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STRATHEARN S.S. CO. v. DILLON— AN UNPUBLISHED OPINION BY MR. JUSTICE BRANDEIS †

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WHEN in 1927 Augustus N. Hand was elevated from the district court, where he had already earned an enviable reputation, and began his great career on the United States Court of Appeals for the Second Circuit, Brandeis wrote him a congratulatory note. Hand's gracious reply contained these two sentences: "However much some of your associates may differ with your general point of view, I believe they appreciate the light you bring to many cases from sources they would never and by their training and education could never explore. The thing which impresses the average lawyer and the law professors about your work is the thoroughness with which you proceed so that everything is tied up before your opinion ends." Four years later, on the occasion of Brandeis' seventy-fifth birthday, Augustus Hand, who was not given to bandying compliments lightly, expanded on this thought. "It is a rare thing," he wrote then, "to find anyone who has your information about the facts affecting economic and social principles and has even the tendency, let alone the capacity,

† The unpublished opinion here printed forms part of a collection of Justice Brandeis' private papers to which Professor Paul A. Freund of the Harvard Law School and the present writer have recently been granted access. It is to be included in a book dealing with the Justice's unpublished opinions, which is currently in preparation. This work has the financial support of the Jacob Brenner Memorial Foundation, assisted by the Philadelphia Community Foundation, Inc. The opinion is printed verbatim, except that obvious typographical errors have been corrected.

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to buttress his conclusions with precedents and convincing argument. I confess that the 'judicial hunch' is to me a terrible thing. If I by mistake employ it I don't believe in any such nebulous stuff and I think it at present a special danger. The worst literalist and case judge is better than one who thinks he has everything in his own hands. By it we should lose the only sanction for our decisions. I have been particularly impressed by the care with which you justify and fortify your conclusions in all the opinions you write."

Augustus Hand's remarks are a fair assessment of the Brandeis method, of the rules by which Brandeis abided in the practice of his craft. And the unpublished opinion here printed is a representative example. Facts and understanding — so Brandeis preached and so, almost always, he practiced — must precede judgment, and they must be spread out in the opinion at whatever length necessary, to explain judgment, to justify it and to gain acceptance for it. This was the proper way in which a decision was made and announced. Its wellspring was principle, a coherent philosophy of life and of government: in this, as in so many instances, the conviction — generally accepted as doctrine but much honored in the breach by Brandeis' colleagues — that elected legislatures, not courts, should make social and economic policy, and that such legislative policy should, within wide and infrequently invoked limits, have the freest range. Whether it was novel, experimental, unwise, profoundly disagreeable — all that was not the Court's concern; when called upon to do so in the course of litigation, it was for the Court faithfully to give effect to legislative policy. But only one in command of all the facts, the history of a statute, the needs that evoked it, the agitation out of which it grew, the choices it embodies, can truly apply such a principle. For on the surface — and to hindsight — the capricious is often indistinguishable from the merely foolish. And the frailties of legislators and of language are such that a statute may not, on its face, give the relevant indication of purpose; thus it may leave a judge who looks no farther with little recourse but to construe its ambiguities on the basis of "hunch" — whether or not he acknowledges it even to himself.

There are opinions by Brandeis more strikingly illustrative of the method which Augustus Hand admired, and of the guiding principle it implemented. And there are other cases in which the contrast between Brandeis and the "literalist" and the "hunch"

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judge is vivid. But the contrast is seldom so salient as in this case, where, in the end, Brandeis and the brethren, in their different ways, came to the same result.

SUPREME COURT OF THE UNITED STATES

Nos. 373 and 391 — October Term, 1919

373	Strathearn Steamship Company, Limited, Petitioner, *vs.* John Dillon.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
391	J. M. Thompson, Master and Claimant of the Steamship "Westmeath," etc., Petitioner, *vs.* Peter Lucas and Gustav Blixt.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March —, 1920]

Memorandum by Mr. Justice Brandeis

The two cases present this question: Does Section 4 of the so-called LaFollette Act of March 4, 1915 (c. 153, 38 Stat. 1164, 1165) confer upon seamen of foreign vessels loading or unloading in a port of the United States the right to demand while there payment of one-half of all wages theretofore earned under their shipping articles, although these were made abroad and provided, consistently with the law of the vessel, the place, and their own nation, that payment of the wages should be deferred until the termination of the contract? The foreign vessel owners and the British Embassy contend both that Congress is without power to confer such right and that it did not by the Seamen's Act attempt to do so. It will aid in determining the validity of these contentions to consider first the nature, the occasion, and the purpose of the provision in question.

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First: The provision is primarily a regulation of the relation of master and servant, similar in character to many which the States have enacted in the exercise of their police power. It resembles most closely weekly and fortnightly payment laws, like that sustained in *Erie Railroad Co.* v. *Williams*, 233 U.S. 685. But it is a modification of our shipping laws made by Congress in the exercise of its power over admiralty and interstate and foreign commerce.

The act of which it is a part contains twenty sections, the whole being designed to complete the emancipation of American seamen and to make possible the participation of the United States in the foreign carrying trade. The status of servitude, fastened upon American seamen by the Act of July 20, 1790, c. 29, 1 Stat. 131, was held not to have been affected by the Thirteenth Amendment, *Robertson* v. *Baldwin*, 165 U.S. 275, and had become ever more galling by comparison with the increasing liberties, the growing comforts, and the improved conditions enjoyed by workingmen on land. As a result, relatively few American citizens were willing to enter upon service at sea. Efforts to ameliorate the condition of seamen were continually engaging the attention of Congress. In the twenty years preceding 1915 nine acts were passed to that end.[1] Flogging was abolished in 1850; corporal punishment in 1898; and, in the same year, the right to arrest seamen on American vessels for desertion in American ports. The grosser incidents of servitude had thus been largely overcome, and in the coast-wise carrying trade conditions for seamen greatly improved. Congress had reserved that trade exclusively to vessels built and owned in the United States;[2] and suppression through control by competing railroads was guarded against.[3] Fair wages and working conditions prevailed. The industry developed.

In the foreign carrying trade American seamen remained liable to arrest for desertion abroad. That was believed to be necessary for the operation of our vessels. But vessels of the

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[1] February 18, 1895, c. 97, 28 Stat. 667; March 2, 1895, c. 173, 28 Stat. 741; March 3, 1897, c. 389, 29 Stat. 687; December 21, 1898, c. 28, 30 Stat. 755; April 11, 1904, c. 1140, 33 Stat. 168; April 13, 1904, c. 1252, 33 Stat. 174; April 26, 1904, c. 1603, 33 Stat. 308; June 28, 1906, c. 3583, 34 Stat. 551; March 2, 1907, c. 2539, 34 Stat. 1233; April 2, 1908, c. 123, 35 Stat. 55.

[2] Acts of September 1, 1789, c. 11, 1 Stat. 55; December 31, 1792, c. 1, 1 Stat. 287; February 18, 1793, c. 8, 1 Stat. 305; March 1, 1817, c. 31, 3 Stat. 351; Revised Statutes, Section 4131; Act of May 28, 1896, c. 255, 29 Stat. 188.

[3] Report of Commissioner of Corporations on "Transportation by Water in the United States," July 12, 1909; December 23, 1912; Panama Canal Act, August 24, 1912, c. 390, section 11, 37 Stat. 560, 566.

