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NOTICE OF APPEAL.

Filed January 29, 1927.

New Jersey Supreme Court

SALVATORE TUCCILLO, *Plaintiff,* vs. JOHN T. CLARK & SON, INC., *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Kent & Kent, Esqs., attorneys of plaintiff.

SIRS:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

Dated January 27, 1927.

Service acknowledged January 28, 1927.

KENT & KENT,
Attorneys of Plaintiff.

GROUNDS OF APPEAL.

Filed February 21, 1927.

New Jersey Court of Errors and Appeals

SALVATORE TUCCILLO, *Plaintiff-Respondent,* vs. JOHN T. CLARK & SON, INC., *Defendant-Appellant.*	*Action at Law.* *Grounds of Appeal.*

The appellant states the following grounds of appeal:

1. The Trial Judge refused to grant a nonsuit or direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted for one or more of the following reasons:

(a) The Court had no jurisdiction over the controversy.

(b) The plaintiff's remedy is either in the Compensation Court of the State of New Jersey, under the Workmen's Compensation Act of 1911-1913, and the supplements and amendments thereof, or under the exclusive admiralty and maritime jurisdiction of the Federal Courts.

(c) That any right that the plaintiff has to sue his employer under the law of the State of New Jersey, is contained in the Compensation Act, all other common law rights of his having been repealed, by the repealer in that Act, and if he has any right under the State law, he must be remitted to that tribunal for that purpose, under the Compensation Act.

(d) That as a matter of fact in this case, as well as a matter of law, his right to sue his employer is exclusively in the Federal Court, because this is purely a maritime act, happening on the Hudson River, or if it is not that, it must be under the Compensation Act.

(e) That he was guilty of contributory negligence as a matter of law.

(f) That any negligence shown was that of a fellow servant, and under the common law of this State, if it comes under the common law, that is a defense.

(g) That the plaintiff assumed the risk of the injury that he received.

2. The following question was admitted to the witness, Dr. John A. Botti:

"Assuming, doctor, that the plaintiff was in good health on the 23rd day of February, 1924, and at that time was doing longshore work, which involved the lifting of heavy boxes, freight and other things and did that work consistently and uniformly for a long period of time, and that on that day, while on board the Steamship Marengo, moored at Pier 9, at Hoboken, he was struck by a block or piece of chain in the stomach about the place you mentioned, the abdominal region, and that as the result of that he was knocked unconscious, removed to an office on the pier, and then was taken home and was incapacitated at home for a period of five or six weeks, roughly speaking, and that since that time he has not been able to do that sort of work but is only able to do work that does not require heavy lifting, such as running a winch, would you say an accident such as I have described would be a competent producing cause of what you found in the abdominal region of this man?"

3. The Trial Judge refused to charge the following requests to charge of the defendant. The

requests are quoted verbatim and each bears the same number that it bore at the time of its admission to the Trial Judge:

1. In this case the plaintiff was admittedly an employee of the defendant. As such employee, the plaintiff's exclusive remedy against the defendant is either under the New Jersey Compensation Act or, if he was employed in work of a maritime nature, under the admiralty law of the United States.

2. The present case is one pertaining solely to the admiralty jurisdiction of the Federal Courts and, therefore, this Court has no jurisdiction at common law to entertain this action on behalf of the plaintiff.

3. This Court, also, has no jurisdiction to determine how much, if any, compensation the plaintiff would be entitled to under the New Jersey Workmen's Compensation Act. That act provides its own tribunal for the purpose of determining what compensation, if any, an employee in any given case is entitled to.

12. The only proof in this case offered by the plaintiff tending to prove that the defendant was negligent is with respect to the manner in which the off-shore guy rope was set up, the plaintiff claiming in his testimony that he was about to use a chain instead of the rope cable to secure the off-shore guy supporting the boom of the Burton fall when the general foreman, Hart, came along and attended to the repair of that off-shore guy himself, and it is claimed by the plaintiff that the general foreman, Hart, in fixing the off-shore guy did so negligently, so that it gave way, causing a pulley to strike him. If the plaintiff has failed to prove that contention by the greater weight of the evidence, then he cannot recover and your verdict must be for the defendant.

13. There is no evidence in this case that the defendant negligently failed to provide sufficient and proper equipment and machinery.

14. There is no evidence in this case that the machinery and equipment were defective, out of repair, inadequate, insufficient or unsuited for the purpose of handling the cargo.

15. There is no evidence in this case that the ropes or cables forming part of the equipment were worn, frayed and damaged.

16. There is no evidence in this case that the defendant failed and neglected to inform or notify the plaintiff of the hazardous and dangerous condition of the equipment.

17. There is no evidence in this case that the defendant failed and neglected to inform the plaintiff of the hazardous and dangerous condition of the employment which he was following on the steamship at the time of the accident.

