farfetched to hold it applicable here. Claimant was disobedient to his orders and for his personal purposes overstayed his shore

95. Id. at pp. 515-516.
leave. His fall into a drydock . . . was due to no negligence but his own.\footnote{Id. at pp. 516-517.}

By this admission, however, Mr. Justice Jackson is resurrecting the reservation of opinion made in Calmar (which in the preceding paragraph of the opinion he had 'enervated'), and saying that a lifelong award of maintenance may be awarded, but in a case where the injury is not contributorily caused by the overleave and "negligence" of the injured mariner. Thus, an original question would be presented if the injury was "caused by the employment" and was in no way caused by the seaman's disobedience and "negligence." Such an aggregation of facts would present a question which Farrell does not necessarily answer.

But so far as Farrell itself is concerned, it is to be here recalled that in the first part of this writing we concluded that only the gross negligence of the seaman would defeat his right to the remedy. Thus, if the remedy were given for a lifetime, it would only be the same gross negligence of the seaman that would shut off the remedy. It was conceded by the majority that Farrell's negligence was not a gross act of indiscretion, especially when he was held to be "in the service of the ship." To stop the graduation of the remedy should likewise only require the same degree of negligence. Mere negligence is not enough.

Fourthly, as Farrell's case was one of permanent disabilities, which had reached a point of maximum possible cure, but which would require future medical aid extending throughout the seaman's life, it is to be distinguished from the case where there is a permanent disability, but one which does not require any future medical assistance.\footnote{See Gaynor v. United States, 90 F. Supp. 751 (E.D. Pa. 1950). Cf. Muruaga v. United States, 172 F.2d 318 (2d Cir. 1949); and Robinson v. United States, 177 F.2d 582 (5th Cir. 1949).} Thus, as Farrell would require future medical succor, the majority did say that when he received care of a curative nature, he could recover in a new proceeding the amount spent for the maintenance and cure. The difficulty with this assertion is that it encourages the litigiousness which the Court is endeavoring to keep at an utter modicum. Surely the burden could be an exacting one on both the shipowner and the shipowned to be subjected to such a mechanical process, let alone the very crowded dockets of the courts. Thus, as a matter of convenience, there is some basis for a lump sum award. Its evaluation is no light matter as the amount is highly speculative and completely in futuro. It is impossible to use analogies of tort and contract damages assessment as the recovery is not based on either tort or contract. To predicate such an award it should be the present value of the maintenance and cure during the remainder of the seaman's life, with use of mortality tables. It is, therefore, also necessary to conjecture, from the nature of the injuries, whether with medical care the disability will diminish in the frequency of its manifestations, and how much so. Though this is necessarily approxi-
mation the seaman should have the election, being precluded from asserting the deficiency should the lump sum be insufficient. If such a result is to be viewed as too broad and dangerous a precedent, then its application should only be where the mariner's case is an extreme one such as Farrell. The obvious difficulty is that this is judicial legislation, but the courts of necessity have frequently indulged therein. Whether such rationality would apply to cases of illness or injury caused by the employment, but arising after departure from the employment, is an unanswered question which Farrell does not answer. However, the argument of Mr. Justice Story in the Harden case, and repeated by Mr. Justice Stone in the Calmar case, against the awarding of a lump sum to a class admitted to be improvident, to protect them from the wiles of their own caprice, can only be viewed as misleading when one's limbs have been amputated (Calmar) or when one is blind and subject to paroxysms (Farrell). To avoid this the most nearly perfect suggestion would be for the imposition of a trust; but the Admiralty, with all its ability to do "Equity," is powerless over trusts, to create or impose one. The most liberal policy of paternalism has not carried the Admiralty this far. A far-fetched solution, to protect against improvidence or "confidence men" urging investment of the fund, would be the creation of an agency, similar to a workmen's compensation commission, into which the employer would contribute the lump sum, and which the agency would administer for the mariner's needs, allowing any excess, if so there be, to be distributed among his heirs at death.

Procedurally and otherwise, the seaman has three rights under which he can recover for his injuries or illness. He may (1) sue for negligence under the Jones Act, (2) sue under the general maritime law for disabilities due to "unseaworthiness" of the vessel, and (3) sue for maintenance and cure. Older authority said that between (1) and (2) above the seaman must elect, but the more recent authority says that the seaman can sue for both (1) and (2) above so long as he elects either a suit in Admiralty or at common law with a jury. But the third right, that of maintenance and cure, the seaman has apart from whatever other claim he may have for damages. "There is a difference of opinion as to whether the seaman should recover his maintenance and cure in the same action which disposes of the negligence or unseaworthiness allegations, or whether he may or should maintain two actions or take two verdicts." There were, at least up to 1939, cases in which the courts required two actions to be brought.