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United States had almost ceased to engage in that trade. There had been a continuous decline for nearly three-quarters of a century. Between our ports and those of other countries, as well as in the carrying trade wholly between foreign countries, our vessels were subjected to the unrestricted competition of foreigners; for Congress had not afforded either to American capital or to labor engaged in such trade protection like that given under the tariff to our manufacturing industries.[4] It had not even been found feasible to reserve the trade between the Philippines and the United States to vessels of American registry.[5] Americans were practically barred from entering the mercantile marine (otherwise than in the coast-wise trade,) except as employees of foreign vessels; and this entailed temporary allegiance to the foreign flag, *In re Ross*, 140 U.S. 453, and subjection to wages and a standard of living lower than those prevailing in the United States.[6] The Act of March 3, 1813, c. 42, 2 Stat. 809, had made it unlawful to employ on board any public or private vessel of the United States any person except a citizen thereof or a native colored person. This act and supplementary legislation were repealed by Act of June 28, 1864, c. 170, 13 Stat. 201, so far as concerned employment of the crew. The number of American citizens engaged in sea-faring grew steadily less; and in 1914, when our mercantile marine was increased by admission of foreign built ships to American registry, Congress deemed it necessary (Act of August 18, 1914, c. 256, 38 Stat. 698), to authorize the President in aid of foreign commerce to suspend the requirement that watch-officers be citizens of the United States.

Congress investigated from time to time the causes of this de-

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[4] "From 1789 until shortly before our civil war American shipping in the foreign trade was in some form or degree protected, first by discriminating duties and tonnage taxes, and later by mail subventions. It is a matter of record that so long as it was protected it prospered. But for some unconscionable reason, when the protective policy in general was strengthened and broadened by the political party which came into full power in 1861, adequate encouragement was denied to this one industry out of all our industries, and has been denied to the present time." Report of Joint Commission on Merchant Marine, December 6, 1905, 59th Congress, 1st Session, Report No. 1, p. 6.

[5] Act of April 29, 1908, c. 152, 35 Stat. 70, amending Act of April 15, 1904, c. 1314, 33 Stat. 181.

[6] "Ninety-three per cent of our foreign trade is carried in foreign ships manned by foreign sailors. Of the few ships that carry the 7 per cent of our foreign trade not 10 per cent of their crews are American citizens. Of this very small number of American sailors in the foreign trade practically all of them are . . . running under the Subsidy Act of 1891. . ." Report of Minority of House Committee on Merchant Marine and Fisheries, May 22, 1912, 62d Congress, 2d Session, Report 645, Part 2, pp. 1–2.

cline of the American mercantile marine and many bills were introduced proposing remedies.[7] Some minor measures designed to remove provisions in then existing laws believed to be unnecessarily burdensome and some to lessen otherwise the cost of building, equipping and repairing and operating vessels engaged in the foreign carrying trade and to promote their entrance into it, were enacted from time to time; [8] but they had proved ineffective. Proposals repeatedly made for general bounties, subventions, and subsidies and for discriminating duties and discriminating tonnage taxes, had all been rejected. The proposal of Government ownership and operation of vessels in the foreign trade was not then accepted.[9] Committees of Congress concluded that the decline of the American merchant marine was the result of lower costs in building, equipping and operating foreign vessels; and that the lower cost of operation was due mainly to their lower wage scale and the inferior living conditions of their crews; and that equalization of operating costs in this respect would be an indispensable factor in reestablishing our mercantile marine. With this general end in view Congress had provided a generation earlier (by Act of June 26, 1884, c. 121, section 20, 23 Stat. 58,) that American vessels could engage

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[7] 41st Congress, 2d Session, Report from the Committee on the Causes of the Reduction of American Tonnage, February 17, 1870, No. 28; 47th Congress, 2d Session, Report of Joint Select Committee on American Shipping, December 15, 1882, Report No. 1827; 58th Congress, 3d Session, Report of American Merchant Marine Commission, January 4, 1905, Report No. 2755, and No. 2755, Part 2; 61st Congress, 2d Session, Report of House Committee on Merchant Marine and Fisheries, February 21, 1910, Report No. 502; 61st Congress, 3d Session, Report of said committee, February 24, 1911, Report No. 2253.

[8] The Act of June 26, 1884, c. 121, 23 Stat. 53, contained many such minor provisions including one (section 16) permitting the importation of supplies free of duty; thus supplementing Section 10 of the Act of June 6, 1872, c. 315, sec. 10, 17 Stat. 230, 238, which placed on the free list certain material for building, equipping and repairing wooden vessels built in the United States for foreign trade. By the McKinley Tariff Act of October 1, 1890, c. 1244, sections 8 and 9, 26 Stat. 567, 614, free entry was granted also to material used for building, equipping or repairing steel vessels engaged in the foreign carrying trade; and the privilege was extended by later acts. See Act of August 27, 1894, c. 349, Section 7, 28 Stat. 509, 548; Act of August 5, 1909, c. 6, Sections 19, 20, 36 Stat. 11, 88. By Act of March 3, 1891, c. 519, 26 Stat. 830, limited provision was made for aiding American ships in the foreign trade by mail subsidies. By Act of May 10, 1892, c. 63, 27 Stat. 27, a limited provision was made for American registry of foreign-built vessels to be so engaged. And some aid was given to the ocean merchant marine by the extension of the American monopoly in the coasting trade to Alaska, Act of July 27, 1868, c. 273, 15 Stat. 240; Hawaiian Act of April 30, 1900, c. 339, sec. 98, 31 Stat. 161, and Huus *v.* New York and Porto Rico Steamship Co., 182 U.S. 392.

[9] See Act of Sept. 7, 1916, c. 451, 39 Stat. 728.

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seamen in foreign ports to serve for round trips without being required to reship them in ports of the United States. Thus equalization with foreign operating costs was sought to be attained by reducing the standard of American wages to that of the foreign competitors. The provision failed to accomplish its purpose. The committees of Congress in reporting the LaFollette bill recommended trial of a new method. It was to overcome the reluctance of Americans to engage in sea-faring by completing the emancipation of seamen; and to equalize operating expenses by raising to the American standard the wages and conditions of seamen on foreign vessels. To accomplish this, the committees proposed, among other things, to abrogate the existing right of arresting American seamen for desertion abroad and to emancipate all seamen on foreign vessels entering ports to the United States for the following reason.

It had been the common practice of such foreign vessels to engage their seamen abroad for long periods of service, or, at least, for a period covering the return or outgoing voyage from the United States. It was also the common practice of such foreign vessels to make to seamen an advance payment at the signing of the shipping articles, and to provide in the articles for deferring payment of substantially the balance of the wages earned until the termination of the shipping contract. Prior to the passage of the Act of March 4, 1915, seamen on foreign merchant vessels who deserted while in American ports were liable to arrest; and by many treaties American magistrates and courts were bound to lend aid in arresting and returning them to their ships. See *Dallemagne* v. *Moisan*, 197 U.S. 169; compare *Tucker* v. *Alexandroff*, 183 U.S. 424. The committees of Congress concluded that if seamen on foreign vessels were freed from liability to arrest in our ports for desertion and this exemption from arrest were coupled with a provision enabling the seaman to obtain here payment of a substantial part of all wages theretofore earned and remaining unpaid, foreign vessels engaged in the American trade would be compelled to raise wages and working conditions to practically the standard prevailing in our coastwise trade. For otherwise they would lose many seamen whenever they entered a port of the United States, and they would be unable to ship new crews except at the rate of wages prevailing in America. As a very large part of the world's shipping was required to carry America's exports and imports,[10] some

[10] It was said in 1906 that 500,000 sailors enter the port of New York each year. Hearing, 59th Congress, 1st Session, on H. R. 383, before Committee on Merchant Marine and Fisheries, February 2, 1906. In 1914 the number of

believed this equalization of operating expenses would extend gradually to vessels engaged in the carrying trade wholly between foreign countries; and, if the initial cost of the vessels should also be equalized, America would be able to compete for the foreign carrying trade. To equalize the initial cost of vessels, Congress had already provided in 1912 for American registry of foreign built cargo vessels not more than five years old, and in 1914 had removed the age limit.[11] The purpose to effect such equalization of costs was clearly set forth in reporting the measure to Congress as will be hereafter shown.[12] Such is the nature of the measure in question; such the evils against which it was aimed and the means by which it was proposed to overcome them. Was it within the power of Congress to employ these means and did Congress express its intention to do so?

