

New Jersey Court of Errors and Appeals

REBECCA COON,
Petitioner-Appellant,

vs.

JAMES KENNEDY,
Respondent-Appellee.

On Appeal.

Brief of Respondent.

The petition filed in the above matter, set forth that the petitioner's intestate sank with respondent's boat, three or four hundred feet from Constable Hook, New Jersey, in a storm, on August 4th, 1915, while the boat was on a trip from Brooklyn, New York, to Elizabeth, New Jersey, and that his employment was in the State of New Jersey; and thereafter followed a prayer for compensation, etc. (Case, pages 4 and 5.)

The action was tried before Honorable James C. Connelly, Judge of the Union County Common Pleas Court, May 19th, 1916. The trial court found, as a fact, that there was evidence to support the conclusion that the boat sank in New Jersey waters, about five hundred feet from Constable Hook, New Jersey, and that Coon was drowned in New Jersey waters.

There is no question but that the deceased met his death in an action arising out of and in the course of his employment. The questions raised by the respondent, however, are, first, that the waters of the Kill-von-Kull, between Staten Island, N. Y., and New Jersey, are, as between the jurisdiction of the two States, exclusively, within the jurisdiction of the State of

New York; and secondly that the Admiralty Courts of the United States have exclusive jurisdiction to hear and determine the rights of the parties in the above entitled action.

POINT ONE of the appellant's brief has reference to the question as to whether the boat foundered within the jurisdiction of New Jersey. Our contention is, that regardless of, at what point in the Kill-von-Kull the boat foundered, the parties, as far as the relative jurisdiction of New York and New Jersey is concerned, are confined to the jurisdiction of the State of New York. This statement is based upon the following decisions: *Central Railroad of New Jersey v. Jersey City*, 70 N. J. L., p. 81; *The State v. Babcock & Babcock*, 30 N. J. L., p. 29; and *in re The Devoe Mfg. Co.*, 108 U. S., p. 764.

POINT TWO.

In this reason, the appellant attempts to prove a contract of hiring made in the State of New Jersey. He fails, however, to show a single statement in the evidence to support such a finding. The evidence shows the contrary, for the respondent, when asked whether the deceased was employed in New Jersey to work on his boat, replied in the negative. (P. 57 case, ll. 30 to 32.) The burden of proving all the facts necessary for recovery, is upon the applicant for compensation. *Reimers v. Proctor Publishing Co.*, 89 Atl., p. 931.

The appellant goes on to argue that the law of the place of the registry of the boat is binding upon the employer and employee, and to this extent the appellant is anxious to apply the law of admiralty, but seemingly objects to the admiralty law any further. The real questions,

however, in the case, are covered in points three and four, which we shall take up in order.

POINT THREE.

This case is controlled by Jensen v. Southern Pacific Railroad Company, and the reversal based thereon was proper. The argument of the appellant, that there is a distinction to be made between the Compensation Act of New York and New Jersey, is without foundation. While we must admit that the wording of the two statutes are somewhat different, the purpose and legal effect are identical. Some comment is made upon the opinion of the Appellate Division of New York in the Jensen case which was referred to by Justice McReynolds in his opinion for the United States Supreme Court, which reference appears at the bottom of page 9 and the top of page 10 of appellant's brief. By an examination of this reference, it will immediately appear that the distinctions between the two acts are of no vital importance. The New York Act provides for the payment by the employer of something in the nature of a penalty in the event that he fails to follow out the requirements of the New York Act. It is to be noted, however, that he has his option of either insuring with the State, or with any corporation or mutual association authorized to transact business, or carrying his own insurance. Later on in the opinion of Justice McReynolds, at the bottom of page 10 of the appellant's brief, reference is made to the purpose of the New York Compensation Act, which seem, in the last resort, *to provide for prescribed compensation payments for certain periods of time in certain hazardous employments.* At another part of Justice McReynold's opinion, on page 11 of appellant's brief, there is a reference to the unloading of ships at

a dock (in New York), and in this part of the opinion, the point which stands out, is that the payments are made without regard to *fault* or *negligence of the employer*. It will be seen by an examination of all these excerpts, that, in the first place, the New York Act merely specifies the employment which the Act covers, whereas the New Jersey Act covers all employments or contracts of hiring in this State and the latter act is the broader in scope. And so, no distinction can be made up to that point. The New Jersey Act fails to provide a penalty in the event that compensation payments are not secured to employees, but the employee's potential right to compensation exists in every contract of hiring in this State, or where the contract of hiring is carried out in this State. Can it be said, assuming for the present, that the Admiralty Law has no effect, that, when a ship is discharging a cargo at a New Jersey port, ~~that~~ the contracts of employment of the men abroad, would not have added, the features of the Workmen's Compensation Act of New Jersey? The penalty provisions of the New York Act were merely added for the purpose of assuring the injured employee of payment of compensation provided for in the Act. A very broad statement covering the question in issue in this case, is given in the appellant's brief quoting the Jensen opinion and reads as follows:

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would

See *Filippis vs*
Exenberg,
10 App. Div. p. 153

be seriously hampered and impeded. The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

Can it be said that the New Jersey Statute does not act similarly to the New York statute?

How can it be said that the New Jersey Act imposes no restrictions upon the admiralty and maritime jurisdiction of the United States Courts, if the results of the Act are the same as from the New York Act? We do not argue that the New Jersey Act was not passed as a matter of public policy of this State, but our contention merely is, that wherever it conflicts with the exclusive jurisdiction of the admiralty courts, it is unconstitutional to that extent. That the New Jersey Compensation Act does conflict in this case is almost too plain for argument.

The Judicial Code of the United States provides that exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Courts, saving to suitors in all cases, the right to a Common Law right of action, where the Common Law is competent to give it. In the majority opinion of *Jensen v. Southern Pacific Company*, Advance Sheet U. S. Reports, July 1st, 1917, the Court said:

"It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have tainted the uniformity and consistency at which the Constitution aimed, on effecting the intercourse of the States with each other, or with foreign States."

How can we reconcile the thought that the New Jersey Act does not conflict with the maritime jurisdiction in the face of this excerpt from the Jensen opinion.

There is only one point further that can possibly be considered, and that is whether the Compensation Act of New Jersey is a Common Law right which is saved to suitors by the Saving Clause in the Judicial Code of the United States. Obviously, the Compensation Act is entirely a creature of Statute, and is unheard of and unknown at Common Law. Fundamentally, all Compensation Acts in the United States are alike, since, to a regular contract of hiring, each State has attempted to add the compensation features which appear in our Act; and this, without consideration of negligence or contributory negligence. Of course, different States have attempted to prescribe additional and different means of recovering the compensation, or safeguarding it to employees. By a careful examination of the Acts, it seems that this statement cannot be gainsaid. Again referring to the prevailing opinion in the Jensen case, the Court, after referring to the Judicial Code of the United States with regard to admiralty, says:

“The remedy which the Compensation Statute attempts to give, is of a character wholly unknown to the Common Law, incapable of enforcement by the ordinary processes of any Court, *and is not saved to suitors from the grant of exclusive jurisdiction.* And finally, this remedy is not consistent with the policy of Court to encourage investments in ships, manifested in the Acts of 1851 and 1884, etc., which declare a limitation upon the liability of their owners.”

Is this not a complete answer to appellant's argument?

The appellant's brief confuses the issue since the only questions for the Court to decide are, what is the nature of the New Jersey Compensation Act; and obviously the answer must be, that it is an added obligation to all contracts of employment in this State; and secondly, does it come within the class of actions which are saved to suitors by the Judicial Code? The above excerpt from the Jensen case answers the last question in the negative. These questions are more capably answered than the briefer can possibly state, in the opinion of Justice McReynolds, in *Jensen v. Southern Pacific Company*. The excerpts from this opinion have been hereinbefore quoted, and the only logical conclusion, is, that a right to compensation is not a Common Law right, and therefore, not saved to suitors.

On page 13 of the appellant's brief, there is a reference to a case in the United States District Court hereinafter referred to, but of course, this decision is entirely eliminated from consideration because of the subsequently decided Jensen case, and we think it is also clear, that the decisions in the United States Supreme Court hold a contrary view from the District Court Judge who wrote the opinion in *Burton v. Tretjan & Lang Drydock Company*, 219 Fed. Rep., p. 763—since the former Court in a well-considered opinion said:

“The admiralty jurisdiction of a Federal District Court extends to the cause of action against a Stevedore Company, arising out of an injury to one of its employees, caused by its negligent failure to secure the hatch covers on a vessel lying in navigable waters.” *Imbrouck v. Atl. Transport Company* (234 U. S., p. 52).

In this case, the Court further said that the test of admiralty jurisdiction, was where the injury occurred, and therefore, where it occurred on navigable waters of the United States, it came within the exclusive jurisdiction of admiralty. The waters between New Jersey and Staten Island, known as the Kill-von-Kull, come within the admiralty jurisdiction. (In *re Devoe Mfg. Co.*, 108 U. S., p. 764, Rep. Ed. 401 to 417). Even without this decision, there could be no question of the jurisdiction of admiralty, over these waters.

As to the appellant's attempt to distinguish between actions *in rem* and actions *in personam*, we beg to refer again to the case of *Jensen v. Southern Pacific Co.*, for in that case, the action was *in personam*, and the Court held that the admiralty had exclusive jurisdiction. Another case decided sometime ago, holds:

"If the cause is maritime in nature, admiralty is not deprived of the jurisdiction by the fact that it is *in personam* and not *in rem*." (*N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How., p. 344.)

Let us assume that the New Jersey Compensation Act is applicable. Can it be said, that if this boat sailed from New York to New Jersey, and an accident happened within the jurisdiction of New Jersey, that the New Jersey Compensation Act would not attach itself to the contract of employment? The decisions in this State hold, that that is exactly what would occur. (*Rogge v. American Radiator Co.*, 86 N. J. L., p. 436, affirmed by the U. S. Supreme Court.) This being so, isn't there an interference with commerce by our New Jersey Act, and isn't there an interference with the maritime relationship of the parties? The affirmative answer of these

questions, negatives the statement by the appellant, that there is a distinction between the New York and New Jersey Compensation Acts. The appellant, throughout his brief, depends upon the dissenting opinion of the United States Supreme Court for support. Manifestly, that is of no value to him.

The last point of any importance, raised by the appellant, is, that the amendment to Section 24 and 256 of the Federal Judicial Code, regarding the jurisdiction of the Federal District Court, saves this action from the decision of the Jensen case. The amendment of October 6th, 1917, saves to claimants, under the Workmen's Compensation Act of any State, the right to bring a compensation action, even though the admiralty has concurrent jurisdiction. The prompt introduction of this Act in Congress, merely indicated that it was considered advisable to save to suitors, all rights under Compensation Acts, in addition to Common Law rights; but it did not indicate that Congress intended that the amendment should apply retroactively.

The decisions quoted by the appellant, continually repeat, that even though retroactive statutes may be passed, that *they must not be violative of contractual rights, or impair the obligation of contracts or interfere with vested rights*. The other cases quoted by the appellant, merely refer to confirmative or curative statutes.

“A statute will be construed as prospective, and operating in future only, unless the intention of the legislature to give it a retroactive effect is expressed in language too clear and explicit to admit of a reasonable doubt.” (*Auffmordt v. Rasin*, 102 U. S. 620.)

There are many cases in this State along the same line of reasoning: *Vreeland v. Bramhall*, 39 L., p. 1; *Baher v. Scudder, Collector*, 3 V., p. 203.

In an opinion by Justice Swayze, *Erie Railroad Company v. Calloway*, 102 At. Rep., p. 6, is quoted the case of *United States v. Heth*, 3 Cranch, 413, 2 L. Ed. 479.

“Words in a Statute—ought not to effect a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them; or unless the intention of the legislature cannot otherwise be satisfied. This rule ought especially to be adhered to, when such a construction will alter *the pre-existing situation of the parties*, or will effect their antecedent rights, services or remuneration, which is so obviously improper, that nothing ought to uphold and vindicate the interpretation to the unequivocal and inflexible import of the terms and the manifest intention of the legislature.”

If this Act were given a retrospective construction, it would be adding a liability to the original contract of hiring, which would affect constitutional rights of the respondent. It would be altering the pre-existing situation of the parties. Under the situation existing at the time of the making of the contract of employment, the respondent was not obliged to make any payments to the deceased in case of injury, or his personal representatives in case of death, unless the respondent was guilty of negligence; and even then, he might set up, to defeat any action brought against him, the contributory negligence of the deceased. Damages to be paid in the event of liability, must have necessarily

been based upon actual proof of loss to the personal representatives, in the case of death. Under the amendment to the Federal Code, giving suitors the right to bring a compensation action in any State which had such an Act in force, the question of negligence could have no effect, unless it happened to be the wilful negligence on the part of the injured person; and the employer would have to pay compensation whether he was negligent or not. To deprive the employer of this right, would be violative of every constitutional right, safeguarding him against losing his property without due process of law, impairing the obligations of contract, and interfering with vested rights.

The Federal Employers' Liability Act regards negligence as the basis for the payment of damages, and the Admiralty Law is similar in this respect. The United States Supreme Court has held that the New Jersey Compensation Act cannot affect the Federal Employers' Liability Act, which provides an exclusive remedy in Interstate Commerce cases. *Amy Winfield v. Erie Railroad Co.*, Advance Sheet of U. S. Reports, July 1st, 1917.

The reason given was, that the Federal Act covered the entire subject as respects Carriers by railroad, and other employees in Interstate Commerce.

The Court further states that it was beyond the power of any State to interfere with the operation of this Act, either by putting the carrier and their employees to an election between its provisions, and those of a State Statute, or by imputing such an election to them by means of a statutory presumption.

There can be no question but that the Admiralty Jurisdiction is a complete one, also, under the Judicial Code. And so, in both in-

stances, namely, the Federal Employers' Liability Act, and Admiralty Law, the basis of the recovery is negligence, whereas the basis of recovery under the New Jersey Compensation Act is by reason of a contract imposed by law. This Winfield case is the New Jersey case, decided in the same Advance Sheet as *Winfield v. N. Y. Central*.

By analogy we must conclude, that the Compensation Act of New Jersey, which provides, liability without negligence is unconstitutional, insofar as it attempts to affect the exclusive jurisdictions of the United States District Courts in admiralty matters. It will also be noted that the decision in the case of *Amy Winfield v. Erie Railroad Co.*, the New Jersey case, is based in reasoning, upon the case of *Winfield v. N. Y. Central*, which is a New York case and the same questions arose in both cases. It will be seen, therefore, that the attempted distinction between the New York Compensation Act, and the New Jersey Compensation Act, made by the appellant, is without force.

Since statutes ordinarily, are regarded in a prospective light, the amendment of October 6th, should not be held to control an accident which occurred in 1915; and for a stronger reason, the amendment should not control where it affects the substantial constitutional rights of the respondent.

The judgment in the Supreme Court should be affirmed with costs.

Respectfully submitted,

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New Jersey Court of Errors and Appeals.

REBECCA COON, <i>Petitioner-Appellant,</i> <i>vs.</i> JAMES KENNEDY, <i>Respondent-Appellee.</i>	On Petition for Compensa- tion. 10 On Appeal from Supreme Court.
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BRIEF ON BEHALF OF REBECCA COON.

The petitioner in a proceeding under the Work-
men's Compensation Act of New Jersey takes this
appeal from a judgment of the Supreme Court
reversing a judgment of the Union Common
Pleas which awarded petitioner three hundred
weeks compensation at \$10.00 per week. Peti-
tioner's husband lost his life by an accident aris-
ing out of and in the course of his employment
with respondent. He left surviving him the peti-
tioner and two infant children. 20

The respondent is in the tow-boat business and
resides in Elizabeth, where he has and for many
years has had his office and principal place of
business. One of his steam tugs, the "Elsie K.,"
was registered in the Customs House in Newark
pursuant to Section 4141, R. S. U. S., Fed. Stat.
Ann., Vol. 7, p. 16. 30

Robert Coon had for several years been em-
ployed as fireman on the "Elsie K." by respond- 40

ent, and was drowned when the tug foundered while on a voyage from Brooklyn to Elizabeth, August 4, 1915. The trial court found as a fact, and there was evidence to support it, that the tug sank in New Jersey waters about 500 feet from Constable Hook, and that Coon was drowned in New Jersey waters.

When trial was moved counsel for respondent in explaining to the Court what the controversy was, stated:

“The only fact is that he was on a boat which foundered, but it was not within the jurisdiction of the State of New Jersey.

“THE COURT: Is that the whole defense?

“MR. KALISCH: Yes, sir. And that the defendant is not entitled to compensation under the Employers’ Liability Law of the State of New Jersey.”

The pleadings admit that Coon met his death through an accident arising out of and in the course of his employment (Petition par. 7, p. 5; Answer par. 9, p. 11).

The trial court found all of the jurisdictional facts in petitioner’s favor (pp. 16, 17, 18, 19).