98. See 1 Benedict, op. cit. supra, § 71 and 2 Benedict, § 223.
100. 4 Benedict, op. cit. supra at pp. 199-201 and the notes therein.
102. See note 99, supra.
103. 4 Benedict, op. cit. supra, at 201.
104. The Liberty Bell, 105 F.2d 604 (5th Cir. 1939).
But this is needless in view of the fact that all the matters in issue can be disposed of in one proceeding.105 The more recent cases allow the single proceeding and it is now generally regarded as the modern practice.106

The seaman injured or becoming ill "in the service of the ship," and thereby being entitled to maintenance and cure, "has a maritime lien for these."107 The mariner may enforce his right to maintenance and cure by a libel in rem or in personam (on the Admiralty side of the federal courts) or he may sue in personam in the state courts or the common law side of the federal courts under "the saving to suitors" clause. To sue on the common law side of the federal court requires that there be $3,000 or more in controversy and that there be diverse citizenship.108 This proposition was asserted by Benedict in his treatise on Admiralty and the courts have not been averse to follow it.109 There is some authority for the proposition that if the suit for maintenance and cure (of which the jurisdictional amount is not $3,000) is joined with a cause of action over which jurisdiction has been established, the maintenance and cure cause of action will not be dismissed for want of jurisdiction.110 It is felt that more courts should embrace this procedure to avoid dismissal of the claim for maintenance and cure.

If maintenance and cure is withheld from the seaman to whom it is due, it can be recovered and the courts will also allow consequential damages for this failure to pay the maintenance and cure.111 This will also be the case where the period of payment has ended.112 But the shipowner's liability for maintenance and cure is not limited to an action between himself and the disabled seaman. Thus, a hospital which has given a seaman maintenance and cure may recover that amount from the shipowner.113

A word, more traditional than anything else, is that with arguable "policy" on both sides of the coin in a hard fact situation such as that presented in Farrell, we should hope for some golden rule by Congressional determination or satisfactory International Conference.114 The latter has been done,115 but with none too effective a result (Farrell), let alone that

105. 4 Benedict, op. cit. supra note 37, at 201.
110. See note 32 supra. See especially the cases collected and discussed in McDonald v. Cape Cod Trawling Corp., 71 F. Supp. 888 (Mass. 1947).
112. Ibid.
114. The same suggestion is made in 23 So. Cal. L. Rev. 81, 82 (1949).
in Farrell Mr. Justice Douglas (dissenting) did point out that Article IV of the Shipowner's Liability Convention must be fused with Article XII thereof, the latter giving power to depart from the Convention where there "... any law, award, custom ... which insures more favorable conditions than those provided by the Convention." Congress could affirmatively act were Article XII held to be non-self-executing, notwithstanding that Articles I and II of the Convention have been held to be self-executing. 110 A solution by Congress would be the most desirable result.

It is disheartening that with such unprecedented injuries as were presented in Farrell, the majority did not take a very sharp step away from tradition. For their adherence to a principle of a Government of Laws the majority is to be lauded. But with Farrell perhaps it should be more of men. Who knows? The Emotion will suffer, tear and wail for the injuries of William Farrell; the Humanitarian spirit in the soul could make one spin with despair for that which was denied him. But however noble be the motive, just how far can it be sacrificed? The result in Farrell leaves much to be desired and many questions of law unanswered as this paper has endeavored to bring forth. It seems that Farrell became enmeshed in the impenetrable webbery of a remedy whose outer fringe had never clearly been defined and can still be regarded as not completely settled. The nature of his personal losses makes the result more difficult to swallow. His claim and position were extreme; that which was opposed to him was too much to be surmounted. To argue for him necessitates admission that in so doing first principles will have to be pushed to their extreme. It seems that Farrell was caught in some sort of trap where his chance of success was thin, but for that chance he will have to suffer the extreme losses that are his own. And that being the case, I can only here choose to emotionally end this writing with the same four words which entered my mind when first I read the Farrell case. Those words were "Poor, Poor William Farrell."