Second: The foreign vessel owners and the British Embassy contend that Congress is without power to confer upon foreign seamen of a foreign vessel the right to demand while in our ports and to recover here wages earned abroad under a contract made abroad and valid where made, if the contract specifically provides that the payment of the wages shall be deferred and be made abroad. They say that this want of power is apparent where, as in these cases, the vessel, the seaman, the place of contract and the agreed place of payment are all of the same foreign country. But the contention will not bear analysis. Such legislation, it is argued, impairs the obligation of contracts. The constitutional inhibition against impairing the obligation of contracts does not apply to acts of Congress. Furthermore, the contract of the Strathearn was made after the LaFollette Act became operative, and those of the Westmeath after the date of its enactment. Compare *Diamond Glue Co.* v. *United States Glue Co.*, 187 U.S. 611, 615; *Louisville & Nashville Railroad Co.* v. *Mottley*, 219 U.S. 467, 482. No treaty presents any obstacle; for the act by its terms provides for the abrogation of all treaties inconsistent with it. (Sections 16 and 17.) The objec-

masters, officers and men employed in Great Britain's merchant marine (20,300,000 gross tons) being one-half the world's tonnage, was only 295,652. Commerce Reports, January 26, 1920, p. 507.

[11] Act of August 24, 1912, c. 390, Section 5, 37 Stat. 560, 562; Act of August 18, 1914, c. 256, 38 Stat. 698; Letter of Acting Secretary of Commerce, December 12, 1914, 63d Congress, 3d Session, Sen. Doc. No. 640; Foreign Vessels Admitted to American Registry, 63d Congress, 3d Session, H. Doc. No. 1664, March 2, 1915.

[12] Reports of House Committee on Merchant Marine and Fisheries, Sixty-second Congress, Second Session, May 2, 1912, No. 645; Sixty-third Congress, Second Session, June 19, 1914, No. 852.

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tion to the validity of the provision must rest, therefore, wholly on supposed rules of admiralty or of international law.

It is urged that, by general consent of the nations, the regulation of the rights and duties of officers and crew are, like matters of internal discipline, to be determined by the law of the country to which the vessel belongs — and not by the law of the place where she may, from time to time, happen to be. This undoubtedly is the general rule. But it is such only because of the consent of each nation affected and to the extent to which such consent has been given either by implication from prevailing custom or expressly by treaty or legislation. Without such consent no nation can legally possess extraterritorial rights within the territory of another. As said in *Schooner Exchange* v. *M'Fadden*, 7 Cranch. 116, 136: "The jurisdiction of the nation within its own territory is necessarily exclusive and . . . is susceptible of no limitation not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself." In the absence of such consent, express or implied, every foreign vessel owes temporary and local allegiance to the country whose port she enters and becomes amenable to the jurisdiction and laws of that country. See *United States* v. *Diekelman*, 92 U.S. 520.

The decided cases illustrate how narrow are the extra territorial rights conceded by the United States to foreign merchant vessels; and the tendency to restrict them further is indicated by our legislation. Thus in *Wildenhus's Case*, 120 U.S. 1, despite the common treaty provision conferring upon the Belgian consul cognizance of differences between captains, officers and crews of Belgian merchant vessels in our ports, a felonious homicide committed on such a vessel in a New Jersey port was held to be within the jurisdiction of the State although committed by one Belgian upon another Belgian, both members of the crew, and although the affray occurred and ended wholly below the vessel's decks and the tranquility of the port was in no wise disturbed or endangered thereby. In *Patterson v. Bark Eudora*, 190 U.S. 169, the Act of December 21, 1898 prohibiting payment in advance of seamen's wages was held applicable to foreign merchant vessels in our ports, even if the seamen engaged were also foreigners. In *Bucker* v. *Klorkgeter*, Fed. Case 2083, it was held that our admiralty courts would take jurisdiction of a suit for wages by a foreign seaman against the vessel of his nationality where the interests of justice appeared to demand it, although the shipping articles entered into abroad pro-

vided that the seaman could seek redress only in the courts of his country. Compare *The Belgenland*, 114 U.S. 355, 364. In *Knott* v. *Botany Mills*, 179 U.S. 69, a provision in a bill of lading limiting liability for negligence, given in a foreign port by a British vessel covering a shipment to this country, was held void because in violation of our statutory law; and in *The Kensington*, 183 U.S. 263, a similar provision relating to baggage, in a ticket sold abroad by a foreign vessel to a passenger bound for this country, was held void because not in harmony with our public policy as interpreted by the courts. In *The Titanic*, 233 U.S. 718, the limitation of liability under the Harter Act (to the benefit of which foreign vessels had been declared entitled in *The Scotland*, 105 U.S. 24; *The Chattahoochee*, 173 U.S. 540, *The Germanic*, 196 U.S. 589, and *La Bourgogne*, 210 U.S. 95), was held to be applicable to a liability arising out of a contract made in England by a British ship with a British citizen, although the British law on the subject differs from our own.

It is insisted that while one country may decline to enforce in its courts a cause of action arising abroad, if the foreign law from which it springs contravenes the public policy of the forum, it may not create a liability out of acts occurring abroad, which do not, by the foreign law, give rise to a cause of action. Compare *Slater* v. *Mexican National R. R. Co.*, 194 U.S. 120, 126; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356; *Cuba Railroad Co.* v. *Crosby*, 222 U.S. 473, 478. The general principle may be admitted; but it has no application here. The liability for wages arises when they are earned. There is *debitum in praesenti, solvendum in futuro.* The wages earned abroad are, therefore, owing though not due. See Bouvier's Law Dictionary; "Owing." The rule is applied in the attachment and the bankruptcy laws, which permit proceedings to be brought before the maturity of the claims of complainants. Compare *Schunk* v. *Moline, Milburn & Stoddart Co.*, 147 U.S. 500; *F. L. Grant Shoe Co.* v. *Laird Co.*, 212 U.S. 445. Refusal to give full effect to the provision in the foreign shipping articles deferring payment of wages earned may rest, also, on the general rule, that where illegal conditions or clauses in a contract do not go to the whole consideration or where they are severable, they may be ignored and the contract enforced as if the invalid provision had never been inserted therein. Thus in *Knott* v. *Botany Mills*, *supra*, and *The Kensington*, *supra*, defences based upon clauses in contracts made abroad which unquestionably go to the liability, — like that limiting the carriers' liability for negligence, — were disregarded because contrary to our law; and the contracts

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were enforced as if these clauses had not been inserted therein. The provision deferring payment may also be likened to clauses in contracts made abroad restricting suit to courts of the foreign country, or to clauses by which the parties bind themselves to submit any controversy to arbitration. In such cases it is held that the provision, although binding by the law of the foreign country, goes only to the remedy and that the suit will be entertained by our courts, although both parties are subjects of the country in which the contract was made. *The Eros*, 241 Fed. 186, 191; 251 Fed. 45; certiorari denied, 247 U.S. 509.