The Supreme Court in reversing did not question the findings of fact of the Common Pleas Court, but based its decision solely on the ground that the lower court did not have jurisdiction because of a decision in the Supreme Court of the United States handed down subsequent to the argument before the Supreme Court in this case. This decision, *Jensen vs. Southern Pacific Company, Advanced Opinions, October Term, 1916*, 61 U. S. L. Ed., p. 524, held that proceedings under the Workmen’s Compensation Act of the State of New York conflicted with the admiralty and maritime jurisdiction of the United States District Court where the injured was a stevedore working on an ocean going steamship,

and that the proceedings under the Compensation Act must fail.

Justice Minturn in his opinion below expressly states that there was evidence to support the finding of the Union Common Pleas that the tug "Elsie K." sank in New Jersey waters and that decedent was drowned within the jurisdiction of the lower court.

This appeal raises the question whether or not the decision in *Jensen vs. Southern Pacific Company* is controlling in a case arising under the Workmen's Compensation Act of the State of New Jersey, which is in many respects different from the New York statute. It also raises the question whether the New Jersey Workmen's Compensation Act either changes, modifies or affects the general maritime law. Furthermore we contend that the claimant's rights and remedies under the Workmen's Compensation Act of New Jersey have been expressly saved to her by an Act of Congress approved October 6th, 1917, set forth *in extenso* hereafter. The questions raised are set forth more fully in the grounds of appeal (pp. 83, 84 and 85), and all the grounds of appeal are relied upon.

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POINT I.

There was evidence that the boat foundered within the jurisdiction of New Jersey.

Petitioner's witness Schlig testified that the boat went down "I should judge about five hundred feet off Constable Hook" (p. 29, l. 30). The
 10 boat was just about to enter the Kill von Kull (p. 29). The respondent, Mr. Kennedy, testified that when raised the "Elsie K." was about five hundred feet from the New Jersey shore (pp. 61, 62).

At the point the tug was raised the distance to the Staten Island shore was pretty near three-quarters of a mile (Kennedy, p. 64, ll. 1 to 10).

The boundary line between the States of New York and New Jersey at the point where the tug
 20 sank is clearly defined on "Map of the Boundary Line between the States of New York and New Jersey in Lands under Water in Kill von Kull and New York Bay, from the Baltimore and Ohio Bridge in Arthur Kill near Elizabethport, New Jersey, to the Hudson River opposite the Battery, New York City, Agreed upon by the Commissioners appointed by the Governors of their respective States on December twenty-third, 1889",
 30 as filed in the office of the Secretary of State of New Jersey. A copy of this map was by consent of counsel used on the trial of this case before Judge Connolly, as appears by his conclusions on page 14. See also "Act to ratify and confirm an agreement made between the Commissioners appointed by the Governor of the State of New York and the Commissioners appointed by the Governor of the State of New Jersey, respecting the territorial limits and jurisdiction between the
 40 said States" (P. L. 1834, p. 118; R. S. 37, Rev. 1877, p. 1178; Comp. Stat., Vol. 4, p. 5358).

There can be no doubt, from the testimony, as to the point where the "Elsie K." went down and the distances between the New Jersey shore and the Staten Island shore as given by Mr. Kennedy, that the boat went down well within the New Jersey line. Our supposition is that she went down about midway between the New Jersey shore and the boundary line, although the precise point of sinking is somewhat uncertain. The strong eddy at that point would carry Coon close to the shore and the strong probability is that Coon expired in New Jersey waters. The boat was on a trip from Brooklyn to Elizabeth. The course which she took would take her over New Jersey waters from a point northeast of the Robin's Reef Light to the point where she sank. 10

Certainly the finding of the Court that she did sink in New Jersey waters is amply supported by the testimony. 20

The sovereignty of New Jersey is co-extensive with the territorial limits of New Jersey.

Central Railroad of New Jersey vs. Jersey City, 41 Vr., p. 81.

Even supposing Coon had been employed in New York his widow is entitled to compensation.

"Most of the work of the 'Elsie K.' consists of tows between Newark and the North of Providence. We do some towing for a refining company in Bayonne, New Jersey" (Kennedy, p. 36, l. 30). 30

She tied up at night in New Jersey some of the time and sometimes in other places, usually wherever she happened to be (Kennedy, p. 38, l. 24). Coon was always paid his wages by checks drawn by respondent on an Elizabeth bank (Kennedy, p. 57, ll. 35 to 40). Kennedy's principal office was in Elizabeth and he only had desk room in New York (Kennedy, p. 34, l. 35, to p. 35, l. 10). 40

The home port of the "Elsie K." was Newark (p. 35, l. 18).

These facts as a matter of law would entitle Mrs. Coon to the compensation provided by the New Jersey statute even though Coon were employed in the State of New York.

10 *Rogg vs. American Radiator Co.*, 86
 N. J. L., 436; affirmed 87 N. J. L.,
 314 (affirmed by Sup. Ct. of U. S., Nov.
 19th, 1917);
 Davidheiser vs. Hay Foundry & Iron
 Works, 87 N. J. L., 689.

POINT II.

**Coon's employment was in New Jersey
 and under the Laws of New Jersey,
 and he was entitled to the benefits of
 the Workmen's Compensation Act.**

20 Coon had been working for Mr. Kennedy not
 quite four years (p. 25, l. 40), and since then he
 was constantly in respondent's employ (p. 28, l.
 8). Mr. Kennedy was asked by his counsel, page
 57, "Mr. Kennedy, did you employ Mr. Coon in
 New Jersey to work in your boat? A. No, sir."

30 This testimony does not assist the Court. It
 did not give the Court the benefit of any facts
 relating to the hiring. Coon may have been em-
 ployed by an agent of Kennedy's, and he may not.
 What the facts are, are not revealed.

40 But the facts as indicated in the first point
 that Coon worked most of the time in New Jer-
 sey; that the boat tied up sometimes in New
 Jersey; that most of her tows were from points in
 New Jersey to ports in other States, and that the
 vessel was registered at Newark, her home port,
 as a matter of law establish the fact that Coon's
 employment was under the New Jersey Law. The

facts that his employer resided in Elizabeth, that his principal office was there, and that Coon was paid there, are very persuasive on this question.

“An Act to encourage American shipbuilding” (May 10, 1892, Ch. 63, 27 Stat. L. 27), Section 4141 of the Revised Statutes mentioned above provides:

“Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides.” 10

“The domicile or home port of a vessel engaged in commerce is the port at which she is registered, and which must be that nearest to the place where her owner or owners reside.” 20

Hays vs. Pacific Mail S. S. Co., 17 How., 596.

The same case holds that the authorities do not support the theory that a vessel can have more than one home port, or be a domestic vessel in more than one State at the same time.

See *The Ellen Holgate*, 30 Fed. Rep., 126.

When Coon engaged himself on the tug “Elsie K.” he placed himself under the laws of New Jersey, and respondent employed him under the laws of New Jersey, because one who enlists as a member of the crew of a vessel becomes subject to the laws of the place of her registry. 30

Ross vs. McIntyre, 140 U. S., 453.

The fact that a vessel engaged in interstate commerce can be taxed only at her home port 40

(*Morgan vs. Parham*, 16 Wall., 471) is a further indication that such a vessel can have but one situs or domicile, and that is at her home port.

The United States Circuit Court of Appeals has upheld the right to a lien given by the New Jersey Act (N. J. Comp. Stat., Vol. 3, p. 3127) to one furnishing coal to a domestic vessel in New Jersey.

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Hitchings vs. Olsen, 184 Fed., 305; 106 C. C. A., 447.

We therefore respectfully urge that the finding of the Court below that Coon's employment was "not under the laws of any other State than the State of New Jersey" (p. 18, l. 13), was not only supported by the evidence, but that any other finding would have been error.

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This finding of fact entitled the petitioner to compensation even though Coon might have met his death in the State of New York.

Rounsaville vs. C. R. R. of N. J., 94 Atl. Rep., 392.

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Furthermore Mr. Kennedy, the respondent, admitted that he had taken out Compensation Insurance under the New Jersey Law (p. 41). This indicates that both Mr. Kennedy and the insurance company considered that the employees on the "Elsie K." were entitled to the protection of the New Jersey Act at the time the insurance was written.

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POINT III.

This case is not controlled by *Jensen vs. Southern Pacific Company* and the reversal based thereon was erroneous.

This case was not argued in the Supreme Court on any question raised in the Jensen case. It was decided by the Supreme Court without the applicability of the Jensen case having been argued. We submit that the Jensen case would have been decided otherwise had that case been an appeal from a decision founded upon the New Jersey statute. There is a striking difference between the New Jersey and New York Workmen's Compensation Acts which led to the decision in the Jensen case. Justice McReynolds in the course of his opinion said the New York "act includes only those engaged in the operation of vessels other than those of other States and countries in foreign and interstate commerce, while the work upon which the deceased workman was engaged at the time of his death was part of the operation of a vessel of another State, engaged in interstate commerce, and hence does not come within the provisions of the act." This was an objection duly made to the award of compensation in the Jensen case. The decision of the Appellate Division of New York in the Jensen case was quoted as follows by Justice McReynolds:

"The scheme of the statute is essentially and fundamentally one by the creation of a State fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The State fund is created from premiums paid by employers based on the pay roll, the number of employees, and the hazards of the employ-

10 ment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the Commission of his own financial ability to pay. If he does neither, he is liable to a penalty equal to the pro rata premium payable to the State fund during the period of his noncompliance, and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk and negligence of a fellow servant."

The New Jersey Act at the time this accident happened did not provide a State fund to insure the payment of the prescribed compensation, nor did it penalize an employer if he did not subscribe to a State fund.

Justice McReynolds further said:

20 "As here applied, the Workmen's Compensation Act conflicts with the general maritime law, which constitutes an integral part of the Federal law under art. 3, sec. 2 of the Constitution, and to that extent is invalid.

30 "The Southern Pacific Company, a Kentucky corporation, owns and operates a railroad as a common carrier; also the steamship El Oriente (the ship on which Jensen was working), plying between New York and Galveston, Texas."

Furthermore Justice McReynolds said:

40 "The fundamental purpose of the Compensation Law, as declared by the Court of Appeals, is 'the creation of a State fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments,' among them being 'longshore work, including the loading or unloading of cargoes,' &c."

Undoubtedly the reason which led to the opinion in the Jensen case was the following statement of Justice McReynolds:

“Under the construction adopted by the State courts no ship may load or discharge her cargo at a dock therein without incurring a penalty, unless her owners comply with the act, which, in order to secure payment of compensation for accidents, generally without regard to fault, and based upon annual wages, provides (Sec. 50) that ‘an employer shall secure compensation to his employees in one of the following ways:’” &c. 10

This section of the statute led the Court to say:

“If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. * * * The legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.” 20

The New Jersey Act, on the other hand, imposes no such restrictions on commerce or upon the admiralty and maritime jurisdiction of the United States Courts. The New Jersey Act is one passed in the exercise of the State’s police powers. It imposes its beneficent provisions into every contract of employment in the State of New Jersey from the date it became effective. The same humane considerations which led to the passing of the Tenement House Act (P. L. 1904, p. 96), which is full of protections for per- 30
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sons who are obliged to live in crowded tenements in cities, to the passing of the Labor Laws (3 Comp. Stats., 3039) which provide that no child of tender years shall be permitted to stunt its growth in factories, the School Laws (4 Comp. Stats., 4775) which provide that children shall be compelled to attend school until they have received at least the rudiments of an education, the Widows' Pension Laws (P. L., 1913, p. 578) which protect unfortunate widows and orphans in their extremities, led to the passing of this act.

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As Justice Brandeis said in his admirable dissent in *New York Central Railroad Co. vs. Winfield*, 61 U. S. L. Ed., p. 554:

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"It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him, even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency, if provision be not otherwise made. Upon the State falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest which attend destitution and the denial of opportunity. Upon the State also rests, under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the States the power to perform either this duty to humanity or their fundamental duty of self-preservation."

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Our statute requiring employers to take out insurance against their liability under the Workmen's Compensation Act was not passed until 1917 (P. L. 1917, Chaps. 178 and 262), and hence the features of the New York statute which imposed such serious obligations on the owners of ships entering and leaving the Port of New York are no

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where to be found in the New Jersey Act as it stood on the date of the happening of this accident, and at the time of the trial.

Indeed in a direct proceeding in the admiralty courts for this District the admiralty courts declined to divest the Common pleas Courts of jurisdiction under this Act. *Berton vs. Tietjen & Lang Dry Dock Co.*, 219 Fed. Rep., p. 763. In that case Berton filed a petition in the Common Pleas Court for compensation, having been injured while working as a machinist on a vessel at the Tietjen & Lang Dry Dock Company's plant in the Hudson River at Weehawken. The Tietjen & Lang Dry Dock Company filed in the District Court of the United States for the District of New Jersey a petition to limit its liability to the value of the vessel pursuant to the Limitation of Liability Acts of Congress, Sections 4283, 4284 and 4285 R. S. U. S. (Comp. Stat. 1913, Sections 8021-8023); and prayed that Berton might be restrained from prosecuting his action in the Common Pleas Court, except in the admiralty proceeding and against the dry dock on which he was injured; and, in the event that the District Court should determine the Dry Dock Company and the dry dock were liable for any injury to Berton, that such liability be limited to the amount of the value of the Dry Dock Company's interest in the dry dock, her equipment etc.

Judge Rellstab held:

"Neither the contract of hiring in the instant case, nor the obligation annexed to it by the New Jersey Statute, is maritime (*Insurance Co. vs. Dunham*, 78 U. S. 11 Wall. 1, 20 L. Ed. 90), and neither is subject to the exclusive control of the maritime law.

"It is only when the substance of the whole contract is maritime that a court of admiralty takes jurisdiction. * * * It is within the power of Congress at any time to give the courts of admiralty exclusive jurisdiction over all matters of controversy arising upon navigable waters; but, so long as concurrent common-law remedies are saved, it is essential, in order to avoid undue friction between these two ancient and formerly conflicting jurisdictions, and to obtain a speedy, economical, and harmonious administration of justice, that in matters of concurrent jurisdiction that court which first takes cognizance should proceed without interference to a finality. Such a course rests not alone on comity, but on necessity. (Cases cited) This suit must therefore be remanded, unless the appeal to the limited liability statutes requires that federal jurisdiction should be retained as the only court competent to afford such relief; for it is clear, however this statutory obligation imposed upon employers may be classified—contractual, delictual, or sociological—that it is not purely maritime in its nature. If not maritime, on that ground the suit is not removable; and, if maritime, it not being exclusively so as it is enforceable by a suit in personam cognizable in a court exercising common-law remedy, it is not removable, because the suitor had a choice of concurrent remedies, and his choice controlled."

The Court therefore remanded the proceedings under the Compensation Act to the Hudson County Common Pleas and dismissed the petition for limitation of the dry dock owners' ability.

Hence the admiralty courts for this district recognize the rights of persons injured on vessels within the District of New Jersey to proceed under the State Compensation Act; the admiralty

court refuses to deprive claimants of their rights to proceed under the State Workmen's Compensation Act, if they so elect, in effect holding that the New Jersey Workmen's Compensation Act is not interference, but rather concurrent with the jurisdiction of the admiralty courts in proceedings in personam.

Judge Rellstab in his decision points out, as does Justice Pitney in his dissenting opinion in the Jensen case, that the exclusive jurisdiction of the admiralty courts is in proceedings in rem and in prize. The courts of common-law and the admiralty courts have concurrent jurisdiction in proceedings in personam. The party plaintiff has the right to elect in which jurisdiction he will proceed, and except for the limitation of liability statutes, the right of a suitor to sue in personam in a state court is never questioned by the admiralty courts. Justice Pitney cites at great length a long line of cases holding that the state courts, however, will not be permitted to interfere with the exclusive jurisdiction of the admiralty courts in proceedings in rem. However, the admiralty courts will in certain instances enforce by their exclusive process and powers proceedings in rem where a lien on a vessel is given by a state statute, (citing *The Hamilton Old Dominion S. S. Co., vs. Gilmore*) 207 U. S., 398; 52 L. Ed. 264) although not be proceeding in rem unless the statute expressly creates a lien (*The Corsair*, 145 U. S., 335; 36 L. Ed. 727). The law on this point has been set forth so clearly by Justice Pitney in his dissenting opinion that it is not necessary to review it at length here.

Indeed the majority opinion of the Supreme Court in the Jensen case recognizes the same principles for in the course of its opinion the majority of the Court says:

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10 "In view of these constitutional provisions and the Federal Act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, (*The Lottawanna*, 21 Wall, 558); pilotage fees fixed (*Cooley vs. Port Wardens*, 12 How. 299 &c.); and the right given to recover in death cases."

20 To the possible objection that the workmen's Compensation Act of New Jersey is an interference with interstate commerce, or that it imposes improper burdens on the owners of ships engaged in interstate commerce, a conclusive reply is given by the Supreme Court of the United States in *Valley Steamship Company vs. Wattawa*, 61 U. S., L. Ed., p. 523 (cited in the opinion below), as follows:

"In the absence of congressional legislation the settled general rule is that, without violating the commerce clause, the states may legislate concerning relative rights and duties of employers and employees while within their borders, although engaged in interstate commerce."

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POINT IV.

Congress has saved to the claimant the rights and remedies under the workmen's compensation law of this state by the act approved October 6th, 1917.