18. There is no evidence in this case that the defendant allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment.

25. Even assuming that the plaintiff has a hernia, there is no evidence in this case that the hernia resulted from the accident for which the plaintiff sues.

26. You can allow the plaintiff nothing for medical expenses or medicines, because he has proven none.

27. You can allow the plaintiff nothing in this case for permanent injury, because he has failed to prove any permanent injury.

4. The Trial Judge charged the following requests of the plaintiff. The requests are quoted verbatim and each bears the same number that it bore at the time of its submission to the Trial Judge:

1. It was the duty of the defendant, John T. Clark & Son, to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on its business of stevedoring and in keeping such machinery and appliances in repair, including the duty of making inspections and repairs at proper intervals.

2. If the defendant selected or designated its superintendent, Julius Hart, to perform this duty for it, and that superintendent failed to exercise reasonable care and skill in its performance, the defendant, John T. Clark & Son, is responsible for the fall.

3. The superintendent, Julius Hart, in this case was not a fellow servant of the plaintiff, but represented the master, John T. Clark & Son.

4. It was the duty of the defendant, John T. Clark & Son, to use reasonable care to provide a safe place to work, and also to provide safe machinery and appliances, and the defendant, John T. Clark & Son, cannot escape liability by entrusting the performance of such duties to others, be they managers, agents or fellow servants.

5. The defendant, John T. Clark & Son, knew or should have known if it had used ordinary care to ascertain the facts, that the boom or ropes which it provided for the use of servants were unsafe or structurally defective, and that the plaintiff, without contributory fault, suffered injury thereby, the defendant John T. Clark & Son is liable therefor.

5. The Trial Judge charged the jury:

"The plaintiff, when he comes into court, must set out in his pleadings the ground on which as asks a verdict against the defendant; so in this case he has set out in the pleadings what his cause of action is, and the negligence which he charges against John T. Clark & Son, Incorporated, that

warrants him in seeking damages against them. In the ninth paragraph of the complaint he says:

'On or about the said 23rd day of February, 1924, while employed as aforesaid, the defendants jointly, by their agent or agents, servants and employees, negligently and carelessly caused, allowed and permitted a boom to swing up and against the plaintiff, severely and permanently injuring him, as hereinafter set out.'

And then in the eleventh paragraph of the complaint he alleges the negligence which he asks a verdict at your hands to be based upon, as follows:

'The said defendants were negligent in that they failed to provide sufficient and proper equipment and machinery, in that the said machinery and equipment were defective, out of repair, inadequate, insufficient and unsuited for the purpose of handling cargo, in that the ropes forming part of the said equipment were worn, frayed and damaged, and were used with knowledge of that fact, in that the defendants failed and neglected to inform and notify the plaintiff of the hazardous and dangerous condition of the employment on the said steamship at the time of the accident; in that the defendants allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment on said steamship; in that the defendants gave him no warning of any kind so as to permit him an opportunity to get out of the way of the said broken and defective boom or equipment.''

6. The Trial Judge charged the jury:

"In ordinary cases, if an employee is injured—either by his own negligence or through the negligence of a fellow servant, or as the result of some accident, it makes no difference—he recovers under what is known as the Workmen's Compensation Act.

But in this instance, the man was working on a vessel, on navigable waters, and the Court of Errors and Appeals in this State has held that the Workmen's Compensation Act does not apply to such a situation. In other words, this man cannot apply the rules of the Workmen's Compensation Act to his case."

7. The Trial Judge charged the jury:

"So, in order to recover, the plaintiff, having brought his action in this Court based on a common law remedy, must show the act or acts of negligence on the part of the defendant that were the proximate cause of his injury. That is the law of the land. He has to show by the evidence in this case that this defendant, John T. Clark & Son, Incorporated, was negligent and that its negligence was the proximate cause of his injury, and if he has failed to do that, under the law as it exists, he cannot recover in this action.

The mere fact that the plaintiff was injured cannot avail him anything in this action unless he has, by a preponderance of the evidence, satisfied you that the injury complained of was caused by the negligence of this particular defendant. That is the duty which the law casts upon him before he can ask a verdict at your hands."

8. The Trial Judge charged the jury:

"Keeping this fact in mind, it becomes your duty to determine just how the accident occurred.

What was the duty devolving upon the defendant, John T. Clark & Son? It was the duty of John T. Clark & Son to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on its business of stevedoring, including the duty of making inspection and repairs of such machinery and appliances at proper intervals. It was also the duty of the defendant to use reasonable care to provide a safe place to work as well as to supply sufficient machinery and appliances.