Congress having absolute power over foreign commerce, *Buttfield* v. *Stranahan*, 192 U.S. 470; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320; *Weber* v. *Freed*, 239 U.S. 325; may prescribe the conditions under which it will admit foreign vessels; and it may express the condition in the form of a pecuniary obligation to its seamen inconsistent with the shipping articles. *Patterson* v. *Bark Eudora, supra*, p. 178. It is clear, therefore, that Congress possesses the power to confer upon foreign seamen on foreign vessels coming into our ports the right to demand payment of half the wages earned, even though by contract made abroad and valid where made, payment was to be deferred. The question remains however: Did Congress express its intention to confer such right?

Third: Section 4 closes with the following clause: "This section shall apply to seamen on foreign vessels while in harbors of the United States and the Courts of the United States shall be open to such seamen for its enforcement." The main provision of the section is this:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void; *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned."

Thereby section 4 amended the then existing law (section 6 of the Act of July 20, 1790, c. 29, 1 Stat. 133, incorporated in the Revised Statutes as Section 4530, and amended by Section 5 of the Act of December 21, 1898, c. 28, 30 Stat. 755, 756), in the following particulars:

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1. The half-wages made demandable are those "earned" instead of those "due."

2. The half-wages are made demandable notwithstanding any "stipulations in the contract to the contrary." The then existing law had denied the right to payment if "the contrary be expressly stipulated in the contract."

3. The half-wages earned were made demandable only after "the expiration of, nor oftener than once in five days." There was no such limitation in the then existing law.

4. Failure to comply with the demand releases "the seaman from his contract and he shall be entitled to full payment of wages earned." There was no such provision in the then existing law.[13]

5. The section is made to apply to foreign vessels as above set forth. There was no such provision in the then existing law.

The contention that section 4 should not be construed as conferring upon foreign seamen on foreign vessels the right to half-wages earned is urged upon several distinct grounds. In the first place it is said that the provision should be limited to American seamen on foreign vessels. The second construction suggested is that the provision should be held to apply only to such seamen on foreign vessels as had been shipped in American ports. A third construction offered is that the provision be held to apply to all seamen on foreign vessels wherever shipped, but that the extent of the recovery be limited to wages earned in American ports; and, as a further limitation upon its application, it is asserted that no right to demand even these wages arises until the vessel has been in the American port for five days. Compare *The Ixion*, 237 Fed. 142, 144; *The Italier*, 257 Fed. 712, 714; *The Delagoa*, 244 Fed. 835.

The argument that the proviso should be limited to American seamen on foreign vessels rests mainly upon the fact that the act is entitled "to promote the welfare of American seamen," etc. This argument may be answered by reference to the familiar rule of construction, that the title forms no part of an act, and is not to be resorted to in order to create an ambiguity. *United States v. Fisher*, 2 Cranch. 358, 366; *United States* v. *O. & C. R. Co.*, 164 U.S. 526, 541; *Cornell* v. *Coyne*, 192 U.S. 418. For the natural meaning of "seamen on foreign vessels" is all seamen; and no reason appears for narrowing that meaning here. The

[13] There was added by Section 4 the further proviso: "That notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require."

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Act of December 21, 1898, 30 Stat. 755, 763, construed in *Patterson* v. *Bark Eudora*, *supra*, was entitled "An act to amend the laws relating to American seamen, for the protection of such seamen, etc."; and the clause there in question, which provided in almost identical terms that it should apply to foreign vessels, was held to be applicable to foreign as well as to American seamen thereon. Compare *United States* v. *McArdle*, 2 Sawyer 367; *United States* v. *Sullivan*, 43 Fed. 602; *United States* v. *Anderson*, 10 Blatchf. 226, 228. If, however, the title is to be considered, it should be noted that it is "to promote the welfare of American seamen in the merchant marine of the United States." The title affords, therefore, no basis for the contention that the proviso in question related to American seamen on foreign vessels. But the title further declares it is an act "to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto," a purpose obviously referring mainly to foreign seamen on foreign vessels. And would it not promote the welfare of the American seamen in the American merchant marine to equalize conditions and operating costs and make employment therein possible? Furthermore, the last clause of the proviso, in declaring our courts open to such seamen, makes clear that the proviso applies to foreign seamen. Americans shipped as seamen on foreign vessels were already entitled to resort to our courts to enforce rights against the vessel. *The Falls of Keltie*, 114 Fed. 357; *The Neck*, 138 Fed. 144; *The Epsom*, 227 Fed. 158. Our courts of admiralty possessed, in the absence of treaty provisions to the contrary, jurisdiction also in controversies between a foreign vessel and her officers or crew; but our courts usually decline, as a matter of discretion, to entertain law suits by foreign seamen; *The Belgenland*, *supra*. By treaties with some countries, our courts were precluded from doing so. *The Salomoni*, 29 Fed. 534; *The Burchard*, 42 Fed. 608; *The Koenigin Luise*, 184 Fed. 170. Consequently foreign seamen needed a grant of the right to sue.

Like the first construction suggested, both the second and third empty the proviso of substantially all effect, as applied to foreign vessels. To limit the application of the section to seamen shipped in an American port would so narrow its scope as to make it inefficacious. To give seamen the right to demand half the wages earned during the days that a foreign vessel is loading or unloading in an American port, and then only after she had been there at least five days, holds out no grant of freedom, even when coupled with the right to enforce payment in our courts. It reminds of the bondage-provision in section 4 of the Act of

July 20, 1790, c. 29, 1 Stat. 133, which declared that "no sum exceeding one dollar shall be recoverable from any seaman or mariner by any one person for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended."

If, as the contentions made here and decisions below indicate, (see, also, *The Sutherland*, 260 Fed. 247), the words of the act standing alone leave a doubt as to the intention of Congress, we may resort to the reports of the committees of Congress to aid in ascertaining its intention. *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 333; *American Net & Twine Co.* v. *Worthington*, 141 U.S. 468, 474. And the following passages from their reports, together with facts recited above, show conclusively that the several constructions suggested by the foreign vessel owners and the British Embassy are each contrary to the intention of Congress and that the section was properly construed by the Circuit Courts of Appeals.

The LaFollette Act originated in the Senate (S. 136). When the bill reached the House it was referred to the Committee on Merchant Marine and Fisheries which at this and previous sessions of Congress had considered a similar measure.[14] In recommending important amendments to the section under consideration, which were accepted by the Senate conferees (House Report 1439, 63d Congress, Third Session), and later enacted into law, the committee reported as follows (House Report 852, p. 19, 63d Congress, Second Session, June 19, 1914):

". . . It is claimed that by making the provisions of section 3 of the Senate bill and section 4 of the committee substitute apply to foreign ships it will tend to equalize the operating expenses of vessels. It is also claimed that the provisions of this bill abolishing arrest for desertion will be largely annulled if the foreign shipowner may by the terms of his contract deny the seaman the right to receive in our ports any part of the wages earned by him; that while the deserting seaman would not be subject to arrest, he would be compelled, if he deserted, to do so without a penny in hand to buy bread or procure a night's lodging; and it is claimed also that if American vessels are subject to the provision allowing seamen to demand half their wages earned, while foreign vessels are not, the shipowner might and

[14] Sixty-second Congress, Second Session, H. R. 23673; Report from House Committee on the Merchant Marine and Fisheries, May 2, 1912, 62nd Cong., 2nd Sess., Report No. 645.