The contention that the Common Pleas Court had no jurisdiction because of the exclusive jurisdiction of the United States District Courts in admiralty proceedings, was not made in the trial court. This cause was argued before the Supreme Court at the February Term. On May 21, 1917 the Supreme Court of the United States decided the Jensen case. On October 20, 1917 the Supreme Court entered its order reversing the Common Pleas Court in accordance with an opinion filed on October 17, 1917. It was on October 6, 1917 that the Act of Congress was approved by the President which saved to all claimants proceedings under the Compensation Laws of the States. The effect of this was to save to Mrs. Coon her remedy under the New Jersey Act in this case. This Act of Congress in full is as follows:

“An Act To amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the district courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any State.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause three of section twenty-four of the Judicial Code is hereby amended to read as follows:

“Third: Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation

law of any State; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.'

"Sec. 2: That clause three of section two hundred and fifty-six of the Judicial Code is hereby amended to read as follows:

10 "Third: Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, and to claimants the rights and remedies under the workmen's compensation law of any State.'

"Approved, October 6, 1917."

The prompt introduction and passage of this amendment to the sections of the Judicial Code on which the Supreme Court of the United States based its decision in the Jensen case, very clearly indicates the intention of Congress to save the remedies under state laws which were denied by the Supreme Court of the United States in the Jensen case, and irrespective of the effect that such state laws might have upon interstate or foreign commerce.

20 The Supreme Court divided five to four in the Jensen case as to the construction to be given to the amended sections of the Judicial Code, so that Congress has merely supplied a defect or omission in the Judicial Code. Congress has 30 undoubted power to do this and in so doing to save existing state proceedings. This Act is merely retrospective and there is no constitution inhibition against retrospective laws.

Blount vs. Findley, 95 U. S., 173, 180;
24 L. Ed., 424.

In *Baltimore &c. R. R. Co. vs. Nesbit*, 10 How., 395, 401, 13 L. Ed., 469, it was said:

40 "That there exists a general power in the

State Governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the federal constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts."

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Speaking of the above decision, the Court says:

"This decision, it is true, was before the Fourteenth Amendment and the restrictions placed by that amendment upon state action apply to retrospective as well as prospective legislation. But it contains no prohibition of retrospective legislation as such, and therefore now, as before, the mere fact that a statute is retroactive in its operation does not make it repugnant to the federal constitution."

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League vs. Texas, 184 U. S., 156; 46 L. Ed., 478.

In the absence of any constitutional provision to the contrary, a legislature has the power to enact retrospective laws for the purpose of curing irregularities in the execution of contracts, or in the proceedings of municipal and judicial bodies, or for the purpose of supplying defects and omissions in statutes. It may lawfully ratify any act or proceeding which it might have authorized in the first instance or excuse the non-observance of any formality which it might have omitted in the beginning. As applied to contracts, such acts do not impair the obligation thereof, but confirm and carry out the intention of the parties thereto; and as to the objection that such laws violate vested rights of property, it has been forcibly answered that there can be no vested right to do wrong. Claims contrary

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to justice and equity cannot be regarded as of that character.

- U. S. vs. Heinszen & Co.*, 206 U. S., 370; 51 L. Ed., 1098;
Turpin vs. Lennon, 187 U. S., 51; 47 L. Ed., 70;
Bolles vs. Brimfield, 120 U. S., 759; 30 L. Ed., 786;
 10 *Anderson vs. Santa Anna*, 116 U. S., 356; 29 L. Ed., 633;
Grenada &c. vs. Brogden, 112 U. S. 261; 28 L. Ed., 704;
Mitchell vs. Clark, 110 U. S., 633; 28 L. Ed., 279;
Mattingly vs. Dist. of Columbia, 97 U. S., 687; 24 L. Ed., 1098;
Randall vs. Kreiger, 23 Wall., 137; 23 L. Ed., 124;
 20 *Beloit vs. Morgan*, 7 Wall., 619; 19 L. Ed., 205;
Thompson vs. Lee County, 3 Wall., 327; 18 L. Ed., 177;
Charles River Bridge vs. Warren Bridge, 11 Pet., 420; 9 L. Ed., 773;
Leeland vs. Wilkinson, 10 Pet., 294; 9 L. Ed., 430;
Watson vs. Mercer, 8 Pet., 88; 8 L. Ed., 876;
 30 *Wilkinson vs. Leeland*, 2 Pet., 627; 7 L. Ed., 542;
Saterlee vs. Matthewson, 2 Pet., 380; 7 L. Ed., 458.

We therefore respectfully submit that the decision of the Supreme Court should be reversed and the judgment of the Union County Common Pleas should be affirmed.

MCDERMOTT & ENRIGHT,
 Attorneys of Appellant.

40 JAMES D. CARPENTER, JR.,
 Of Counsel.

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Writ of Certiorari.

Writ of Certiorari.

Filed October 30, 1916.

NEW JERSEY, ss.

The State of New Jersey to the Court
of Common Pleas in and for the 10
County of Union and Abram P.
Morris, Clerk of said Court, and
Rebecca Coon, administratrix, &c. of
Robert Coon, deceased.

GREETING:

We being willing for certain reasons to be cer-
tified of and concerning a certain determination
of facts and order on motion for a modification
of determination and facts and conclusions rend- 20
ered, on the first day of June, nineteen hun-
dred and sixteen, by the Honorable James C.
Connolly, Judge of the said Court of Common
Pleas in and for the said County of Union, in
certain proceedings brought on behalf of Re-
becca Coon, administratrix, &c. of Robert Coon,
deceased, petitioner, against James Kennedy,
doing business under the name of Kennedy's
Towing Line, respondent, for the determination
and recovery of compensation under an Act of 30
the Legislature of the State of New Jersey, en-
titled, "An Act prescribing the liability of an
employer to make compensation for injuries re-
ceived by an employee in the course of employ-
ment, establishing an elective schedule of com-
pensation and regulating procedure for the de-
termination of liability and compensation there-
under," approved April fourth, nineteen hun-
dred and eleven, and the acts amendatory
thereof and supplemental thereto, we command
you that the said determination and judgment, 40

Writ of Certiorari.

10 together with all proceedings for the making of the same and all things touching and concerning the same, as fully and entirely as before you they remain or are in your custody and control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature at Trenton, on the thirtieth day of October, nineteen hundred and sixteen, that therein may be caused to be done what of right and according to law ought to be done.

WITNESS, the Honorable James F. Minturn, Chief Justice of our said Supreme Court, at Trenton, this day of October, nineteen hundred and sixteen.

WILLIAM C. GEBHARDT,
Clerk.

20 KALISCH & KALISCH,
Attorneys.

This writ is allowed; let it be sealed.

J. J. BERGEN,
Jus. Sup. Ct.

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Return.

Return.

In obedience to the command of this writ, to me, ABRAM P. MORRIS, Clerk of the Court of Common Pleas in and for the County of Union, directed, I DO HEREBY CERTIFY and send to our Justices of our Supreme Court of Judicature, at Trenton, within mentioned, the Petition and Order Fixing Time and Place of Hearing, and Proof of Service thereof, Answer, Conclusions of the Court, Determination and Finding of Facts, Notice and Motion for Modification for Determination of Facts, &c., whereof mention is within made with all things touching and concerning the same as fully and entirely as they remain in our said Court of Common Pleas.

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IN TESTIMONY WHEREOF, I have hereto [L s] set my hand and affixed the seal of said Court, this 28th day of October, A. D., 1916.

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ABRAM P. MORRIS,
*Clerk of the Court of Common Pleas of Union
County.*

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Petition.

Petition.

Filed March 24, 1916.

Union County Court of Common Pleas.

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REBECCA COON,

Petitioner,

vs.

JAMES KENNEDY, doing business under the name of KENNEDY'S TOWING LINE,

Respondent.

On petition for compensation:

Petition.

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The petition of Rebecca Coon, residing in the City of Brooklyn, New York, shows and charges as follows:

(1) Your petitioner is the widow of Robert Coon, who died while in the employ of respondent August 4th, 1915.

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(2) Petitioner's husband was at the time of his death engineer of the steam tug "Elsie K," which was on a journey from Brooklyn, New York, to Elizabeth, New Jersey; that when about three or four hundred feet off Constable Hook and within the bounds of the State of New Jersey the said steam tug "Elsie K" foundered and sunk in a storm, and your petitioner's husband and the master of said steam tug were lost.

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(3) That the said steam tug "Elsie K" was registered at the port of Newark, New Jersey, where the said steam tug "Elsie K" belonged at the time of her registry, to wit, on a date

Petition.

prior to August 4th, 1915; that the said steam tug "Elsie K" belonged to the port of Newark at the time of the accident above mentioned; that the residence and place of business of the respondent is at Elizabeth, Union County, New Jersey.

(4) That the employment of the said Robert Coon was in the State of New Jersey and was subject to the provisions of an Act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder, approved April 4, 1911," and the acts amendatory thereof and supplemental thereto. 10
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(5) That the wages of the said Robert Coon were \$85.00 per month and board on the said steam-tug, which had been agreed with his employer to be worth the sum of \$15.00 per month; the total wages of the said Robert Coon being \$100.00 per month.

(6) The respondent had actual knowledge of the happening of said accident on August 4th, 1915, and the loss of the said steam-tug "Elsie K" and the death of the said Robert Coon. 30

(7) That the death of the said Robert Coon was caused through an accident arising out of and in the course of his employment.

(8) The said Robert Coon left dependent upon him your petitioner, his widow, and two children, Myrtle Coon, three years of age, and Mildred Coon, one year of age.

Petition.

(9) Your petitioner claims from the respondent, James Kennedy, doing business under the name of Kennedy's Towing Line, compensation for herself and her two said dependent children amounting to forty-five per cent. of the wages of the said Robert Coon for three hundred weeks from the date of his death, August 4th, 1915, and \$100.00 on account of decedent's funeral bill, and for such other relief in the premises as may be just.

REBECCA COON,
Petitioner.

McDERMOTT & ENRIGHT,
Attorneys of Petitioner.

STATE OF NEW JERSEY }
COUNTY OF HUDSON } ss.

REBECCA COON, of full age being duly sworn according to law upon her oath deposes and says that she is the person mentioned in the foregoing petition; that she has read the same and knows the contents thereof and that the matters and things therein contained are true to the best of her knowledge, information and belief.

REBECCA COON.

Subscribed and sworn to before me this 26th day of February, 1916.

HENRY A. OETJEN,
Notary Public of N. J.

Order Fixing Fine and Place of Hearing.

Order Fixing Time and Place of Hearing.

Filed March 24, 1916.

UNION COUNTY COURT OF COMMON PLEAS.

10

REBECCA COON,

Petitioner,

vs.

JAMES KENNEDY, doing business under the name KENNEDY'S TOWING LINE,

Respondent.

On Petition &c.: Order fixing time and place of hearing.

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It is on this twenty-fourth day of March, 1916, on motion of McDermott & Enright, attorneys for petitioner;

ORDERED that the above entitled cause be set down for trial before the Union County Court of Common Pleas, at the Court House in the City of Elizabeth, on the twenty-eighth day of April, 1916, at the hour of ten o'clock in the forenoon.

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JAMES C. CONNOLLY,
Judge.

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Affidavit of Service.

REBECCA COON,
vs.
 JAMES KENNEDY.

10 I hereby deputize and appoint Thomas L. Carey a Special Deputy to serve the within writ. Witness my hand and seal this 24th day of March A. D., 1916.

GEORGE C. OTTO,
 George C. Otto, Sheriff, Union County, by

.....
Under Sheriff.

20 Thomas L. Carey of full age being duly sworn according to law on his oath saith, that he is a special Deputy Sheriff of the County of Union, and that on the twenty-fourth day of March, A. D., 1916, he served a true copy of the annexed Petition for compensation and Order fixing time of hearing upon James Kennedy by leaving a true copy at his residence, No. 504 Morris Avenue, Elizabeth, N. J., with a member
 30 of his family above the age of fourteen years.

THOMAS L. CAREY.

Sworn to and subscribed before me this twenty-fifth day of March, A. D., 1916.

GEORGE W. PEEK, JR.,
Notary Public of N. J.
 Shff Fees \$2.72

Answer.

(7) He denies that petitioner is entitled to compensation as demanded in paragraph nine of the petition.

And the respondent, further answering, says:

10 That the Union County Common Pleas Court has no jurisdiction to hear or determine the rights of the parties to the within action, and that the petitioner cannot invoke the Compensation Act of the State of New Jersey for the purpose of obtaining any compensation or damages against this respondent.

KALISCH & KALISCH,
Attys. for Respondent.

Dated April 8, 1916.

20 STATE OF NEW JERSEY }
COUNTY OF ESSEX } ss.

Isidor Kalisch, being duly sworn upon his oath deposes and says, that he is the attorney for the respondent in the foregoing answer, and the agent in this behalf, that he has read the foregoing answer and that the matters and things therein contained are true to the best of his knowledge and belief.

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ISIDOR KALISCH.

Sworn and subscribed to before
me this day of April, 1916.

ABNER KALISCH,
Master in Chancery of N. J.

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Conclusions of Judge Connolly.

Conclusions.

Filed June 1, 1916.

UNION COMMON PLEAS.

<p>REBECCA COON, <i>Petitioner,</i> <i>vs.</i> JAMES KENNEDY, doing busi- ness under the name of the KENNEDY TOWING LINE, <i>Respondent.</i></p>	}	<p>10</p> <p><i>Conclusions.</i></p>
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J. D. Carpenter, (McDermott & Enright) for
Petitioner.

Kalisch & Kalisch, for Respondent. 20
Hearing, May 19th, 1916.

CONNOLLY, J:

This proceeding was instituted by Rebecca Coon, the widow of Robert Coon, deceased, to recover compensation under the Workman's Compensation Act, (P. L. 1911, p. 134) and the supplements thereto and amendments thereof, for herself and two infant children, said children being one and three years of age, respectively. 30

The facts show that for some years prior to August 4, 1915, Robert Coon had been employed on the boats of the respondent and received wages to the amount of one hundred dollars a month. The testimony does not show where the hiring of the deceased took place. The tugboat "Elsie K," on which he was employed, was owned by respondent, who is a resident of the City of Elizabeth, and was registered at the 40

Conclusions of Judge Connolly.

Custom House in the City of Newark, in this State, its home port. On August 4, 1916, while the tugboat was on its way from New York toward the City of Elizabeth, a violent storm swamped it, and it sunk in water to a depth of thirty-three or thirty-five feet. Shortly before it sank, Coon called on the fireman to make his escape, and jumped overboard. He was drowned. The tugboat was running when he left it, and proceeded some distance before it went down. The respondent now contends that the deceased was drowned in New York waters, and not in the waters of New Jersey, and that the petitioner's claim for compensation, if she has a right to recover compensation, should be submitted to the courts of New York.

John W. Schlig, who was employed as fireman on the tugboat, swore that when it went down, it was five hundred feet from the shore of Constable Hook, in New Jersey, and that Coon went down, at a distance of five hundred feet from Constable Hook. This witness also testified that the derrick which raised the tug, put out anchors and fastened its lines to the dock at Constable Hook. Kennecy, the respondent, who was on the scene where the boat was raised, said that she lay five hundred feet from the New Jersey shore, and half a mile from the Staten Island shore, and that the shores at that point are about three-quarters of a mile apart.

The two witnesses for the respondent contradicted the foregoing statements. William Bulke testified, that he is a diver, and that the tugboat foundered at a distance of seven or eight hundred feet from Constable Hook, that she was thirty-five feet under water, and that

Conclusions of Judge Connolly.

his derrick boat was kept in position by anchors. When asked whether there were hawsers from his boat to the dock, he made answer saying that the captain would answer that question. John Blomber, who was employed on the derrick boat, swore that the tugboat went down seven or eight hundred feet from the outer side of the dock, and that no lines were used from his boat to the dock. 10

Nelson, a witness who was employed in the tugboat on the day when it foundered, swore that the deceased jumped from the tug at a point five hundred feet out from the coal dock on Staten Island, and that the boat ran for about fifteen minutes, after the deceased jumped off, toward Constable Hook.

It will be seen that the testimony is conflicting, and if the deceased was drowned in New York waters, the proceeding must be dismissed, and the petitioner should be left to pursue her remedy in the New York courts. But I regard the testimony of Kennedy, the respondent, of great importance. He says that at the point where the boat was raised, the distance between the shore of New Jersey and New York, (Staten Island) is three-quarters of a mile, and that the boat foundered at a point five hundred feet from the New Jersey shore. If deceased jumped from the boat, according to Nelson, when it was five hundred feet from the coal docks in Staten Island, then the boat went a distance of from thirty-four to thirty-five hundred feet before it went down. I do not think that the boat could have proceeded this distance, as she was going down when the deceased jumped into the water. I rely on the respondent's statement as to distance, because he is well acquainted with the 20 30 40

Conclusions of Judge Connolly.

waters in and around New York Bay, and owns five tugboats which he operates on these waters. And again, the testimony of Schlig is contradictory of that given by Nelson, Schlig swearing that deceased went into the water when he was drowned, about five hundred feet from the New Jersey shore.

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At the hearing, a "Map of the boundary line between the States of New York and New Jersey in lands under water in Kill von Kull and New York Bay, &c.," attached to a "Report of proceedings of the New Jersey Boundary Commission, appointed to lay out by stakes and buoys the true boundary line between New York and New Jersey," was used. The map was agreed upon by commissioners appointed by the States of New York and New Jersey and is authentic as to the lines and boundaries which it sets forth. The boundary line between New York and New Jersey lies about in the middle of the Kill von Kull, where that stream runs into New York Bay, but at the mouth of the Kill, turns from a northeasterly direction and runs due east for about a mile and a half toward the Long Island shore. On the north, or New Jersey side of this line, the New Jersey shore recedes in a northwesterly direction, while the Staten Island shore recedes in a southeasterly direction, leaving an immense distance between the shores of the two States. The foundering of the respondent's tug took place at this point. It did not happen on the Kill, as the water there is very deep, and runs through a narrow channel, carrying the waters of the Newark Bay, into which empty the Passaic and Hackensack rivers, and a part of the waters of the Staten Island Sound. On the north of the boundary line, at

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Conclusions of Judge Connolly.

the mouth of the Kill von Kull, the waters are generally only twenty feet deep, but near the boundary line runs to a depth of thirty and thirty-three feet. On the south, or New York (Staten Island) side of said boundary line, the depth of the water is from forty-one to forty-eight feet, and the map, and the soundings which it contains, go to sustain the testimony of Kennedy, the respondent. Now, as the tugboat sunk to a depth of thirty-three or thirty-five feet, it is evident that the sinking took place in New Jersey waters, and not in the Kill or deep water. 10

From a careful study of the testimony and of the map, I am led to the conclusion that the drowning of the deceased and the sinking of the boat, both happened in New Jersey waters.

The respondent is entitled to forty-five per centum of the weekly wages of the deceased for herself and her two children, for three hundred weeks, and in addition thereto, to the sum of one hundred dollars for funeral expenses. 20

I will allow a counsel fee of two hundred dollars to the attorneys of the petitioner, to be paid as follows: One hundred dollars from the amount now due the petitioner, and the balance in weekly sums of two dollars per week, until the whole amount is paid. Costs will be awarded to the petitioner. 30

Judgment may be entered accordingly.

JAMES C. CONNOLLY,
Judge.

Dated June 1, 1916.

*Determination and Finding of Facts.***Determination and Finding of Facts.**

Filed June 17, 1916.

UNION COUNTY COURT OF COMMON
PLEAS.

10

REBECCA COON,

*Petitioner,**vs.*JAMES KENNEDY, doing bus-
ness under the name of KEN-
NEDY'S TOWING LINE,*Respondent.**On petition
for compen-
sation:**Determina-
tion and
finding of
facts.*

20

A petition having been heretofore filed in the above stated matter praying that the Court would decide the matters in dispute between the parties hereto and for payment of the compensation to which the petitioner might be entitled by virtue of the terms and provisions of an act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employ-

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ment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the supplements thereto and amendments thereof, and the time and place for the hearing of the said petition having been fixed, to wit, March 24th, 1916, and the said respondent having filed his answer, and the said hearing having been adjourned to May 19th, 1916, at the

40

Court House in the City of Elizabeth, and it

Determination and Finding of Facts.

appearing to the Court that a copy of the said petition and the order fixing the time and place for the hearing were duly served upon the respondent, and the respondent and the petitioner appearing in court before me at the time and place fixed for the final hearing by the said adjournment, and I having heard the testimony of the witnesses for the petitioner and respondent, and having considered the said testimony and the argument of counsel thereon, 10

I do hereby determine as follows: That Robert Coon, was in the employ of the respondent August 4th, 1914, and had been in his employ for a considerable time prior thereto; that the said Robert Coon met his death August 4th, 1915, by an accident arising out of and in the course of his employment with the respondent, and that the respondent had actual notice of and knowledge thereof; that the said Robert Coon at the time of his death aforesaid and for a considerable time prior thereto was receiving \$100 per month wages; that the said Robert Coon was a fireman employed on the tugboat "Elsie K" owned by the respondent; that the said "Elsie K" was registered pursuant to the provisions of the Act of Congress at the port of Newark, which was her home port in the State of New Jersey at the time of the accident and for many years prior thereto; that the residence and principal place of business of the respondent is at Elizabeth, Union County, New Jersey. 20 30

I further find as a fact that the said Robert Coon was employed a large part of the time in the State of New Jersey and that his employment was under the laws of the State of New Jersey; that the residence of the said Robert Coon at the time of his decease was in the City 40

Determination and Finding of Facts.

of Brooklyn, New York, and that his employment on the tugboat "Elsie K" owned by the respondent was in both the waters of New York and New Jersey; that his employment in the State of New Jersey was fully one-half of the time that he worked for the respondent; that the
 10 said Robert Coon was paid with checks of the respondent drawn on a bank in the State of New Jersey, and that the employment of the said Robert Coon was not under the laws of any other State than the State of New Jersey.

I further find as a fact that the said Robert Coon met his death when the tugboat "Elsie K" foundered in a storm on the morning of August 4th, 1915, when the said "Elsie K" was in the waters of the State of New Jersey, over lands of
 20 the State of New Jersey, and when on a voyage to Elizabeth, New Jersey; that the said tugboat sunk about five hundred feet from the New Jersey shore in New York Bay, and the said Robert Coon met his death at or about the time the said tugboat sank and in the waters of New Jersey and over lands of the State of New Jersey.

I further find as a fact that the said Robert Coon left dependent upon him Rebecca Coon, his
 30 widow, and two children, Myrtle Coon, three years of age, and Mildred Coon, one year old, all of whom were actual dependents of the said Robert Coon and residing with him in the City of Brooklyn, New York, and who now reside in Brooklyn, New York; that the petitioner is entitled to recover forty-five per cent. of the wages of the said Robert Coon, \$100.00, or \$10.00 per week for a period of three hundred weeks, commencing August 4, 1915, and \$100.00 funeral expenses.

40 The Court allows to McDermott & Enright, attorneys of the petitioner, counsel fees of \$200.00,

Determination and Finding of Facts.

\$100.00 of which shall be paid out of the payments due on the date of the entering of judgment, and the balance to be paid at the rate of \$2.00 per week out of the payments hereafter to be due until the whole sum of \$200.00 shall be paid.

The petitioner is entitled to recover costs in addition to the counsel fee above mentioned. 10

IT IS THEREUPON on this seventeenth day of June, 1916, on motion of McDermott & Enright, attorneys of the petitioner,

ORDERED that the respondent do pay to the petitioner the sum of \$100.00 for funeral expenses of the said Robert Coon, and the sum of \$10.00 per week for three hundred weeks, commencing August 18, 1915, all the payments for the petitioner and her two children to be made to the said petitioner. 20

IT IS FURTHER ORDERED that petitioner pay to McDermott & Enright, her attorneys, out of the compensation awarded to her the sum of \$200.00 for their fees, \$100.00 of which shall be paid out of the compensation payable to the date hereof, the balance to be paid at the rate of \$2.00 per week out of the compensation hereafter payable, until the whole sum of \$200.00 shall be paid.

IT IS FURTHER ORDERED that respondent pay to McDermott & Enright their costs of suit to be taxed. 30

IT IS FURTHER ORDERED that judgment be entered in favor of the petitioner and against the respondent for the sum of \$100.00 funeral expenses, and the sum of \$10 per week for three hundred weeks, together with costs.

JAMES C. CONNOLLY,
Judge Court of Common Pleas.

40

Rule actually entered June 17, 1916, at 11:50
A. M.

Notice.

Notice.

Filed October 18, 1916.

UNION COUNTY COMMON PLEAS COURT.

10

REBECCA COON,

Petitioner,

vs.

JAMES KENNEDY, doing business under the name of KENNEDY TOWING LINE,

Respondent.

On petition.

Notice.

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To McDermott & Enright, Attorneys for petitioner.

GENTLEMEN:

PLEASE TAKE NOTICE, that on Friday, August 25th, at 11 a. m., or as soon as counsel may be heard, we shall move, in the Union County Common Pleas Court, for an Order modifying the Determination of Facts entered in the above action, to conform with the Conclusions filed by the Court.

30

Respectfully yours,

KALISCH & KALISCH,
Attorneys for Respondent.

Dated July 10th, 1916.

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Motion for Modification.

**Motion for Modification of Determination
of Facts.**

Filed October 18, 1916.

UNION COUNTY COURT OF COMMON
PLEAS.

10

REBECCA COON,

Petitioner,

vs.

JAMES KENNEDY, doing busi-
ness under the name of the
KENNEDY TOWING LINE,
Respondent.

*On motion
for modifica-
tion of
determination
of facts, &c.*

20

The attorneys of the petitioner hereto, hav-
ing appeared before me this 25th day of August,
1916, pursuant to a notice of motion served by
the respondent upon the petitioner why the
Determination of Facts should not be modified
to conform to the conclusions filed by the Court,
and the Court having heard the arguments on the
same, makes the following determination with
reference to each request for a modification of
the Determination of Facts and conform to the
conclusions;

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Request No. 1—Respondent maintains that the
following Determination of Fact, namely, "That
the residence and principal place of business of
the respondent is at Elizabeth, Union County,
New Jersey," be amended to read, "That the
residence and a place of business of the re-
spondent is at Elizabeth, Union County, New
Jersey," the respondent having also another

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Motion for Modification.

place of business in New York City. Request denied because the change is immaterial.

10 Request No. 2—Respondent maintains that the following Determination of Fact, namely, “That the said Robert Coon was employed a large part of the time in the State of New Jersey, and that his employment was under the Laws of New Jersey,” should be stricken out as not conforming with the conclusions filed by the Court reading as follows: “The testimony does not show where the hiring of the deceased took place.” Request denied, because the Court feels that the employment was under the laws of New Jersey, regardless of the place of hiring.

20 Request No. 3—Respondent maintains that the following Determination of Fact, namely, “That his (Coon’s) employment in the State of New Jersey was fully one-half of the time that he worked for the respondent,” be amended to read, “That his (Coon’s) employment consisted of work both in the State of New Jersey, New York and other States.” Request denied.

30 Request No. 4—Respondent maintains that the following Determination of Fact, namely, “That the employment of the said Robert Coon was not under the laws of any other State than the State of New Jersey,” be eliminated, because of the fact that the Court in his conclusions found as follows: “The testimony does not show where the hiring of the deceased took place.” Request denied.

40 Request No. 5—Respondent maintains that the following Determination of Fact, namely, “I further find as a fact that the said Robert Coon met his death when the tugboat “Elsie K” foundered, “be amended to read, “I further find

Motion for Modification.

as a fact that the said Robert Coon met his death somewhere near the time when the tug-boat 'Elsie K' foundered." Request denied.

Request No. 6—That the Determination of Facts and Order should contain the following finding: "The testimony does not show where the hiring of the deceased took place." (Which finding was set forth in the conclusions filed by the trial court). Request denied. 10

JAMES C. CONNOLLY,

Judge Union County Court Common Pleas.

Dated Sept. 1, 1916.

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Opening.

UNION COUNTY COURT OF COMMON
PLEAS.

10	REBECCA COON, <div style="text-align: right;"><i>Petitioner,</i></div>	}	<i>For compensation.</i>
20	<div style="text-align: center;"><i>vs.</i></div> JAMES KENNEDY, doing busi- ness under the name of KENNEDY'S TOWING LINE, <div style="text-align: right;"><i>Respondent.</i></div>		

20 Transcript of stenographer's notes of evi-
 dence, taken in the above entitled matter, before
 HON. JAMES C. CONNOLLY, Judge of the Court
 of Common Pleas, in the Union County Court
 House, in the City of Elizabeth, New Jersey,
 on the nineteenth day of May, A. D., 1916, at
 2.50 p. m.

Appearances:

McDermott & Enright, present Mr. Carpenter,
 for the petitioner.

Kalisch & Kalisch, present Isador Kalisch,
 Esq., for the respondent.

30 *Mr. Kalisch.* The only fact is that he
 was on a boat which foundered, but it was
 not within the jurisdiction of the State of
 New Jersey.

The Court. Is that the whole defense?

Mr. Kalisch. Yes, sir. And that the de-
 fendent is not entitled to compensation un-
 der the Employer's Liability Law of the
 State of New Jersey.

Mrs. Rebecca D. Coon, direct.

MRS. REBECCA D. COON, the petitioner, being duly sworn on her oath, according to law, saith:

Direct examination by Mr. Carpenter.

Q Mrs. Coon, where do you reside? A No. 151 Baltic street, Brooklyn. 10

Q Were you related to Robert Coon? A Wife.

Q How long had you been married? A It would have been five years in September.

Q Have you any children? A Two.

Q What are their names and ages? A Myrtle Catherine is three.

The Court. I must hear you.

A Myrtle Catherine is three.

The Court. Yes? 20

A Mildred Emma one past.

Q One year. And your husband, was he employed by the defendant?

Mr. Carpenter. That is admitted.

Mr. Kalisch. Yes, I have not denied it in my answer.

Q Now—

Mr. Carpenter. And you have admitted the wages? 30

Mr. Kalisch. Admitted the wages, yes.

The Court. How much are the wages?

Mr. Kalisch. One hundred dollars a month. Consists of eighty-five dollars actual wages and fifteen dollars board and keep.

Q Do you know how long your husband had been employed by Mr. Kennedy? A Not quite four years. 40

Mrs. Rebecca D. Coon, direct.

Q Where did he work—between what States and in what States?

Mr. Kalisch. I object to this on the ground it is hearsay.

Q If you know. A Between New York and New Jersey.

10 *The Court.* If she knows.

Mr. Kalisch. I would like to examine her with reference to this answer.

The Court. I will allow you do so.

Special cross examination by Mr. Kalisch.

Q Who told you he did? A He did.

Mr. Kalisch. I move that answer be stricken out.

20 *The Court.* I will allow further examination.

Re-direct examination by Mr. Carpenter.

Q Did you ever hear Mr. Kennedy say where your husband was employed? A No, sir.

Q Were you present before the New York Compensation Commission when Mr. Kennedy testified? A I was.

Q Did you hear him say there—

30 *The Court.* I do not think that is proper. Did she ever ride on the boat with him between New York and New Jersey?

Q Did you ever, Mrs. Coon? A I went out to the Hook—out toward the Hook.

The Court. With him?

A With him.

The Court. On the boat?

A (Witness nods head affirmatively).

40 Q Did you ride in the State of New Jersey with him, over into New Jersey waters? A

Mrs. Rebecca D. Coon, cross.

I don't know whether that is New Jersey waters or not. I went from New York out toward the Hook and in again.

(Answer repeated by the stenographer).

Q You mean Sandy Hook? A Yes, sir.

Q Did you ever come to Elizabeth with him, or Elizabethport? Or Hackensack? A No, I came to Communipaw. 10

Q How long ago was this, Mrs. Coon? A About three years ago.

Q Your husband's body was recovered, wasn't it? A Yes, sir.

Q What did the funeral expenses amount to? A Close on to three hundred dollars.

(Question and answer repeated by the stenographer).

Q Did your husband work continuously from 1911 when he was employed down to the date of his employment with Mr. Kennedy? A He did. 20

Mr. Carpenter. Cross examine.

Mr. Kalisch. No cross examination at this time.

(At this time a recess of five minutes was taken).

Cross examination by Mr. Kalisch. 30

Q Do you remember your husband getting a telegram telling him he should report at the boat in Brooklyn? A When?

Q From Mr. Kennedy some years ago? A Yes, sir.

Q Telling him to report to Brooklyn, or was it South Brooklyn, which was it? A It was New York office.

Mr. Carpenter. I object now unless the telegram is produced; it is the best evidence. 40

Mrs. Rebecca D. Coon, re-direct.

The Court. What has a telegram sent several years ago got to do with this business?

Q Since that time he has been constantly in the employ of the Kennedy Towing people?

A Yes, sir.

10 *The Court.* Still you have not shown where it is material yet.

Mr. Kalisch. I will not go any further with it now.

Re-direct examination by Mr. Carpenter.

Q Do you know whether your husband was paid in cash or by check? A By check.

Q Do you know on what bank the checks were drawn?

20 *Mr. Kalisch.* I object unless the checks are produced.

The Court. I will allow the testimony; proceed.

A No. I don't know just what bank, but I know he had to cash them in one place.

Q Was the bank in New Jersey?

Mr. Kalisch. I object to the question being put in the form that the answer is obvious.

30 *The Court.* She does not, and I imagine you must have other witnesses who can testify to that. What is the use of taking up the time?

Mr. Carpenter. All right; that is all.

John W. Schlig, Jr., direct.

JOHN W. SCHLIG, JR., produced as a witness on behalf of the petitioner, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Carpenter.

Q Mr. Schlig, where do you live? A I live on the boat; I am employed on the boat. 10

Q What boat? A G. H. Dovall.

Q Are you in the employ of the defendant now, Mr. Kennedy? A No, sir.

Q Were you in his employ on the fourth of August, 1915? A Yes, sir.

Q That is the day this boat sank; the Elsie K sank? A Yes, sir.

(Question and answer repeated).

Q What was your position on the boat? A On board as fireman. 20

Q Did you know Mr. Coon, the husband of the petitioner here? A Yes, sir.