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probably would put his ship under a foreign flag to avoid this obligation.

"Quoting from the report on H. R. 23673, known as the seaman's bill, made to the House of Representatives in the Sixty-Second Congress, second session, May 2, 1912:

" 'Under existing laws men may be and are employed at the ports where the lowest standard of living and wages obtain. The wages in foreign ports are lower than they are in the ports of the United States; hence the operating expenses of a foreign vessel are lower than the operating expenses of an American vessel. It is not proposed to prevent vessels from employing seamen in ports where they can secure them cheapest, but it is proposed by this bill to give the seamen the right to leave the ship when in safe harbor, and in time this will result in foreign seamen engaged on vessels coming into ports of the United States being paid the same wages as obtain here, as a means of retaining their crews for the return voyage. That will equalize the cost of operation, so that vessels of the United States will not be placed at a disadvantage.'

". . . If, however, giving greater freedom to the seaman shall operate not only to equalize wages, but to elevate and better the conditions and service of the seaman, which is its purpose, then the provision will justify itself and be of benefit to the American merchant marine in equalizing the cost of operation as between our ships and those of other nations.

"It should be stated that the committee are not unanimous in making this provision apply to foreign ships.

"Some members of the committee doubt our right and the wisdom of making it apply to foreign ships and question its value to our merchant marine."

The report of May 2, 1912, had declared in introducing the passage quoted above (p. 7):

"Two things are essential to the building up of our merchant marine; one is the creating of a condition where the initial cost of the vessel is as low as that of the foreign vessel and the other is an equalization of the operating expenses.

"This bill will tend to equalize the operating expenses."

And on the following page (8) — the report of May 2, 1912 — gave the further explanation:

"The section thus amended gives the seaman the right to demand one-half the wages due him in any port, notwithstanding any contract to the contrary, and extends its application to seamen on foreign vessels while in American harbors, and the whole section becomes part of the means by which the cost of opera-

tion of all vessels taking cargo out of any American port may be equalized."[15]

Senator Fletcher in reporting to the Senate the Seamen's Bill, enacted March 4, 1915, said (50 Cong. Record, 5748–9):

"The three main purposes were: First, to give freedom to seamen and improve their condition; second, to promote safety of life at sea; third, to equalize the wage cost of operating vessels, foreign and domestic, taking cargoes or passengers from ports of the United States. It is very generally acknowledged that the bill will accomplish those three purposes. . . .

"First, Senate bill 136 permits seamen on foreign vessels to leave their vessels in ports of the United States; that was one thing to be worked out; second, it permits seamen to draw one-half of the pay due them in any port where the vessel lies or delivers cargo, making this section applicable to foreign vessels while they are within the jurisdiction of our laws; . . .

"The right to one-half of the earned wages at a stopping place on a voyage would seem to be reasonable. It would not induce a sailor to leave a ship when he was being decently treated and fairly compensated to have the privilege of quitting and collecting only one-half of what he had earned. On the other hand, if the sailor is maltreated, or for sufficient reason he quits the vessel, perhaps in a strange land, he should at least have one-half the wages he has earned in cash. The forfeiture of the other half would seem to be ample allowance by way of liquidated damages for breach of his contract. . . ."

The enactment of the provision had been recommended by the Secretary of Commerce and the Secretary of Labor in a joint communication to the Senate committee (63d Congress, 1st Session, Senate Document No. 211, p. 6), which said: "The section thus amended gives the seaman the right to demand one-half the wages due him in any port, notwithstanding any contract to the contrary, and extends its application to seamen on foreign vessels while in American harbors, and the whole section becomes a part of the means by which the cost of operation of all vessels taking cargo out of any American port may be equalized."

The Senate bill had used the expression "one-half part of the wages which shall be due him at every port." To make certain that half the wages earned were to become payable Congress adopted upon recommendation of the House committee, as a substitute, the language: "One-half part of the wages he shall have then earned." Whatever doubt might otherwise have existed, the Reports of Congress made it clear that Congress in-

[15] For vigorous dissent see the Minority Report, 62d Congress, 2d Session, May 22, 1912, Report 645, Part 2.

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tended that seamen on foreign vessels should be entitled to receive at every port an amount up to one-half of the wages earned then remaining unpaid under the shipping contract.

The foreign vessel owners and the British Embassy urge that the decisions below are inconsistent with the decision of this court in *Sandberg* v. *McDonald* (*The Talus*), 248 U.S. 185; *Neilsen* v. *Rhine Shipping Co.* (*The Rhine*), and *Hardy* v. *Shepard and Morse Lumber Company* (*The Windrush*), 248 U.S. 205. The contention rests upon misapprehension. The precise question there involved was not whether the provision concerning advances applied to foreign vessels but whether it applied to advances made abroad. Because the place of the advance was deemed decisive, it was held inapplicable there to both the American and the foreign vessels. On the other hand the provision conferring the right to demand half-wages is confessedly applicable to American vessels wherever the wages were earned, whatever the nationality of the seamen, and wherever the demand may be made; and the United States gives this right to seamen on foreign vessels when they enter our ports; and that is practically the extent of our sovereign power. In reaching the conclusion that Section 10 of the act did not apply to advances made abroad this court deemed the provision for criminal liability of "great importance as evidencing the legislative intent to deal civilly" as well as criminally only with matters in our own jurisdiction. No such criminal provision is attached to Section 4. Furthermore the court, having examined the "reports and proceedings in Congress there referred to" found in them "nothing which requires a different meaning to be given the statute." Here the opposite is true.

The contention that Dillon's demand was premature because made within three days after the arrival of the ship at Pensacola is also shown by its history and the Report of the Committee on Merchant Marine and Fisheries (p. 18) to be wholly unfounded. The bill, as it came from the Senate, contained no such provision. It was inserted by the House Committee which said: "To prevent any unnecessary annoyance of the captain of the ship on voyages where the vessel may call at ports oftener than once in five days, it is provided that the demand for wages shall not be made more often than once in five days." As was stated by the Court of Appeals in the *Strathearn* case: "Evidently the intention was that such a demand should not have the effect given to it by the statute, if it is made within five days after the voyage was commenced of if made sooner than five days after the making of a previous demand contemplated by the statute."

THE history of *Strathearn S.S. Co. v. Dillon* [1] in the Supreme Court goes back to November 1918, more than a year before the date of Brandeis' opinion. At that time the case was first argued together with *Sandberg v. McDonald*, [2] which involved a closely related issue. The section of the La Follette Act on which Dillon's claim depended provided for the payment to seamen, upon demand, of one half of the wages earned when the vessel reached a safe port, anything to the contrary in the contract of employment notwithstanding. The *Sandberg* case turned on another section of the same act, which rendered unlawful the payment of advance wages at the time of hiring, either to a seaman or, as was more usual, to an agent who had acted for him in arranging his employment. Violation of this section was made a misdemeanor punishable by a fine and a prison term. It was also provided that the payment of advance wages could not avail as a defense to a later suit for recovery of wages otherwise due. Like the provision which Dillon invoked, this section was made applicable to foreign vessels while in waters of the United States.