Q What was his position? A His position was chief of the boat.

Q Chief fireman? A No, sir; just chief; I was fireman.

Q Were you on deck when the boat went down? A Yes, sir; I was on deck.

Q What was the position of the boat, how close was it when he went down? A I should judge it was about five hundred feet off Constable Hook. 30

Q Had you yet got into Kill von Kull? A Just about entering it.

Q Is that from the shore line; five hundred feet from there? A Yes, sir.

Q Did you afterwards see the boat raised? A Yes, sir.

Q And who raised it? A Merritt & Chapman people. 40

John W. Schlig, Jr., direct.

Q Merritt & Chapman Derrick Company? A Yes, sir.

Q Whereabouts was the boat when it was raised? How close to the shore was it? A A very few feet from where she sunk; just about five hundred feet.

10 Q Was the derrick that raised the boat fastened to any obstacle along the shore? A Why the tug when she brought the derrick there she had to run lines out for anchors so she laid there and hoisted the boat up.

Q Where did she fasten the lines to? A Laid to shore off the tug.

Q To which shore? A Jersey shore.

Q Next the Hook? A Yes, sir.

Q The lines that held the derrick in place which raised the tug "Elsie K" were fastened
20 to the New Jersey shore? A Yes, sir.

Q Can you say whether—which shore was nearest when the boat went down, the New Jersey shore or Staten Island shore? A New Jersey shore.

Q Quite a lot nearer than the— A Yes, sir.

Q Some boat picked you up, didn't it? A Yes, sir.

Q Whereabouts was that boat going at the time it went down? A Bound for Elizabeth.

30 Q How long had you been working on this boat? A About three days.

Q Had you been in New Jersey waters on each of those three days?

Mr. Kalisch. I object to that as immaterial.

The Court. That is leading.

A Well, no, sir.

Mr. Carpenter. Do not answer. It is
40 objected to by the other side.

Cross examine.

John W. Schlig, Jr., cross

Cross examination by Mr. Kalisch.

Q Where were you hired?

Mr. Carpenter. I object to that as immaterial.

The Court. I do not see how it is immaterial, Mr. Kalisch.

Mr. Kalish. The question has materiality, first—

10

The Court. I will allow it.

Q Where were you hired? A At Pier Six, East River.

Q By whom? A Chief engineer of the "Elsie K."

Q Pier six of the East River is— A New York City.

Q And you say this boat foundered or went down five hundred feet off the shore line? A Yes, sir, of New Jersey.

20

Q Of New Jersey. Now, I ask you the question, are you sure that they had lines reaching to the shore, hausers? A What held the boat there?

Q You are sure of that? A Yes, sir.

Q And you are sure it wasn't held by anchors? A Well, what is that on shore?

Q You are sure the boat wasn't held by anchors dropped into the water? A Why she had lines reaching to the shore.

30

Q I am asking you whether you are sure it wasn't held by anchors dropped into the water? A No, not the way she laid.

The Court. You did say on your direct examination that anchors had been dropped in.

A I said lines laid to the shore.

40

John W. Schlig, Jr., cross

Q There were no anchors at all? A That I can't say.

Q Then you were not stating the fact when you said on your direct examination that some anchors were dropped out?

10 *Mr. Carpenter.* I object to that because I do not recall such testimony.

Mr. Kalisch. I recall it.

The Court. I think if you will read his direct examination you will find that the derrick—anchors were thrown overboard and there was a line fastened to the shore. The New Jersey shore; the New Jersey shore was nearer than the Staten Island shore.

20 *Mr. Carpenter.* Your Honor is probably correct.

Q Which is correct, anchors or no anchors? A Both.

Q Now, you are sure there were anchors? A You asked—

Q And I will again ask? A I will answer you they have both.

Q They did have? A Yes, sir.

Q You were down in the engine room when this thing happened? A When she sunk.

30 Q When she started to sink? A Yes, I was called out by the chief.

Q How long before you did he go overboard? A How long before who went overboard?

Q Before you went overboard—strike that out—how long a time elapsed from the time Coon went overboard before you went? A Before I went over?

40 Q Yes. A That I can't say—judge the time.

John W. Schlig, Jr., cross

Q You don't know when he went over? A No, I don't.

Q Now, are you positive about the distance being five hundred feet? A I should judge in my judgment.

Q That is your judgment. What is your judgment from the distance between where you are sitting and the back of this room? 10

Mr. Carpenter. I object to this.

The Court. And I will allow it.

A From here to this room? About fifty feet, or more.

Mr. Kalisch. Your honor has not any measurement? I assume this came up before.

The Court. It has. I do not know the exact measurement, but I do not think he is very far wrong. 20

Q When you went overboard how many feet from Constable Hook were you? A How many feet I was? From Constable Hook? I may be over a little more from Constable Hook when the tide and wind was taking me away from there as rapidly as it could, after.

Q When you went overboard? A Yes.

Q How far were you from Constable Hook? A How far was I from Constable Hook? 30

Q Don't keep repeating questions; answer them. A I say it must have been a little more than five hundred feet.

Q You were more than five hundred feet? A Yes, sir.

The Court. A little more than five hundred feet.

Q Wasn't the tide coming out at the time? A Yes, sir; it was on ebb tide. 40

James Kennedy, direct

Q Wouldn't that put you over to the other side? Wouldn't that reduce the distance between you and Constable Hook, instead of increasing it? A There is a very strong eddy in there which keeps you close to the banks. Carrying is a pretty hard fight in the wind. I
10 didn't have much time to tie fast to anything; it was my life I was looking for.

Q Did you see the diver go down? A No, sir; not the first time. I don't remember him going down.

Q Did you see him come up? A Once I did.

Q Did you see the man at the wheel who was giving the diver air while he was down? A No, sir; I didn't.

20 Q You saw a man at the wheel, however, giving him air? A They didn't, no. If I am not mistaken I think there was compressed air.

Q Compressed air? A If I am not mistaken.

Q There was nobody there turning a wheel for the diver? A If I am not mistaken.

Mr. Kalisch. That is all.

JAMES KENNEDY, produced as a witness
30 (the respondent) on behalf of the petitioner, being duly sworn on his oath according to law, saith:

Direct examination by Mr. Carpenter.

Q Mr. Kennedy, where do you reside? A 504 Morris avenue, Elizabeth, New Jersey.

Q You have your office there, have you not? A Yes, sir.

40 Q And you do business under the name of Kennedy's Towing Line? A Yes, sir.

James Kennedy, direct

Q And you have desk room in the City of New York, do you not? A Yes, sir.

Q Thirty-two South street? A Yes, sir.

The Court. Do not lead your witness.

Q What is your business, Mr. Kennedy?

A I am in the towing business.

10

Q Where do you do business? A Most any place.

Mr. Kalisch. What is that answer?

“Most any place?”

(Answer repeated by the stenographer.)

A Yes, sir.

Q The “Elsie K” was at the time of this accident registered in Newark, wasn’t she? A Yes, sir.

Q How long had she been registered in Newark? A Well, ever since I owned her, and I guess she was always registered in Newark as far as that is concerned. As far as I know.

20

Q Yes. You used the “Elsie K”?

Mr. Kalisch. Ask him what he did.

Q In towing freight to New Jersey, didn’t you? A Yes, sir; used it for towing all over.

Mr. Kalisch. I object.

30

The Court. Do not answer the question when an objection is made. Question overruled.

Q Before this accident had the “Elsie K.” been engaged in towing between ports in New Jersey and ports in New York, and other ports? A She had been towing and used in general towing all over between New York, Jersey and other places. Wherever towing would be.

40

James Kennedy, cross.

Q I see. Well, isn't it a fact that most of that work consisted of tows between Newark and other points?

The Court. Well, that is all right, between Newark and other points.

10 A Well, I have five boats and we tow all over and I don't pick one boat to tow. Any one boat they pick it wherever they send.

Q Just answer the question.

The Court. You are just talking about the "Elsie K."

Q Didn't most of her work consist of tows between Newark and other points? A I wouldn't say most of it.

20 Q Didn't you swear before the New York Board—? A I said most of her work.

Mr. Kalisch. What page are you reading from?

Mr. Carpenter. Reading from page ten—eight, Coon, seven.

(Question repeated by the stenographer.)

30 Q Most of her work consists of tows between Newark and the North of Providence. We do some towing for a refining company in Bayonne, New Jersey. Didn't you swear to that? A I surely did; yes, sir.

The Court. There was an objection raised to that.

Mr. Carpenter. I withdraw the objection.

Mr. Carpenter. That is all, sir.

Cross examination by Mr. Kalisch.

40 Q Where does your towing start from usually? The beginning of the voyage—where is the

James Kennedy, cross.

“Elsie K” kept when not on a towing expedition or whatever you might call it?

Mr. Carpenter. I object to that on the ground it is immaterial and irrelevant for the reason that this being a boat registered at Newark, New Jersey, is a New Jersey boat. And the employment of the petitioner’s deceased and the other seamen engaged on it was governed by the laws of this State. And it is immaterial because of those facts where she started out so long as she did work in this state. 10

The Court. I do not think the question is very material. It is simply where she was put up. I will allow it.

A What do you mean put up, at nights?

Q Yes, and when she wasn’t out on a trip? 20

A Well, generally New York.

Q Where do you hire your men?

Mr. Carpenter. I object as immaterial. Now, the only man we are concerned in is Mr. Coon. The question is where he was hired, perhaps.

Q I will ask the question. Where do you hire your men?

Mr. Carpenter. I object as immaterial. 30

The Court. The form in which the question is put I will overrule it.

Q Now, Mr. Kennedy, for what length of time is Mr. Coon, or did Mr. Coon work for you from that pier whatever it is in New York?

Mr. Carpenter. I object to the form of the question. Where he worked from that pier. 40

James Kennedy, re-direct.

The Court. The evidence is it was from a pier in New York, and I think I will allow that question. State the pier, too, if you remember, if it was any number pier.

A No number pier as I know. But all the
10 time he was in my employ.

Q Do you know where he lived? A I know he lived in Brooklyn.

Q Where was the starting point with reference to your boats going out? The "Elsie K." going out? A Well, wherever she tied up at night she started in the morning.

Q Where was the beginning of your voyage after one job was complete? A Well, sometimes pier six and other places; they would call up on the telephone, we would start them from
20 where they were.

Q Pier six in New York? A New York.

Re-direct examination by Mr. Carpenter.

Q Didn't she sometimes tie up in New Jersey, Mr. Kennedy? A Sometimes she tied up all over; sometimes in Long Island, sometimes in New Jersey, and wherever sometimes night would overtake her.

Q There was a petition for compensation
30 filed against you by Mrs. Coon under the New York statute, wasn't there?

Mr. Kalisch. I object to that as immaterial.

The Court. How is it material?

Mr. Carpenter. I propose, your honor, to show that Mrs. Coon made petition under the New York Act for compensation, and the court there refused to entertain jurisdiction because the witness claimed there
40

James Kennedy, re-direct.

that the widow was entitled to compensation under the New Jersey Act, and not under the New York law.

Mr. Kalisch. And I—

Mr. Carpenter. And also that he claimed he was insured in New Jersey and not in New York. If that is so I think this is evidence of the fact that he considered Mr. Coon and the other workmen employed by him, the other seamen employed on his boat, as employees governed by the laws of this state. 10

Mr. Kalisch. I object to that as a misstatement of fact, number one, and secondly, as immaterial what was said before the hearings in New York. The testimony of the hearing said this was thrown out by reason of the fact it was a foreign owned vessel, which vessel is the "Elsie-K," and under the New York compensation act a foreign owned vessel is excluded from the terms of the act. That is the legal record. 20

Mr. Carpenter. I am willing to offer the record.

The Court. I will at the present time rule it out. And I want to say it will not make any difference to me what way the courts in New York ruled on this case; I am going to judge it as it is here. 30

Mr. Carpenter. Of course, I want to show an admission against this defendant's interest. What he has claimed in this very case. If he, and for instance, suppose I had gone to him before filing this petition, and said to him, Mr. Kennedy, I would like to know whether I have the right to file a petition against you for Mr. Coon 40

James Kennedy, re-direct.

10 under the New York act or New Jersey act, and suppose he said to me, why, this man was employed by me in New Jersey, and I am liable for compensation in New Jersey, that would certainly be admissible as against his interest. Now, then, suppose that I can do it just that way and show that in another proceeding brought by the same plaintiff against the same defendant he had testified that this court has no jurisdiction, but the court in New Jersey has. Haven't I the right to show that as a fact that he did so testify? I claim I have as an admission against his interest.

20 *The Court.* If you can show that he said that in another case, where he was sworn and testified, I will allow you to show it.

Mr. Carpenter. Thank you.

Q Mr. Kennedy, you were sworn before the New York State Industrial Commission, were you? A Yes, sir.

Q That was at a hearing that was held in October eighth, 1915? A Yes, sir; just about that.

30 Q I am giving you that date; I think that is right. Do you remember being asked this question by Mr. Connor, who was counsel to the commission, this question: "You claim that the widow (referring to Mrs. Coon) is entitled to compensation under the New Jersey law, and now under the New York law?" And didn't you answer: "Yes, sir; we are insured in New Jersey and not in New York." Did you give that answer to that question? A I don't think I personally said that, no.

40

James Kennedy, re-direct.

Q You deny you said that? A I do not recollect personally I said that. If you will permit me to make a statement on this.

The Court. No.

Mr. Kalisch. This is the plaintiff's witness.

The Court. I am not allowing him to go outside of the issue. You must answer the question yes or no. The testimony, as I understand it is testimony that was taken stenographically and by a duly authorized stenographer in a New York Court. Now, if you said that, why say so. 10

A Well, there was counsel. I had counsel there. I was represented by counsel.

Q The question was, as follows, you were asked this question by Mr. Connor, counsel for the commission: "You claim that the widow, Mrs. Coon, is entitled to compensation under the New Jersey law, and not under the New York law." And did you not answer this way to that question: "Yes, sir; we are insured in New Jersey and not in New York?" A I told him we were insured in New Jersey as I understood. Yes, sir; I said that distinctly. 20

Q Did you not say also that you claimed the widow was entitled to compensation under the New Jersey law? A No, he did. I don't recollect that part of it. I did say we were insured in New Jersey. 30

Mr. Kalisch. The petitioner's attorney has assumed to call this man to the stand as his witness. I maintain he cannot continually ask the same question over again when he has received two answers to the same effect in response to this question. 40

James Kennedy, re-cross.

Mr. Carpenter. I only want one.

The Court. He said he does not remember saying it. That does not deny he said it.

10 Q Do you deny you made that answer? A I have answered you twice on that. I say the same thing over. I don't recollect it. I have always said—

The Court. Don't! You have gone far enough.

Mr. Carpenter. That is all.

Re-cross examination by Mr. Kalisch.

20 Q The reason why you determined to take insurance in one place or another was by reason of the fact that your attorney advised you to so do, isn't that correct?

Mr. Carpenter. I object to that.

The Court. That is not cross examination.

Mr. Kalisch. That is cross examination.

The Court. No, it is not.

Mr. Kalisch. I am cross examining him.

30 *The Court.* No, you are not cross examining him. You are going into his reasons for getting insured in one place in preference to the other.

40 *Mr. Kalisch.* Because your honor has permitted this testimony with reference to insurance to come in. I maintain that what a man does with reference to coverage is not an admission of anything. It is merely that such coverage will protect this and the other will protect that. We all cannot be insurance people and we all cannot know the effect of the laws of different

James Kennedy, re-cross.

states. Therefore, we are bound by the advice of other people, in reference to what coverage protects us and what coverage does not protect.

The Court. I will overrule the question.

Mr. Kalisch. I ask an exception.

The Court. You may have an exception. 10

Exception allowed, sealed accordingly.

(Seal)

.....

Judge.

Q Mr. Kennedy—

The Court. You have cross examined this witness once.

Mr. Carpenter. Petitioner rests.

20

Mr. Kalisch. I ask the petition to be dismissed on the ground there is no proof before the court as to where the petitioner drowned, and the fact that there is no proof before the court that the petitioner was drowned in an accident arising out of and in the course of his employment within the confines or jurisdiction of the State of New Jersey.

The Court. Motion denied. 30

Mr. Kalisch. I ask an exception.

Exception allowed, sealed accordingly.

(Seal)

.....

Judge.

PETITIONER'S CASE CLOSED.

William Bulke, direct.

RESPONDENT'S TESTIMONY.

WILLIAM BULKE, produced as a witness on behalf of the respondent, being duly sworn on his oath according to law, saith:

Direct examination by Mr. Kalisch.

10

Q Mr. Bulke, what is your occupation, what business are you in? A Diver.

Q You are a diver? A Yes, sir.

Q And for what company are you a diver? A Merritt and Chapman.

Q Merritt and Chapman? A Wrecking company.

Q Do you remember doing any diving around this tugboat, "Elsie K"? A I did.

20

Q Is it a fact you had no helper? A I had a helper tend me.

Q What does that mean, tend you? A Hold the lifeline and hose.

Q Has it anything to do with the air? A Air is run by an air compressor.

Q So that there was a man there? A So that there was a man there.

Q You heard Mr. Schlig's testimony? A That gentleman's testimony?

30

Q Yes, sir. A Yes, sir.

Q Did you hear him say there was no man tending you? A I heard something like that.

Q Now, Mr. Bulke, when you went down—when you did your diving act around the "Elsie K."—how far, if you remember, was the boat, the "Elsie K," from the Constable Hook side? A Between seven and eight hundred feet.

Q Between seven and eight hundred feet. Now, do you know how much under water she was? How much under water was the boat?

40

A Thirty-five feet.

William Bulke, direct.

Q Now, oh! Before you started your diving work there, can you tell us whether there were hausers and lines by which the boats, the Merritt-Chapman boats, which were doing this wrecking work, were connected with the New Jersey shore? A The captain will answer that question.

10

Q Do you know? A I know there is none there.

Q There is none there? A The captain will answer that question.

(Last few questions and answers repeated by the stenographer.)

Q What I mean is this: were there hausers attached to those boats which were connected with the New Jersey side? A There was not.

Q There was not? A No.

20

Q Did you hear Mr. Schlig say there were? A Yes.

Q Are you sure there were not? A I can swear they were not.

Q How were them boats kept in place? A Anchors.

Q She was completely covered, the boat? Was she? A Yes, sir; thirty-five feet under water.

30

Q Do you mean thirty-five— A Down.

Q There was thirty-five feet depth there? A Depth there, under water.

By the Court.

Q Did the top of the boat project above the water? A No, below the water.

Q How many feet below? A I couldn't exactly tell you. We had thirty-five feet to the bottom.

40

William Bulke, cross.

Q That is from the surface of the water to the bottom? A Yes, sir.

Q Was thirty-five feet? A Yes, sir; thirty-five feet.

Mr. Kalisch. Cross examine.

10 *Cross examination by Mr. Carpenter.*

Q You say the captain would have to answer the questions as to whether or not there was lines between your boat and the shore. What is the captain's name? A Mr. Captain Blumberg.

Q Is he here? A He is right here.

Q What day was it you went down to raise the "Elsie K"? A If you will let me to take a little memorandum. On the fifth, I think.

20 Q Never mind your memorandum. How many times did you raise her in 1915? A I don't know nothing about that. How many times I raised her.

Q Didn't she sink after you raised her once?

(Question repeated by the stenographer.)

A No.

30 Q What made you hesitate when I asked you that question? A I didn't know what to answer.

Q Why didn't you know what to answer?

(No answer by the witness.)

Q Do you understand my question? A I understand the question.

Q Were you there when the boat went down the second time? Look at me. Don't look back there. Were you there when the boat went down the second time? A When it went down the second time?

40 Q Yes. A No; I wasn't there that time.

William Bulke, cross.

Q You were there when it went the second time? A I was down there, that is all I know.

Q What day was it you were down there, if you know? A On the fifth, I think it was.

Q Of what month? September? A Don't come up to my recollection exactly. I have a memorandum of my log. 10

By Mr. Kalisch.

Q Your log? A Yes, sir.

Q You got your log with you? A Yes, sir.

Q When did you make it up? A Same day; when the boat sunk.

By Mr. Carpenter.

Q You do not keep a log, do you? A Yes, sir.

Q What kind of a log? A Diving log. 20

Q You don't have to do that as part of your duty, do you? A Part of our duty.

Q What time of the day was it you went down there? Thirty-five feet below the water? A It was in the forenoon.

Q What time in the forenoon? A I can't exactly tell you, I got it down here.

Q Can't tell whether it was seven— A I can't exactly tell the minutes. 30

Q What time of the day was it the depth of water was thirty-five feet? A That is the sounding we had.

Q What is that?

(Answer repeated by the stenographer.)

Q You took that sounding or somebody else?

A Captain and me.

Q Where were you, down below? A Up on deck.

Q What did you take the sounding with?

A A lead. 40

William Bulke, cross.

Q Was that sounding thirty-five feet on the inside or the outside of the "Elsie K"? A I can't tell you exactly. We sounded her. That's all; thirty-five feet.

(Answer repeated by the stenographer.)

10 Q Who dictated the distance between seven hundred and eight hundred feet to the shore? You or the captain? A I guess both of us.

Q How did you take it; did you measure it? A No; we didn't have a rule.

Q You just estimated that was the distance, is that so? A I estimated; yes. Between seven and eight hundred feet.

20 Q Did you estimate how far it was from where you were to the—how far was it from where she went down to Bedloe's Island? A I haven't got the plans on that.

Q How far was it from where she went down over to the Brooklyn shore? A I didn't have the sun for that.

Q How far was it from where she went down over to the Staten Island shore? A I give you estimation on where it was from Jersey shore. I don't know anything to the Staten Island.

30 Q It was a good bit further from Staten Island? A I give you my estimation what I judge, and that is all.

Q That is all you can tell us? A That is all.

Q Did you go—what kind of a wrecking apparatus did you have there that day? A Well, we had a derrick and regular diving apparatus.

Q Did you go down on the derrick? A Yes, I went down from the derrick overboard.

40 Q I don't mean that. Did you go down to the place of the accident with the derrick? A

William Bulke, re-direct.

Not with the derrick. I went down to the boat sunk.

Q Did you go down to that point on the tug boat? A I went from the derrick.

Q How did you get down to Constable Hook; did you ride down with the equipment you had, or go row boat? A Went there with the derrick. 10

Q Did you ever go with the derrick to the shore? A No, sir.

Q When the derrick got through work you went with the derrick right home? A I went to the shore.

Q How long did the derrick stay with the wreck?

Mr. Kalisch. I object.

The Court. I will allow it. 20

A I can't tell.

Q Can't you tell whether it was one day or a week? A One day.

Q Did it go back after that? A No.

Q Did you get the boat raised all in one day? A Well, it wouldn't be up today if we didn't.

Q It didn't take you more than one day to do the job? A One day. 30

Mr. Carpenter. That is all.

Re-direct examination by Mr. Kalisch.

Q That log you have in your pocket, will you produce it, please? A If I have privilege to do it.

Q Just produce it and the court will determine afterwards whether we can use it.

(Witness produces "log.")

Q This you made the same day you made the diving? A Yes, sir; same day. 40

William Bulke, re-direct.

Q Does that correctly state the place where you did the diving from? A Yes.

Q And the tender? A Everything.

Q And the vessel wrecked or object? A Yes.

Q Location? A Yes, location.

10 Q Depth? A Depth.

Q From what boat you worked from? A Yes, sir.

Q The time? A Yes, sir.

Q Time you were in dress? A Yes, sir.

Q Time diving? A Yes, sir.

Q And the full particulars done and services rendered? A Yes, sir.

Q And did you sign this signature, diver, W. Bulke? A I did.

20 Q Is that stamped Merritt and Chapman? A Merritt and Chapman, right.

Q And the date, August fifth? A That is right.

Q Date of the dive? A Date of the dive.

Mr. Kalisch. I ask to introduce that into evidence.

Mr. Carpenter. I object to that as incompetent, irrelevant and immaterial.

The Court. On what ground?

30 *Mr. Carpenter.* Apparently this is only one sheet of a number of sheets. I can't see on any theory on which this is relevant.

Mr. Kalisch. I will not use this for the purpose of putting it in evidence. I will ask it for the purpose of refreshing his recollection.

Mr. Carpenter. If that is what it is for, all right.

40 (Mr. Carpenter examines it.)

William Bulke, re-cross.

Q By looking at this diving log will that make you sure as to the date? A Yes, sir; sure of the date.

Q What is it? A August fifth.

Q Yes. And by looking at the next line in which it says "diver," with your name opposite, does that recall anything to your mind? 10

A Yes, sir; William Bulke.

Q And what was the tender? Carlson? A Carlson.

Q And the wreck is what? Steamboat, tug, what? A "Elsie K."

Q Location? A Well, I got it New Brighton.

Q New Brighton, Staten Island? A Yes.

Q And the depth thirty-five feet? A Thirty-five feet.

Q And you worked from the— A Derrick 20
Century.

Q How long were you dressed?

Mr. Carpenter. I object to that; I do not think that is material.

A Time dressed eight forty-five.

Mr. Carpenter. Eight forty-five to eleven fifteen a. m. And you were diving from nine to eleven.

Q And what was the work done? A Plac- 30
ing wires—place schlings in the tugboat.

Q By the way, you afterwards turned that in to the company, didn't you? A To the company, yes.

Mr. Kalisch. That is all.

Re-cross examination by Mr. Carpenter.

Q Your address there of New Brighton, Staten Island, how did you come to put that on there? A Well, I don't know exactly to put 40

William Bulke, re-cross.

down, I put down New Brighton, I live right there, and we towed it across; and I put on New Brighton.

Mr. Carpenter. All right; that is all.

By the Court.

10 Q I want to ask you some questions. What caused the sinking of the boat, if you know? A Well, I couldn't tell you. It was blowing pretty hard.

Q Do you know the Kill von Kull? A Yes, sir.

Q Did this boat sink within the Kill von Kull? A Well, about seven or eight hundred feet from the dent.

20 Q That is you mean seven or eight hundred feet up toward New York? A Well, right from the new part. There is kind of a new part built there.

Mr. Kalisch. Perhaps that will illustrate something.

By Mr. Kalisch.

Q There is a filled in property there? A Yes, sir.

30 Q About how many feet out? A I couldn't tell you.

Q Do you know at that time whether part of that property was built out? A Well, I couldn't hardly say.

By the Court.

Q Well, now, was the boat sunk in the narrow channel of the Kill von Kull, or in the wide place? A It was right in the shallow part of the channel.

40 Q In the narrow part of the channel? A Yes, sir.

John Blamberg, direct.

Q Then she was opposite Brighton, was she? A Right opposite Brighton.

Q Right opposite Brighton. And do you know where the Crude Oil Company is? A Yes, sir.

Q Where is that located? A That is up next what you call— 10

Q Constable's Hook? A Constable's Hook; yes, sir.

Q Are there docks there now? A Yes, sir; there are docks there.

Q Well, now, do I understand you to say that the tugboat sunk between Constable's Hook and Brighton? A Yes, sir; right in between there.

The Court. Right in between; I see.

Mr. Kalisch. That is all. 20

Mr. Carpenter. That is all.

The Court. That is all.

Mr. Carpenter. I would like to ask the address of Mr. Bulke.

A 218 Fourth avenue, New Brighton, Staten Island.

JOHN BLAMBERG, produced as a witness on behalf of the respondent, being duly sworn on his oath, according to law, saith: 30

Direct examination by Mr. Kalisch.

Q For whom do you work? A Merritt-Chapman Wrecking and Derrick Company.

Q Do you remember having seen the "Elsie K" raised? A Yes, sir.

Q And what date was that, do you remember what date? A As near as I can remember it was August fifth.

Q How many times was it raised? Once or more? I mean on that sinking? A I never 40

John Blamberg, direct.

raised her more than once. That is the only time I had anything to do with it.

Q After it was raised on that day do you know whether it was towed into port? A Took her into Burden's, I think.

10 Q You don't know where? A I am pretty sure she went into Burden's Dry Docks, or to West Brighton.

Q How far away from Constable Hook would you say the boat was when you raised her? A To my judgment it should be between seven and eight hundred feet as near as I can judge.

Q And is that the narrow place between Constable Hook and New Brighton, is that correct?

20 *Mr. Carpenter.* That is leading question, I object.

The Court. Yes.

Mr. Kalisch. I withdraw the question.

Q The point at which you saw the boat before it was raised was between what points of land? If you know. A Why, it was right off the ends of the new docks, Constable Hook.

Q Between Constable Hook and what place? A Staten Island.

30 Q Staten Island, and you say about seven or eight hundred feet off Constable Hook? A Yes, sir; as near as I can tell.

Q When you raised this boat, the "Elsie K," was the boat raised with hausers connecting your working boats with Constable Hook, or the New Jersey shore? A No, four anchors, moored with four anchors.

40 Q Was there any connecting lines at all between your boat and the Jersey shore? A No, sir.

John Blamberg, cross.

Q Were you there when Bulke went down diving? A I was.

Mr. Kalisch. Cross examine.

Cross examination by Mr. Carpenter.

Q Did you go ashore at any time while your apparatus was down there? A No, sir. 10

Q Are you the captain? A I am captain; yes, sir.

Q What derrick did you have down there? A Derrick Century.

Q Are you still employed by Merritt & Chapman? A I am.

Q How long was your boat—or your derrick—down there? A We went there in the morning and we towed into West Brighton that evening before dark; one day. 20

Q Didn't the boat go down twice? Didn't you raise the boat, and didn't she go down again? A Not that I know of.

The Court. Did you ever hear of that?

A No, sir.

Q Do you know whether any report was made to the United States Government officials saying the "Elsie K" was raised and she went down again? A I don't know anything about it. 30

Q Do you know what made the boat sink? A I do not. I wasn't there when that happened. It was down when I went there.

Q Did she have holes in it? A No.

Q Did you discover anything out of order with it? A I didn't.

Q Now then you say she went down about between seven and eight hundred feet off the new docks of the Standard Oil Company? A New docks at Constable Hook there. 40

John Blamberg, cross.

Q Those docks run straight out into New York Bay, don't they? From the shore? A Practically so. Off the corner there.

(Answer repeated by the stenographer.)

Q But they run directly from the shore out into the waters of the New York Bay, don't they?

10 A They do. They don't run spare out to the Kill, they come kind of cornerway out of the corner there.

Q They are not in the waters of the Kill von Kull are they? A I am not sure what you call them. How far out you call Kill von Kull I couldn't answer that.

Q Is it your judgment that the boat was seven or eight hundred feet from the face of the docks away from the shore? A From the outer part
20 of the docks.

Q As they were at that time?

The Court. From the outer part of the docks?

A From the outer part of the docks.

Q As they were at that time? A As they were at that time.

Q Have you been down there since that time? A Not exactly at that place. I was over near
30 there. They were just building them then. And it was just built there then. I am not sure whether they were all built or not at that time.

Q They had started to build those new piers at this time? A They had drove piles.

Q At that time were they just piles there? A That's all. On the outer end of them anyhow.

Q You are pretty sure you didn't have any lines over to those piles? A Surely not. Then no-boats would be able to go up and down if they
40 wanted to.

James Kennedy, direct—cross.

Q Is that the reason you didn't tie at the pile?

A Well, one answer. Another one, if I wanted to put lines on those piles they were just drove there I wouldn't have been allowed to do that.

Q You were close enough to put lines? A Sir?

Q You could have put lines there? A I suppose I could only I didn't though. 10

Q You were close enough to put lines to those piles? A We have a good many thousand feet of lines aboard that boat.

Mr. Carpenter. I think that is all.

Re-direct examination by Mr. Kalisch.

Q How many feet of water was that boat? A About thirty-five feet.

Mr. Kalisch. That is all. 20

Re-cross examination by Mr. Carpenter.

Q Do you know whether the dredging had been done there for the slips at that time? A I don't know.

Q For the docks? A I don't know.

JAMES KENNEDY, recalled.

Direct examination by Mr. Kalisch.

Q Mr. Kennedy did you employ Mr. Coon in New Jersey to work in your boat? A No, sir. 30

Mr. Kalisch. Did not. That is all.

Cross examination by Mr. Carpenter.

Q You paid him though, didn't you? A I paid him, yes, paid him often.

Q Where did you have your bank account? A Elizabeth.

Q You paid him by checks? A Yes, sir.

Q Twice a month? A Twice a month. 40

James Kennedy, cross.

Q Now, Mr. Kennedy, tell me this: You know where the boat was raised, don't you? A Yes, sir.

Q It was raised about five hundred feet off the banks of Bayonne? A Yes, five or seven hundred feet I thought.

10 Q I want you to be about as exact about this as we can be. You testified before the New York Commission and I am asking you this so you will have the benefit—

Mr. Kalisch. I object to the form of the question on the ground that is not the same proceeding. It is an entirely different proceeding and the reading into the record from testimony from another case is improper.

20 *Mr. Carpenter.* I propose to show he testified on another occasion. I do not care where.

Q That, "when we raised her it was five hundred feet out."

The Court. I will allow that question.

A I still stick—

The Court. The question is not put to you yet.

30 Q That is the question. That is a question put to you by Mr. Bingham. "Question: And do I understand that she (that is the boat) had arrived about five hundred feet from the New Jersey shore off Bayonne, New Jersey, when this accident happened?" And do you remember answering: "Yes, sir; that is where she sunk anyway. When we raised her it was about five hundred feet out." A That is what I thought.

Q That is your testimony? A Yes, sir; I wasn't there when she sank.

James Kennedy, cross.

Q I want to ask you this further one, so as to get the thing down right. You were asked on another hearing—by Commissioner Lyon, in New York: “Where was she sunk?” And didn’t you answer—

Mr. Kalisch. I object to this, that it is improper to read a question and answer in a proceeding of this kind from a record which is not authenticated. Also there is no denial on this witness’ part of any fact and before that time it is not proper to read the answer, which he claims to have been given in other proceedings. 10

Mr. Carpenter. I do not expect to, for a minute, influence this Court by something done on other proceedings. What I want to get is the truth. I will refresh the witness’ memory and it will give us the facts the best way we can do it, and I am asking the respondent himself who has not been interrogated on this point in this matter. 20

Mr. Kalisch. I object to his reading his answer, until an answer is given by the man on the stand.