Sandberg, not a United States national, had signed for a voyage on a British ship in Liverpool, and, as was customary and legal in Britain, had received an advance payment on account of wages. When the ship put in at Mobile, Alabama, Sandberg asked for payment of one half of the wages then earned. This was the same demand that Dillon made. Sandberg's master, unlike Dillon's, tendered payment in response to the demand, but, in reckoning what was due, deducted the amount advanced in Liverpool. It was Sandberg's position that this deduction was inconsistent with the provision of the La Follette Act declaring advance payments unlawful. He quit the ship, being logged as a deserter, and brought his libel.

In both the *Dillon* and *Sandberg* cases, the seamen urged the Court to construe the La Follette Act as reaching out beyond the customary province of national legislation. Admiralty normally regards a ship as an extension of the territory of the nation of its flag, and holds that questions relating to the internal economy and discipline of a ship, to the conditions of seamen's employment, are governed by the law of that nation. Moreover, it is a maxim of private international law that the validity of contracts,

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[1] 252 U.S. 348 (1920).

[2] 248 U.S. 185 (1918).

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such as the articles signed by both Dillon and Sandberg, and the legality of most acts undertaken pursuant to the terms of a contract, such as the refusal to pay half-wages to Dillon and the tender of an advance to Sandberg, are governed by the law of the place where the contract was concluded.

These and like rules of international courtesy and convenience are of long standing, and it is the natural and on the whole beneficial impulse of courts to resist their casual abrogation. To some extent, doctrines of private international law placing limits on national legislative power are held to be incorporated in the Constitution.[3] In both these cases, therefore, as Brandeis pointed out in his *Dillon* opinion, the Court was faced with two questions. First, did Congress have the power to reach out in the fashion in which the seamen claimed it had done, and, second, had Congress done so, had it truly intended to disregard the laws of other nations and impose its own will to the limit of its power, or had it meant its enactment to be construed in light of traditional rules.

Though it was argued in both cases, the issue of power was in neither one very difficult. For the imposition of our will occurred within American waters. Compliance with the provisions of the La Follette Act was a condition attached to permission to enter our ports, which it is plainly within national power to deny. The effect of this condition, if any, on transactions taking place abroad was indirect. The second question was the difficult and decisive one. For a judge who simply took the advance payments and the half-wages sections of the act at face value and read them separately, the question of congressional purpose was baffling.

The drafting of the sections was inartistic. With respect to each, for every exegetical argument which pointed one way, there was another tending in the opposite direction. Thus, Congress could not have intended to punish the making of advances abroad, where its jurisdiction did not extend. That would have been a futile purpose. Hence the section must have meant to outlaw only advances to a seaman hired in an American port. But Congress had said that a seaman suing here might recover wages otherwise due, despite the fact that he had already been paid them by way of an advance. That was a perfectly enforceable purpose, as applied to advances made both here and abroad.

[3] See Note, 7 MIAMI L.Q. 400 (1953).

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Or, Congress would not have expressly provided, as it did in the half-wages section, that our courts should be open to seamen for its enforcement, if it had not meant the section to apply to foreign seamen, for our courts are necessarily open to our own citizens. But our courts had also, for more than a century, been hearing suits for wages by foreign seamen, although in doing so they generally applied the law of the flag, and exercised, at least in theory, discretion to dismiss such suits on the ground that another forum would be the more convenient one.[4] And the question was not whether a foreign seaman might, everything else being equal, sue for half-wages, but whether he was entitled to them when his contract of employment, providing otherwise, was concluded abroad. If it was necessary to open the courts to foreigners at all, it could have been thought necessary to do so for the case where the contract was made here.

The ease with which exegesis could lead to opposite but on the whole equally plausible results is demonstrated by the *Sandberg* case, which a majority of five decided adversely to the seaman, a month and a half after the argument. Day spoke for the Court. The advance payment of wages was legal where made, he said, and, conceding that the United States might disregard it with respect to foreign vessels seeking to enter our ports, Congress had manifested no intention to do so. "How far was [the advance payments section] . . . intended to apply to foreign vessels?" Day asked. "We find the answer if we look to the language of the act itself. It reads that this section shall apply to foreign vessels 'while in waters of the United States.' "[5] Moreover, the fact that criminal sanctions were imposed made it doubly plain that advances paid abroad were not affected.

Proceeding in exactly the same fashion, McKenna, who, joined by Holmes, Brandeis, and Clarke, wrote the dissent, arrived at the contrary conclusion. On its face, he said, the section was clearly applicable. The Court was not "called upon to assign the genesis of the policy or trace the evolution of its remedy . . . ." "Ours," McKenna declaimed, "is the simple service of interpretation, and there is no reason to hesitate in its exercise because of supposed consequences." The statute was unambiguous. To de-

[4] See Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12, 19–26 (1949).

[5] 248 U.S. at 195.

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part from the grammatical meaning of the language, to qualify it, to wander from its "certainty" to "the uncertainties of construction," would "take us from the deck to the sea, if we may use a metaphor suggested by our subject." [6]

At the same time, Day, again speaking for the majority, held that advances on account of wages made by an American ship on the occasion of hiring seamen in Buenos Aires were also not affected by the act. More in sorrow than in anger, Day remarked that the advances in this case were actually paid not to the seamen, but to an agent without whose intervention seamen's services could not be obtained in Buenos Aires — a custom "which works much hardship to a worthy class." [7]

The *Dillon* case was not disposed of at that term. A technical and remediable jurisdictional flaw necessitated that it be returned to the lower court.[8] But the *Sandberg* decision augured ill for Dillon's chances when his case should come back up with the jurisdictional defect removed. Distinctions were possible, to be sure. But the outlook was poor, considering the ready answer which, in *Sandberg*, the Court had sought and found in the language of the act. If the legality of advances made abroad was respected, why should not the same courtesy be extended to contracts made there and providing, as Dillon's did, for payment of wages only at the conclusion of the voyage? It was no doubt just as well for Dillon that an incidental jurisdictional error prevented the judgment in his case from being delivered in due course, together with the judgment in *Sandberg*. That this is more than idle speculation is indicated by the events which took place a year later, after Dillon's case had been argued once more. It was at this time that Brandeis wrote his opinion. His law clerk, Dean Acheson, made a somewhat rueful memorandum, telling what happened, which he filed with the Justice's papers in the case. The memorandum wastes no words and reads as follows:

> This opinion was prepared at a time when it appeared that the decision might have gone against the interpretation of the act which is here advocated. The Chief Justice was wavering, Pitney, Van Devanter, Day and McKenna were contra. I don't remember whether a copy was sent to the Chief or not. But eventually it was

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[6] *Id.* at 201, 202.

[7] Neilson v. Rhine Shipping Co., 248 U.S. 205, 213 (1918).

[8] Dillon v. Strathearn S.S. Co., 248 U.S. 182 (1918).

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decided according to this view and Judge Day wrote a poor opinion.
This took the Justice two weeks of hard work while court was sitting. D.G.A.