The Court. Read the question.

(Question repeated by the stenographer.)

The Court. The witness was called originally by the petitioner and he finished his examination and then he was cross examined by the attorney for the respondent, left the witness stand and after several witnesses had been examined he was called back again by the attorney for the respondent. Not to correct any testimony he had given, but as an original witness. 30

Mr. Carpenter. As a party to the case. 40

James Kennedy, cross.

10 *The Court.* And now he has been examined and the cross examiner desires to cross examine not only on those questions which would be cross examination, but as to other matters within his knowledge, and one of those things within his knowledge to which his attention is called is testimony which he gave on a proceedings in the City of New York, as I understand it, where other proceedings involving the same questions as are here, were before the Court, which had this witness under examination. Now, I will allow—

20 *Mr. Kalisch.* I am not objecting to the asking the question. I say it is improper to read into the record from any other State until this man has had an opportunity to answer here.

Mr. Carpenter. I will not ask him—

The Court. Let the Court rule with reference to all those questions.

30 *Mr. Carpenter.* I already asked him about the distance and he gave it and now then what I am reading is his testimony on that very precise point. He said where was she sunk; this was the question before the New York Commission and he gave this answer: about five hundred feet from the shore, I should judge.

The Court. He has already testified to that.

Mr. Carpenter. This was on a different date.

The Court. On a different date?

Mr. Carpenter. Yes, sir.

James Kennedy, cross.

The Court. Is this different date involved in this case any way?

Mr. Carpenter. No, sir; I think not.

The Court. Why should you examine on it?

Mr. Carpenter. I want to show time and time again he said the same thing. 10

The Court. I will rule it out under those circumstances.

Q And how near to the New York shore was the boat when she went down?

Mr. Kalisch. I object to that as it is a wrongful assumption of fact, inasmuch as this man has testified he didn't see the accident.

The Court. I will let him testify as to what he saw when he got there. He was the most interested person as to what happened that boat. And he went right there, no doubt. I will allow it to be shown. 20

A You mean Staten Island?

Q How near the New York shore was it? A Staten Island shore, you mean?

Q Yes? A Well, I couldn't exactly say the distance; I should think she was at least seven or eight hundred feet. 30

Q Well, didn't you testify when you were asked before the New York Commission by Commissioner Lyon, as follows: "Q How near the New York shore was it?" And didn't you answer: "The distance from there to Staten Island was about a half a mile to the best of my knowledge." A Something like it. I guess I did. And that is about what I mean now.

Q And that is what you mean now. A That is about. I am not up to figure her feet and miles. 40

James Kennedy, cross.

Q Your best judgment is that the boat went down about five hundred feet from the New Jersey shore?

10 *The Court.* He has already testified, so do not emphasize it. He said that, that she went down about five hundred feet from the Jersey shore. And now he says that she was about, when he saw her lifted up, she was about a half a mile from the Staten Island shore.

Q That is your best recollection? A I don't want to contradict nothing.

20 *Mr. Kalisch.* It is my objection that this witness has not seen it. It is my objection that there is no testimony in this case that the boat is likely to stay at the point where she sank.

Q Mr. Coon was injured in an accident before this one in which he met his death?

Mr. Kalisch. I object to that.

A Several.

The Court. What has that got to do with it?

30 *Mr. Carpenter.* It has this to do with it: we are concerned here with the question of whether this was a New Jersey or a New York employment. If it is a New Jersey employment unquestionably we are entitled to compensation even though this accident happened in New York. If I can show that this man was injured, the same man whose death we are having the controversy about, was injured in the course of his employment, and was paid compensation, what stronger evidence can I get of the fact that this was a New Jersey employment? I cannot get him

40

James Kennedy, re-direct.

to testify to it. I can only get the employer. And this is only a summary proceeding. If I can show that this man was injured in the course of his employment, and he was paid compensation, isn't it a very strong piece of evidence that his employment was in New Jersey? That is not conclusive, of course, 10
but it is one piece of evidence.

The Court. Was it paid on a judgment obtained in this State?

Mr. Carpenter. No, I do not claim that.

The Court. He was paid by Mr. Kennedy you mean? Compensation for his injuries?

Mr. Carpenter. He is injured in the course of his employment after this statute went into effect, and paid under the New Jersey statute. 20

The Court. I do not think it would have very much bearing on this particular case. I will deny your right to ask the question.

Mr. Carpenter. And may I ask an objection?

The Court. Yes.

Re-direct examination by Mr. Kalisch.

Q You said five hundred feet, are you sure it was five hundred feet? I understood you at one other time to say from five to seven hundred feet. 30

Mr. Carpenter. I object.

The Court. And I will allow it.

A I am not positive of five hundred feet no more than I am positive eight hundred feet.

James Kennedy, re-direct.

By the Court.

Q How wide is the Kill von Kull, or the waters between the Staten Island shore and the New Jersey shore where the boat was sunk? A Well, it widens out where it was sunk, and I should judge it was pretty near three-quarters of a mile.

10 Q Three-quarters of a mile? A Yes, sir. The way it branches out large and comes back narrow and then spreads out large and leads up to Bayonne in the middle where it was sunk.

Q The boat was sunk on the fifth of August, 1915? A Yes, sir; fourth of August|

Q Fourth of August. And you were not on board the boat when she sank, were you? A No, sir.

20 Q How did you receive communication that she did sink? Do not tell us what anyone said. How did you receive it, by telegram, or word of mouth from somebody, or see it yourself? A I was in another little boat that morning. I was steering a boat myself and I was going out that way and they hailed me on the dock in Burdens' shipyard, Staten Island and asked—

Q Do not tell what they asked. From that they said what did you do? A I went out to New Brighton, and found the boat.

30 Q Was that on the fourth? A Yes, sir; the morning I was there about three hours or two hours after she sank.

Q How did you know it was two or three hours after it was sunk? A Because I left here and went over to Bergen Point and they had that awful storm and it was hail and I went off about eight o'clock and that took me about an hour or an hour and a half before I got there.

40 Q How long have you been connected with the steamboat business in the harbor of New York? A About thirty-five years.

Anker Nelson, direct.

Q From your experience would you say that the boat after she had sunk had floated inward or outward? A Well, when this boat sunk—

Q Could you say yes or no? A I could say on this—this is a peculiar case. When this boat sunk her engine was working when she went down. It was not stopped, as I understand it; it was in motion. 10

Q She could not remain in motion after she went down. A No, what I mean she was still going ahead, even if she did go under water the steam would not lose its power at once. And it might be three or four or five minutes before the engine was stopped. She had on full head of steam, one hundred and twenty pounds, or whatever was on it and she went down with the wheel revolving. 20

ANKER NELSON, produced as a witness on behalf of the respondent, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Kalisch.

Q Mr. Nelson, were you on the boat the day she foundered? The "Elsie K"? A Yes, sir.

Q Do you know whether the boat foundered—strike that out please. Do you know whether Mr. Coon jumped off the boat before she went down? A Yes, sir. 30

Q Did he? A Yes.

Q And do you know the point at which he jumped off the boat? A I think about five hundred feet from the coal dock.

Q From the coal dock where? A Staten Island.

Mr. Carpenter. I object and move to strike it out as not being a statement of fact, 40

Anker Nelson, cross.

but a guess on the part of the witness, as is very evident.

Mr. Kalish. I certainly think that the defendant cannot wait and speculate upon the answer.

10 *The Court.* As I understand it, the answer, it is that Coon jumped off the boat about five hundred feet from the coal dock. The coal dock on Staten Island.

Mr. Carpenter. He didn't say that. He said: "I think it was."

Q You say about five hundred feet from the coal dock? A Yes, sir.

Q After he jumped off what happened with reference to the boat? What did the boat do?

20 A She went full speed, across over to Constable Hook.

Q She went full speed across over to Constable Hook? A Yes, sir.

Q And she continued to go for about how many hundred feet or how many feet? A Oh, about three or four hundred feet.

Q Where do you live? A (Continued). I live at No. 208-A Twenty-ninth street.

30 Q Whereabouts? A Between Fourth and Fifth avenue.

Mr. Kalisch. Cross examine.

Cross examination by Mr. Carpenter.

Q What city? A Brooklyn.

Q Do you know Mr. Coon? A Yes, sir.

Q How long had you worked with him? A Oh, I was there about three months.

40 Q And what was your job on the boat? A Cook and deckhand.

Anker Nelson, cross.

Q And where were you at the time Coon jumped overboard? A I stood right alongside of him on the rail. On the port side.

Q And how long after he jumped over, did you jump over? A I stood right until the boat sank down on the top deck.

Q Why didn't you jump when he jumped? A 10
No, because I got hold of the life preserver.

Q Did you have a life preserver? A Yes, sir.

Q Did you offer it to Coon? A No, sir; I saw it on the—

Mr. Kalisch. I object to that as immaterial whether this man offered a life preserver to Coon or not.

(Testimony repeated by the stenographer.)

The Court. What is the object of it? 20

Mr. Carpenter. I would just as soon have it stricken out if he objects to it.

The Court. It is stricken out.

Q Didn't you rush out of your place where you work and jump overboard yourself? Didn't you run out— A No, sir; I was on the top of the boat about fifteen minutes.

Q Didn't you have a fork and knife in your hands when they picked you up? A Yes, sir. 30

Q What did you hold on to them for? A That I don't know.

Q You mean to say that boat was right over close to Staten Island and then turned around and went clear over to Constable Hook?

Mr. Kalisch. I object to that on the ground it is not a statement of facts according to the testimony of this witness.

The Court. I think if you will put your questions a little differently it will be all 40

Anker Nelson, cross.

right. I suppose your object is this: why this boat turned and put into Constable Hook instead of putting into Staten Island, if Staten Island were nearer to him than Constable Hook?

10 Q Do you mean to say that boat was right close up to the coal docks in Staten Island? A About five hundred feet or so from it.

Q Why do you say five hundred feet? A Because I can't say anything else.

Q Who told you five hundred feet? A Nobody.

Q Who asked you to come here today? A I got order from the lawyer.

Q What lawyer? A Mr. Kalisch.

20 Q Whereabouts were you when you got your orders? A Well, I was home, in the house, my brother had a little slip with a telephone number of a man was, I don't know his name, Mr. Maloney, he told me to go over to Mr. Kalisch.

Q How long have you been in this country? A Me?

Q Yes? A Five years.

Q Are you a citizen? A No, sir.

Q Taken out any of your papers? A Yes, sir.

30 Q Whereabouts? A In the Court House in Brooklyn.

Q How far—how close to the New Jersey shore would you say this boat was when it went down? A From six to eight hundred feet.

Q How many? A From six to eight hundred feet.

40 Q How far would you say it ran between the time Mr. Coon jumped off according to your story and the time the boat sank? How many feet A I don't know how long distance a boat could run, but I am sure it was running about

Anker Nelson, re-direct.

fifteen minutes after he jumped off. I should say about three hundred feet.

Q About three hundred feet you ran altogether? A Yes, sir.

Q Which direction were you going, toward Kill von Kull at that time? A Yes, sir.

Q Coming from Brooklyn? A Yes, sir. 10

Q Did your boat change its course at all running from Brooklyn to Kill von Kull? A Yes, sir. She changed because the captain run out from his pilot house to—the time the engineer jumped then the wheel was hard aport, and she shoot over to Constable Hook side.

Q I see. But your course before that had been to Brooklyn, to New Brighton, had it? A Yes, sir.

Q Sure of that? A Yes, sir. 20

Q Were you out on deck at the time? A I was in the pilot house.

Q What made you go on deck? A Well, when she got so I rushed out and saw what is the matter, it was—

Q And she went down almost immediately after you got out? A No. She was going fifteen or twenty minutes after I went out.

Q Were you in the pilot house? A Out on the top deck. I wasn't in the pilot house. 30

Q The top deck? A Yes, sir; in the box where the life preservers are.

Re-direct examination by Mr. Kalisch.

Q Was there anybody in the pilot house after Coon jumped off, if you know? A Yes, sir the captain was there.

Q How long was he there? A Well, he wasn't there very long after. He came running out on deck. 40

Harrison R. Van Duyne, direct.

Q He came running out too? A Yes, sir.

Mr. Kalisch. That is all.

By the Court.

Q What was the distance between Staten Island and New Jersey shore at the time the
10 boat sunk? A I couldn't say.

Q Half mile, quarter mile or mile? A I couldn't say about that distance.

Q You have calculated on the distance that boat from Staten Island. How long had you been on those waters? A About four years.

The Court. About four years? That is all.

By Mr. Kalisch.

Q You are positive, however, about the fact
20 that she went on three or four hundred feet after he jumped? A Yes.

Mr. Kalisch. That is all.

Q Do you know what direction that was from the New Brighton or Staten Island side at which Mr. Coon jumped off? A North.

Mr. Kalisch. That is all.

HARRISON R. VAN DUYNE, produced as a
30 witness on behalf of the respondent, being duly sworn on his oath, according to law, saith:

Direct examination by Mr. Kalisch.

Q Mr. Van Duyne, what business are you in?

A Civil engineer and surveyor.

Q How long have you been in the business?

A Twenty years.

Mr. Carpenter. That is all I want.

Q Whereabouts, Newark? A Newark.
40

Harrison R. Van Duyne, direct.

Q Will you look at the map you have before you, Kill von Kull, New Jersey, Staten Island, and show us—or show us the points between the coal dock, coal pockets and the new docks in Constable Hook. Nearest points. A I haven't got your questions exactly.

Q Measure the distance. A You mean across Kill von Kull? 10

Q Yes? A I have transferred the scale of the map to a little piece of paper.

Q Is that done accurately, Mr. Van Duyne? A This I have done accurately on this paper which you can check up on this scale.

Q All right. Just give us the distance, will you please? A Constable's to the coal pockets and the end of the new docks at Constable Point.

Q Constable Hook. It is Constable Point. 20

By the Court.

Q Who made that map. A That is the survey of the Kill von Kull, United States East Coast, New York and New Jersey Geodadic survey map.

Q It is not very correct in its name. Kill von Kull is not the proper name.

By Mr. Kalisch.

Q You have Constable Point. A Distance from the coal pockets as indicated from a point which I can designate as "A," if you so wish it— 30

The Court. Do so.

A (Continued.) to the slips or docks at Constable Point, which I will designate as "B," is twenty-one hundred feet.

Q Now the nearest points between the two shores?

The Court. You mean whereabouts? 40

Harrison R. Van Duyne, direct.

Q Between the two? A At a point opposite New Brighton to the line—to the outside line of the slips on Constable Point it is about twelve hundred feet. Between eleven and twelve hundred feet.

Q That immediately opens out, does it not?

10 A In width, yes.

Mr. Carpenter. As it enters into the New York Bay?

A Exactly.

The Court. Nearest point on shore or the docks built upon the shore?

Mr. Carpenter. Narrowest part of the Kill.

A That does not go to the shore line. That goes to the exterior wharf ends.

20 *Mr. Carpenter.* You mean as established, or contemplated?

A Neither. As shown on this map.

The Court. Is that so with respect to the first distance which you gave, twenty-one hundred feet?

A That is also so with reference to the first distance.

30 Q It is not from the shore line as you are measuring, but from the dock lines? A From the dock lines.

Mr. Kalisch. As a matter of fact it is so indefinite, especially as where the point of this sinking is I don't know the map will do us any good. Do you want to cross examine, Mr. Carpenter?

Mr. Carpenter. No, sir.

Mr. Kalisch. If Your Honor please, that is the defendant's case.

40 Defendant (Respondent) rests.

John Schlig, direct.

PETITIONER'S REBUTTAL TESTIMONY.

JOHN SCHLIG, recalled in rebuttal.

Direct examination by Mr. Carpenter.

Q Mr. Schlig, you said you came out of the boat after she—or she was going down? A 10
Yes, sir.

Q Did you see Nelson at all overboard? A
Overboard?

Q Yes? A No, I didn't.

Q Do you—you don't know whether he jumped off or stayed on the boat until she went down, do you? A That I can't say.

Q You saw Coon in the water after you were in the water? A Yes.

Q And was that before or after the boat went down? A After the boat went down. 20

Q And was he then nearer the New York or Jersey shore? A Why he was nearer the Staten Island at the time; wind had blown him down; at that time had taken him down.

Q Within how many seconds or minutes was it, if you can tell? Was it after the boat went down? Was it right afterwards? A That I can't tell exactly.

Q Was that right after you got in the water? A Yes. 30

Q When you were looking around?

Mr. Kalisch. I object to the form of the question.

The Court. Isn't this new examination? In what respect is it rebuttal?

Mr. Carpenter. He said Coon jumped overboard next to Staten Island.

Q While you were in the water did you see Coon? A Yes, and the captain. 40

Harrison Van Duyne, direct.

Q Was that the last you saw of him? A
That was the last I saw of him.

Mr. Carpenter. All right.

Mr. Kalisch. No cross examination.

10

RESPONDENT'S SUR-REBUTTAL TESTIMONY.

HARRISON VAN DUYNÉ, re-called.

Direct examination by Mr. Kalisch.