Chief Justice White, Pitney, and Van Devanter had been with Day in the *Sandberg* case. It had been Day's rather than McKenna's literalism that had convinced them then, and the conviction very likely lingered. McKenna himself may well have thought that *Sandberg* — a decision he had contested and lost — ruled this case, and that that ended the matter; or, in the performance, on the deck, of the simple service of literal interpretation, he may have seen differences between the advance payments and half-wages sections which enabled him to hold the second inapplicable where he had applied the first.

The facts which Brandeis set forth as decisive in his *Dillon* opinion cut through the inartistic drafting of the La Follette Act and dissipated the bafflement to which it gave rise. Indeed, these facts decided more than the *Dillon* case; they were sufficient also to resolve in favor of the seaman the ambiguities of the advance payments section involved in the *Sandberg* case. In light of the rational purpose central to the entire statute, verbal distinctions between the advance payments and half-wages sections evaporated. Congress, it became clear, wanted to force the payment by foreign masters to foreign seamen of a substantial portion of their wages upon demand, in order to make it possible for such seamen to jump ship — as Sandberg did — and in order thus to cause foreign owners, if they wished to retain their employees, to raise their wage and other standards to those Congress was requiring on American ships. Advances made abroad were not punished, to be sure, although advance payments in American ports were rigorously outlawed. Yet the making of advances abroad could be discouraged, and this the two sections, read together so as to prevent advances previously made from being reckoned in the calculation of half-wages due in American ports, could accomplish. In this way the American seaman's lot could be bettered without weakening the competitive position of American shipping. Pressure was applied to improve conditions on foreign ships as well, thus affirmatively bolstering the American competitive position, which had long been on the decline, in part at least because American labor costs were higher.

There can be little doubt that these considerations, and not

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McKenna's touching verbal certainties, determined the result for Brandeis in *Sandberg* as well as in *Dillon.* Yet Brandeis signed McKenna's dissent, in which none of this emerges. We do not know why Brandeis failed to write in the *Sandberg* case nor, of course, whether if he had written there would have been a chance of gaining a court for his result. In the month and a half between the argument of *Sandberg* and its decision, Brandeis delivered six opinions. Five of these were opinions of the Court, and he may well have felt that disposing of them should take precedence over the writing of dissents.[9] Of the five, one had been held over from the previous term, and Brandeis doubtless considered it particularly urgent.[10] Another, though decided unanimously in the end, had been troublesome, becoming the subject of a debate with Pitney which occasioned an exchange of special memoranda.[11] The sixth, delivered the day the *Sandberg* case itself came down, was Brandeis' massive and important dissent in *International News Serv. v. Associated Press*,[12] also a case pending from the previous term. In the same six-week period, Brandeis received as well the assignment of at least one other opinion of the Court. This was a case argued after *Sandberg*. It may also have had priority, and it came down two weeks after *Sandberg*.[13] It is thus likely that in the relatively short time which Day took to write the majority opinion, Brandeis simply had no chance himself to write. He might of course have held up the disposition of the case, had it been up to him to speak for the dissenters. But McKenna, next to Holmes, was the quickest producer on the Court. His dissent was most likely written and circulated in ample time to come down when the majority was ready. It is quite a different matter

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[9] Iowa v. Slimmer, 248 U.S. 115 (decided December 9, 1918); Tempel v. United States, 248 U.S. 121 (decided December 9, 1918); United States v. Spearin, 248 U.S. 132 (decided December 9, 1918); Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U.S. 139 (decided December 9, 1918); MacMath v. United States, 248 U.S. 151 (decided December 9, 1918).

[10] Iowa v. Slimmer, *supra* note 9 (argued April 15, 1918).

[11] Tempel v. United States, 248 U.S. 121 (1918).

[12] 248 U.S. 215, 248 (argued May 2 and 3, 1918; decided December 23, 1918).

[13] Turner v. United States, 248 U.S. 354 (argued November 13 and 14, 1918; decided January 7, 1919). See also these Brandeis opinions: Chicago, R.I. & Pac. Ry. v. Maucher, 248 U.S. 359 (argued December 17 and 18, 1918; decided January 7, 1919); Missouri, Kan. & Tex. Ry. v. Sealy, 248 U.S. 363 (argued December 18, 1918; decided January 7, 1919); Merchants Exchange v. Missouri *ex rel.* Barker, 248 U.S. 365 (argued December 19, 1918; decided January 7, 1919).

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to hold up decision of a case for the purpose of writing another, rather than the only, dissent.

Of one thing we can be certain, and that is that what Brandeis wrote in the *Dillon* case, which is so different from what he signed in *Sandberg*, did not come as an afterthought. The history of seamen's legislation and the legislative history of the La Follette Act itself had been argued in the briefs for Sandberg, earnestly if not as exhaustively as Brandeis himself was to discuss them. Moreover, Brandeis did not need counsel to draw his attention to these matters. His awareness of them is shown by the manner of his drafting of the *Dillon* opinion. It was the law clerk who collected the comprehensive list of statutes going back to the earliest days. But Brandeis had started writing before he had the citations, and he referred to the subject matter of a number of the statutes, leaving blank spaces to be filled in when specific references became available.

Brandeis' general familiarity with seamen's legislation may be traceable to his close friendship with one of the sponsors of the Seamen's Act of 1915, the elder Robert M. La Follette.[14] Brandeis had often, before coming to the Court, acted as a sort of unofficial legislative counsel to La Follette.[15] There is no evidence whatever that Brandeis helped draft this statute, but he cannot have failed to be familiar with La Follette's activities in its behalf. Moreover, La Follette was its chief legislative promoter. But the principal motive force behind it was another man whom Brandeis befriended, and whom, no doubt, he had heard speak about seamen's problems. This was a remarkable humanitarian figure, Andrew Furuseth, the president of the International Seamen's Union of America. The passionate and dedicated Furuseth, born in Norway, had been to sea as a boy and young man and, battered but neither broken nor bent by the hardships of life before the mast, had formed, as La Follette wrote, the deliberate purpose "to get one great nation to provide by law a haven where seamen could escape tyranny and maltreatment aboard ship. One country where a sailor could lawfully leave his ship would serve to elevate the condition of labor at sea throughout the world." [16] Furuseth

[14] See MASON, BRANDEIS: A FREE MAN'S LIFE 353, 356–57, 365–76 (1946).

[15] See 1 LA FOLLETTE & LA FOLLETTE, ROBERT M. LA FOLLETTE 336–37, 346–47, 475 (1953).

[16] See 1 *id.* at 522.

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selected the United States as his battleground, jumping ship here and taking up residence early in the 1880's. From then on his campaign was unrelenting and effective. He called on leading men, preaching his cause, "a great soul speaking through his face, the set purpose of his life shining in his eyes." [17]

It was Furuseth's unshakable purpose, communicated to more than one congressman, which, wedded to a policy of restoring the competitive position of American bottoms in international trade, informed the La Follette Act of 1915. An echo of Furuseth's fervor resounds in these words (perhaps Furuseth wrote them; he took an active interest in the preparation of seamen's cases, often working with counsel) from one of the briefs filed in behalf of Sandberg: "This 'Seamen's' Act is no ordinary act of the Congress! . . . The pages of the Federal Reporter . . . are full of stories of how, under the cloak of the advance, had hidden the assassins of his [the seaman's] character and his wages. Societies sprang up in the name of humanity to protect him. Years pass and at last through the long night there flashes for the seaman the light of the 'Seaman's' Act!" [18]

When Brandeis came to write in the *Dillon* case, which had been fortuitously saved for another day, it was not enough, however, to set out the considerations which he deemed decisive. For *Sandberg* was by then on the books, and it had to be dealt with if a majority, let alone a unanimous Court, was to be obtained for a result favorable to the seaman's claim. It is almost certain that overruling so recent a precedent as *Sandberg* would have been out of the question for most of the Justices. And so Brandeis' opinion suggested unconvincing verbal distinctions and refrained from pointing out that, in light of the materials it discussed, the *Sandberg* case had been wrongly decided.

As Acheson's contemporaneous note suggests, and as appears from a brief notation in Brandeis' hand on a copy of his opinion,

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[17] See 1 *id.* at 521–22. The quotations are from an article by Robert M. La Follette, published in April 1915. See also A SYMPOSIUM ON ANDREW FURUSETH (Axtell ed., undated); TAYLOR, THE SAILORS' UNION OF THE PACIFIC (1923). For a detailed description of Furuseth's activities in connection with seamen's legislation, including the La Follette Act of 1915, see LA FOLLETTE & LA FOLLETTE, *op. cit. supra* note 15, at 500, 520–36. For indication of Furuseth's friendship with Brandeis, see letter from M. E. Waggaman, Furuseth's secretary, to Silas B. Axtell, printed in A SYMPOSIUM ON ANDREW FURUSETH, *supra* at 35–37.

[18] Petition for Writ of Certiorari and Brief in Support of Petition, p. 11, Sandberg v. McDonald, 248 U.S. 185 (1918).

there was no general circulation of it. It is nevertheless possible that Brandeis showed the opinion privately to a few of his colleagues (he had the final draft printed in ten copies), and he certainly made its contents known in conference. The assignment to Day, once Brandeis' result was accepted, may be attributable to the situation created by *Sandberg*. That case and the decision in *Dillon* had to be reconciled. Nothing could leave a stronger impression of conflict than if *Dillon* were written by one of the *Sandberg* dissenters. Nor could anything give a greater appearance of consistency — for the benefit of wavering brethren and afterward of the bar — than that the same Justice should write both cases. In any event, however, it is quite doubtful that in the spring of 1920 a majority of the Justices would have signed an opinion such as Brandeis' in the *Dillon* case. Their attitude toward historical and legislative materials is indicated by a remark of Day's at the end of his *Sandberg* opinion. He alluded there to "the reports and proceedings in Congress during the progress of this legislation," to which counsel had drawn attention. He held them up at a distance, gingerly and uncertainly, his face partly averted, as if they were something he had picked out of a bundle of laundry. We have examined counsel's references, he said, "so far as the same may have weight in determining the construction of this section of the act. We find nothing in them, so far as entitled to consideration . . . ."[19] Perhaps, as Augustus Hand surmised, the light Brandeis shed was appreciated. But it had — for Day and his colleagues — to remain decently under a bushel.

In writing what became the unanimous opinion in *Dillon*, delivered in March 1920, Day went about his business as he and McKenna had done in the *Sandberg* case. The statute was by its terms applicable to seamen on foreign vessels putting in at American ports. It was manifest on its face that it was meant to be so applicable, since provision was made to open the courts to seamen with claims under the statute. Then, still dealing with the words of the statute only, Day went on to make the following assertion, similar to the one at the heart of Brandeis' opinion. It was stated without documentation by Day:

> Apart from the text, which we think plain, it is by no means clear that, if the act were given a construction to limit its application to

[19] 248 U.S. at 197.

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> American seamen only, the purposes of Congress would be subserved, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages . . . . But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned . . . . In the case of *Sandberg* v. *McDonald* . . . we found no purpose manifested by Congress . . . to interfere with wages advanced in foreign ports under contracts legal where made.[20]

By way of support for this argument, Day mentioned that a predecessor statute, in also creating a right to half-wages, had limited it to cases in which the articles did not provide to the contrary. In the La Follette Act, this proviso had fallen. Hence it was plain that Congress wanted half-wages to be recoverable, no matter what had been agreed to in the articles. But it is, of course, on this basis alone, anything but plain that Congress was thinking of articles signed between foreigners abroad as well as contracts made here.

Eight years after the *Dillon* case had been decided, the issue of *Sandberg v. McDonald* was before the Court once more. The advance payments section had since been amended slightly, and it was argued for the seaman, with some force, that the congressional purpose had been to overrule the *Sandberg* result. But once more the statutory language harbored ambiguities (if, like McKenna, one may use a nautical turn of speech suggested by the subject). A unanimous Court dealt with it on its face. The distinctions made in *Dillon* came home to roost, and *Sandberg* was reaffirmed.[21] Brandeis was silent. Nevertheless, in the generation since *Strathearn S.S. Co. v. Dillon*, Brandeis' method of ascertaining legislative purpose, for which he gained no acceptance in that case, has made much headway. It is as normal today as it was unusual then for the Court to look to legislative materials for indications of basic purpose and then to apply broadly or poorly worded statutes in conformity with that purpose. The method is today almost a matter of course; so much so that it has at times been abused; so much so also that there is evidence of reaction

[20] 252 U.S. at 354–55.

[21] Jackson v. S.S. "Archimedes," 275 U.S. 463 (1928).

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setting in against it. There are those who feel that to speak of a legislative intent is theoretically untenable and too often unrealistic. And there are those who fear that the prevalence of this method promotes irresponsibility in Congress, manifested by an unhealthy tendency to legislate by committee report.[22] Much — though not all — of this current of doubt, of second thought, is directed only at abuses of the method, which cannot be charged to Brandeis. Among those whose misgivings went the whole way was the late Mr. Justice Jackson. He expressed them both judicially and in extrajudicial writings.[23]

In his last full year on the bench, before his illness, Jackson dealt in an elaborate opinion with a problem not unlike that presented by the *Dillon* case. A successor statute to the La Follette Act of 1915, the Jones Act of 1920, creates a cause of action at law, with right to trial by jury, in favor of seamen injured in the course of their employment. The act applies, in this respect, to "any seaman." [24] The suit in question was by a Danish seaman employed on a Danish ship, who was injured in Havana, Cuba. Jackson, for the Court, held the Jones Act inapplicable.[25] Without suggesting that Congress would have had no power to make the act applicable, but without, also, seeking such light as the legislative and historical materials might have supplied, he concluded that Congress had not intended to give a remedy in a situation such as this. The normal doctrines of private international law showed what an extraordinary thing it would have been for Congress to have so intended. At the end there is this passage:

> In apparent recognition of the weakness of the legal argument, a candid and brash appeal is made by respondent and by *amicus* briefs to extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own. . . . The argument is misaddressed. It would be within the proprieties if addressed to Con-

[22] See, *e.g.*, Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). *But cf.* Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

[23] See Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948).

[24] 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952).

[25] Lauritzen v. Larsen, 345 U.S. 571 (1953).

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gress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us.[26]

It may well be that the argument was indeed not tenable with respect to this provision of the Jones Act. Just the same, one cannot help being struck by Jackson's tone of dignified outrage. It reminds one of the Day and McKenna opinions in *Sandberg*. Precisely this sort of contention was decisive for Brandeis. The briefs in Jackson's case, including one filed in behalf of the Friends of Andrew Furuseth Association, though not exhaustive, buttressed the argument with reference to historical and legislative materials. Brandeis would certainly have wanted to meet it factually.

[26] *Id.* at 593.

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