Q Mr. Van Duyne, five hundred feet north, from the beginning of those docks will bring you on which side of the dividing line between New York and New Jersey?

20

Mr. Carpenter. I object now on the ground we are not concerned with the location of any alleged docks on this map; we are concerned with docks which were in the course of construction at the time this accident happened, and this witness has said so.

Mr. Kalisch. This is the Staten Island side.

30

Mr. Carpenter. And this map made in 1913, or two years before this accident, happened, and it is a known fact, I think the Court will take knowledge of, that there are extensive docks being built there at this time. And they take measurements there for the purpose of this case from docks which are not in question.

Mr. Kalisch. Mr. Carpenter evidently does not understand my question. I said from coal pockets at Staten Island, five hundred feet north. Where would that bring him, on which side of the line.

40

Harrison Van Duyne, direct.

The Court. Five hundred feet north of what?

Mr. Kalisch. Coal pockets testified to in Staten Island, and which side of the divide would it bring him, reckoning it out.

The Court. I do not know what you are trying to get at. 10

Mr. Kalisch. If your Honor does not think it material.

The Court. That map was made in 1913.

Mr. Kalisch. This is made in 1889, your Honor.

The Court. Then I cannot consider any of the maps.

Mr. Kalisch. I will withdraw mine.

Mr. Carpenter. Only so far as the New Jersey lines. 20

The Court. I suppose the 1899 map is all right so far as the line which divides the territory of the two States.

Q How have you plotted this out? A I have plotted out the line between New York and New Jersey with reference to fixing what is the position, but with reference to plottings from the meridians and that is scaled off from the geodadic survey in New Jersey so that in my opinion that dividing line is right as near as it can be obtained. 30

Mr. Kalisch. May I ask the question—

The Court. I think I have all the testimony in this case that will do me any good. This map is made before this accident, and he is going to take bearing from points of this map that may not have been in existence at the time. 40

Harrison Van Duyne, direct.

Mr. Kalisch. That would not change the line if he determines the lines by meridians, not by points which are new or old.

10

The Court. I think it would. He has to take some starting point. And you refer to coal pockets, and those coal pockets may not have been there in 1915.

Mr. Kalisch. May I then—may I introduce evidence as to the effect of the coal pockets there then?

The Court. Yes, you may do that.

Mr. Kalisch. I will let the evidence stand, as it is.

Mr. Kalisch sums up for the respondent.

Mr. Carpenter sums up for the petitioner.

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30

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Reasons.

Reasons.

Filed.

New Jersey Supreme Court.

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JAMES KENNEDY, trading as
KENNEDY'S TOWING LINE,
Prosecutor,

vs.

COURT OF COMMON PLEAS in and
for the COUNTY OF UNION and
ABRAM P. MORRIS, Clerk of
said Court, and REBECCA
COON, Administratrix, &c., of
ROBERT COON, Deceased,
Defendants.

On certiorari.

Reasons.

20

The prosecutor presents the following reasons for setting aside the proceedings, determination and statement of facts and judgment brought before this Honorable Court by the writ of certiorari in the above entitled cause:

1. There were no facts adduced at the hearing to support the finding of the trial court that petitioner's intestate was drowned in the waters of the State of New Jersey. 30

2. There was no proof that petitioner's intestate was drowned in the waters of the State of New Jersey, but on the contrary it appeared that he was drowned in New York waters.

3. The trial court's finding as to the point at which the "Elsie K" sank was not based upon any evidence adduced at the hearing. 40

Reasons.

4. The Court erroneously refused to allow respondent to ask the following question: "The reason why you determined to take insurance in one place or another, was by reason of the fact that your attorney advised you to do so, isn't that correct?"

10 5. The trial court made an erroneous conclusion in finding that, "If deceased jumped from the boat, according to Nelson, when it was five hundred feet from the coal dock on Staten Island, then the boat went a distance of from thirty-four to thirty-five hundred feet before it went down. I do not think that the boat could have proceeded this distance as she was going down when the deceased jumped into the water."

20 6. The trial court erroneously found in his conclusions as follows: "And again the testimony of Schlig is contradictory of that given by Nelson, Schlig swearing that deceased went into the water where he was drowned about five hundred feet from the New Jersey shore."

30 7. The following conclusion is not based upon any evidence: "It did not happen in the Kill, as the water there is very deep and runs through a narrow channel, carrying the waters of the Newark Bay, into which empty the Passaic and Hackensack Rivers, and a part of the waters of the Staten Island Sound."

40 8. The following finding is erroneous as not being based upon any facts adduced at the hearing: "On the north of the boundary line, at the mouth of the Kill von Kull, the waters are generally only twenty feet deep, but near the boundary line run to a depth of thirty and thirty-three feet. On the south, or New York side of said boundary line, the depth of the water is from forty-one to forty-eight feet, and the map and

Reasons.

soundings which it contains, go to sustain the testimony of Kennedy, the respondent. Now, as the tugboat sunk to a depth of thirty-three or thirty-five feet, it is evident that the sinking took place in New Jersey waters, and not in the Kill or deep water."

9. The following finding is erroneous as not being based upon any facts adduced at the hearing: "From a careful study of the testimony and of the map, I am led to the conclusion that the drowning of the deceased and the sinking of the boat, both happened in New Jersey waters." 10

10. Because the map which was used by the Court in determining upon the conclusions to be filed in this matter, was not introduced in evidence and at most was used for the purpose of fixing the boundary line between New York and New Jersey, and therefore it was not proper for the trial court to use the soundings which the conclusions set forth appear on the said map, as neither counsel nor the court referred to the soundings during the trial and there was no proof of the correctness of the said map with reference to the depths which the court finds, appear in the said map. 20

11. The following finding is erroneous as not being based upon any facts adduced at the hearing: Because the facts on which the conclusions by the court are based, do not support a recovery of any compensation or funeral expenses by reason of the death of the petitioner's intestate. 30

12. Because the conclusions in itself was a determination of facts and provided that "Judgment may be entered accordingly," and therefore, the entire determination of facts as presented by the petitioner and differing from the 40

Reasons.

conclusions was improperly and erroneously allowed to be filed.

13. Because the determination of facts as filed should have contained the same findings of facts as the conclusions filed by the court.

10 14. Because the court refused upon the argument of a motion for the modification of the determination of facts, as filed by the petitioner, to modify the same in the following particulars:

Request No. 1—Respondent maintains that the following determination of fact, namely, "That the residence and principal place of business of the respondent is at Elizabeth, Union County, New Jersey," be amended to read, "That the residence and a place of business of the respondent is at Elizabeth, Union County, New Jersey," the respondent having also another place
20 of business in New York City. Request denied because the change is immaterial.

Request No. 2—Respondent maintains that the following determination of fact, namely, "That the said Robert Coon was employed a large part of the time in the State of New Jersey, and that his employment was under the Laws of New Jersey," should be stricken out as not conforming with the conclusions filed by the court reading as
30 follows: "The testimony does not show where the hiring of the deceased took place." Request denied, because the court feels that the employment was under the Laws of New Jersey, regardless of the place of hiring.

Request No. 3—Respondent maintains that the following determination of fact, namely, "That his (Coon's) employment in the State of New Jersey was fully one-half of the time that he worked for the respondent," be amended to read,
40 "That his (Coon's) employment consisted of

Reasons.

work both in the State of New Jersey, New York and other States." Request denied.

Request No. 4—Respondent maintains that the following determination of fact, namely, "That the employment of the said Robert Coon was not under the Laws of any other State than the State of New Jersey," be eliminated, because of the fact that the court in his conclusions found as follows: "The testimony does not show where the hiring of the deceased took place." Request denied. 10

Request No. 5—Respondent maintains that the following determination of fact, namely, "I further find as a fact that the said Robert Coon met his death when the tugboat 'Elsie K' foundered," be amended to read, "I further find as a fact that the said Robert Coon met his death somewhere near the time when the tugboat 'Elsie K' foundered." Request denied. 20

Request No. 6—That the determination of facts and order should contain the following finding: "The testimony does not show where the hiring of the deceased took place." (which finding was set forth in the conclusions filed by the trial court). Request denied.

KALISCH & KALISCH, 30
Attorneys of Prosecutor.

Notice of Appeal.

(Served Oct. 26, 1917; Filed Oct. 30, 1917.)

NEW JERSEY SUPREME COURT.

REBECCA COON,

*Petitioner-Appellant,**vs.*JAMES KENNEDY, trading as Ken-
nedey's Towing Line,*Respondent-Appellee.***10**TO MESSRS. KALISCH & KALISCH,
Attorneys of Respondent.

Please take notice that Rebecca Coon, the above named petitioner, does hereby appeal to the New Jersey Court of Errors and Appeals from the judgment of the New Jersey Supreme Court entered in the above entitled cause the 20th day of October, 1917, reversing the judgment of the Union County Court of Common Pleas in favor of the petitioner.

20

Further take notice that the following are the reasons which will be urged for the reversal of the judgment of the Supreme Court:

(1) Because the Supreme Court reversed the judgment of the Union County Court of Common Pleas.

30

(2) Because the Supreme Court held that the Union County Court of Common Pleas did not have jurisdiction to enter the judgment and determination made by it below.

(3) Because the Supreme Court held that the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) is in conflict with Article 3, Section 2, of the United States Constitution extending the judicial power of the United

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Notice of Appeal.

States to all cases of admiralty and maritime jurisdiction.

10 (4) Because the Supreme Court held that the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) is in conflict with Article 1, Section 8, of the United States Constitution, giving Congress power to make all laws necessary and proper to carry into execution powers vested in the Federal Government.

(5) Because the Supreme Court held that the Union Common Pleas did not have jurisdiction in this cause for the reason that under the provisions of the Judicial Code of the United States, the United States District Courts have exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction.

20 (6) Because the Supreme Court held that the question of the jurisdiction of the Union Common Pleas Court would be considered despite the fact that it had not been raised in the trial court, whereas the Supreme Court should not have considered such question.

(7) Because the Supreme Court did not hold that since the question was not raised in the trial court that this cause was within the exclusive jurisdiction of the admiralty courts, such question would not be considered in the Supreme Court.

30 (8) Because the Supreme Court erred in not holding that proceedings under the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) are not in conflict with the jurisdiction of the courts of admiralty of the United States, for the reason that the only exclusive jurisdiction of the admiralty courts is in proceedings in rem, and is not exclusive in proceedings in personam, and because the proceedings under the Workmen's Compensation Act of the State of New Jersey in this cause is not a proceeding in rem wherein the courts of admiralty

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Notice of Appeal.

of the United States have exclusive jurisdiction, but on the contrary is a proceeding in personam, saved to the State courts.

(8½) Because the Supreme Court did not hold that the proceedings in this case under the provisions of the Workmen's Compensation Act (P. L. 1911, p. 134) were not a burden on interstate commerce, but on the contrary were merely the enforcement of remedies reserved to the petitioner under the valid exercise by the State of New Jersey of police powers reserved to the State of New Jersey under the Constitution of the United States. 10

(9) Because the Supreme Court did not hold that the proceedings under the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134) were essentially different from those under the Workmen's Compensation Act of the State of New York, and that the decision of the Supreme Court of the United States in *Jensen vs. Southern Pacific Company* did not control the decision of this cause. 20

(10) Because the Supreme Court did not hold that the granting of compensation by the Union Common Pleas below was merely the enforcement of an agreement made between Kennedy and petitioner's intestate pursuant to the terms of the Workmen's Compensation Act of the State of New Jersey and not therefore the exercise of any jurisdiction reserved by the Constitution and Laws of the United States exclusively to courts of the United States. 30

(11) Because the rights of the States to enforce remedies under Workmen's Compensation Statutes (particularly under P. L. 1911, p. 134 of the State of New Jersey) have been expressly reserved by Congress. 40

Respectfully yours,

MCDERMOTT & ENRIGHT,
Attorneys of Petitioner.

Opinion of Supreme Court.**NEW JERSEY SUPREME COURT.**

February Term, 1917.

10 JAMES KENNEDY, trading as Ken-
 nedy's Towing Line,
Respondent-Prosecutor,
vs.
 REBECCA COON,
Petitioner-Respondent.

Certiorari Removing Judgment of Union Com-
 mon Pleas.

Argued February Term, 1917. Decided June
 Term, 1917.

20 KALISCH & KALISCH, for Prosecutor.

MCDERMOTT & ENRIGHT, for Defendant.

Argued before Justices SWAYZE, MINTURN and
 KALISCH.

The opinion of the Court was delivered by MIN-
 TURN, J.

30 The writ of certiorari brings up the proceedings
 in a workman's compensation case, in the Union
 County Common Pleas, wherein judgment was ren-
 dered for petitioner, whose husband lost his life
 by an accident, as the trial court found, arising
 out of and in the course of his employment with
 prosecutor.

The prosecutor is in the tow-boat business, and
 is engaged in interstate commerce, between New
 York and New Jersey. He resides in Elizabeth,
 where he has his office and principal place of
 business. One of his steam tugs, the "Elsie K,"

Opinion of Supreme Court.

was registered in the Customs Office in Newark pursuant to section 4141, R. S. U. S. Fed. Stat. Ann., Vol. 7, p. 16.

Robert Coon, petitioner's husband, had been employed as fireman on the boat, and was drowned when she foundered while on a voyage from Brooklyn to Elizabeth, August 4, 1915. She went down within about five hundred feet of the New Jersey shore at Constable Hook. The Court below found as a fact, and there was evidence to support it, that the tug sank in New Jersey waters, and that the deceased was drowned within the jurisdiction. 10

Since this case was submitted, two causes involving questions of the same general legal import have been decided by the Federal Supreme Court. The case of the *Southern Pacific Company vs. Jensen*, U. S. Supreme Court, ad. op. 1916, Oct. Term, 1916, p. 524, involved the inquiry whether the workmen's Compensation Act of New York was in conflict with Art. 3, sect. 2, of the Federal Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction, and article 1, sect. 8, giving Congress power to make all laws necessary and proper to carry into execution the powers vested in the Federal government; and the United States Judicial Code, sections 24 and 256, giving Federal District Courts exclusive judicial cognizance of all civil causes of admiralty and maritime jurisdiction; as well as with the general policy of Congress to encourage investments in ships, manifested by various Congressional enactments imposing a limitation of liability upon the owners of vessel property. 20 30

The majority opinion of a divided court held that such a conflict of legislative authority existed, and that the New York Act was consequently invalid so far as it attempts to impose liability 40

Opinion of Supreme Court.

upon the owner of an ocean going steamship plying between New York City and the City of Galveston, Texas, for an injury resulting in the death of a longshoreman killed while at work upon the vessel.

10 This determination would obviously be dispositive of the claim in the case *sub judice*, since the fact is conceded that the boat upon which this decedent was employed was engaged in interstate commerce between the port of Brooklyn in the State of New York and Elizabeth, in this State. But the Southern Pacific case was followed at the same term of the Federal Court by *Valley Steamship Company vs. Wattawa*, and the same company against Mraz, reported in the same number of advance opinions at page 523. This later ad-

20 judication imposes a practical qualification or limitation upon the general application in practice of the rule declared by the former adjudications to the effect that the claim of exclusive Federal jurisdiction will not be recognized as a basis for a writ of error, unless the question shall have been raised in the trial court, and is presented as a basis of appeal, where the State appellate tribunal is circumscribed in its discussion of the case to errors appearing on the record, citing in support of this general rule of practice, *Mutual Life Ins.*

30 *Co. vs. McGraw*, 188 U. S., 291.

The general rule of practice in this State relative to matters determinable in this Court, and in the Court of Errors, has been settled in accordance with the rule promulgated by the Federal Supreme Court, with the additional qualification that the rule shall not apply, whereas in this case the question presented is one dealing with the jurisdiction of the Court, or the general public

40 policy of the State.

State vs. Shupe, 88 L., 610.

Obviously, therefore, the question of jurisdiction is involved in this controversy in view of the Federal decisions to which we have referred, and under our practice is not eliminated by the failure of the record to present it. The result is, that in reaching a result, our determination must be controlled by the Federal decisions referred to, which leads to a reversal of the judgment under review. 10

Judgment of Supreme Court.

NEW JERSEY SUPREME COURT.

JAMES KENNEDY, trading as Kennedy's Towing Line,

Respondent-Prosecutor,

vs.

REBECCA COON,

Petitioner-Respondent.

Order on
Reversal. 20

This matter coming on to be heard before the New Jersey Supreme Court, at the February Term, 1917, and Kalisch & Kalisch appearing for the prosecutor, and McDermott & Enright, for the defendant, and the argument of counsel having been considered, it is, on this 20th day of October, nineteen hundred and seventeen, 30

ORDERED, that the judgment under review be reversed, with costs.

By the Court,
JAMES F. MINTURN,
J. S. C.

On the 10th day of January, 1888, the report of the
Commissioner of the State of New York, in relation to
the condition of the State, was read and approved.
The report was then referred to the Committee on
the Administration of the Government, and the
Committee reported thereon as follows:

Report of the

COMMISSIONER OF THE STATE OF NEW YORK

James A. [Name] [Title]
[Text of report]

The report contains a full and complete
statement of the condition of the State
at the close of the year 1887, and
of the progress of the various
departments of the State Government
during the year.

Attest:
James A. [Name]

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