The defendant, John T. Clark & Son, Incorporated, was not an insurer of the plaintiff against accidents. It was only required to use reasonable care and skill to furnish suitable and safe machinery and appliances for the work for which the plaintiff was employed, and to use reasonable care to see that the place where the plaintiff was at work was safe for such work to be carried on. The defendant was also required to make, from time to time, reasonable inspection of the machinery and appliances so used and of the place where the plaintiff was working, to see they were reasonably safe for the use for which they were intended, and, if not, to use reasonable care to have any defect that was discovered remedied within a reasonable time."

9. The Trial Judge charged the jury:

"The defendant could not escape liability by delegating the duty of using reasonable care in the performance of its duties to someone else."

10. The Trial Judge charged the jury:

"If you find the boom was in proper order and was used in loading the vessel, during the day, through hatch No. 4, and that someone, either the plaintiff or some other man in his gang, changed the position of the rope on the boom so that the strain caused the guy to break, and that the broken guy was repaired or replaced with a chain, and the chain broke, when the boom was used, by the additional strain, then you should determine whether the defendant knew, or should have known if it had used reasonable care to ascertain, whether the boom was in proper condition to be used. If the defendant failed to use proper care in making an inspection, then, of course, there would be negligence on its part."

11. The Trial Judge charged the jury:

"If he had an attending physician, if there is any evidence as to what amount was laid out or expended by him for the physician, or for medicines, he is entitled to be compensated for that; but as I recall—you being the sole judges of what the evidence has been—the only evidence on that was the price he paid for an abdominal belt, and, of course, if that belt was required as the result of this accident, he is entitled to be compensated for that."

12. The Trial Judge charged the jury:

"If he has any permanent injury resulting from this accident, he would be entitled to be compensated for such permanent injury. But he is not entitled to be compensated for any previously existing injury or other condition not the result of this accident.

You have had medical testimony, which you can consider. The plaintiff claims he has a hernia. Dr. Feury, for the defendant, says there is no hernia; that there was a spreading and separation of the rectus muscle, which was not the result of this accident but was congenital. Of course, if that condition was congenital and it was not the result of this accident, the plaintiff cannot ask compensation for it. If, on the coutrary, you find from the evidence that that condition was the result of this particular accident, and that the accident was due to the negligence of the defendant, the plaintiff should be compensated for that, as well as for the pain and suffering."

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged Feb. 18, 1927.

KENT & KENT,
Attorneys Plaintiff-Respondent.

COMPLAINT.

Filed April 10, 1924.

New Jersey Supreme Court

HUDSON COUNTY.

SALVATORE TUCCILLO, *Plaintiff,*

vs.

JOHN T. CLARK & SON, INC., a corporation, and ELERMAN'S WILSON LINE, LTD., a corporation, *Defendants.*

Complaint.

The plaintiff, who resides in the Town of West Hoboken, County of Hudson and State of New Jersey, for his complaint says that:

1. At all the times hereinafter mentioned the defendant, John T. Clark & Son, Inc., was a corporation organized and existing under and by virtue of the laws of the State of New York.

2. At all the times hereinafter mentioned the defendant, Elerman's Wilson Line, Ltd., was a foreign corporation.

3. The defendant, John T. Clark & Son, Inc., was engaged in the stevedoring business and was on or about the 23rd day of February, 1924, engaged in the transferring of cargo from a lighter to the steamship "Morengo."

4. On or about the 23rd day of February, 1924, the defendant, Elerman's Wilson Line, Ltd.,

was and still is the owner of the steamship "Morengo," which at that time was alongside of Pier 9, Hoboken, New Jersey.

5. On or about the 23rd day of February, 1924, the defendant Elerman's Wilson Line, Ltd., was in possession of the aforesaid steamship.

6. On or about the 23rd day of February, 1924, the defendant Elerman's Wilson Line, Ltd., used, managed, navigated, operated and controlled the said steamship, then in port at Pier 9, Hoboken, in the County of Hudson and State of New Jersey.

7. On or about the 23rd day of February, 1924, both defendants, at the time and place aforesaid, were engaged in the loading and storing of cargo on board the said steamship and were in the joint control of the appliances, machinery and equipment used for that purpose.

8. On or about the 23rd day of February, 1924, the plaintiff was in the employ of the defendant John T. Clark & Son, Inc., on board the said steamship at the time and place aforesaid as stevedore and was then and there lawfully on the deck of the said steamship, duly engaged in his employment in and about the loading and storing of cargo, and was not a member of the crew of the said steamship.

9. On or about the said 23rd day of February, 1924, while employed, as aforesaid, the defendants jointly by their agent or agents, servants and employees, negligently and carelessly caused, allowed and permitted a boom to swing up and against the plaintiff, severely and permanently injuring him as hereinafter set out.

10. The said accident and the said injuries were caused without any fault or negligence on the part of the plaintiff, but solely through the fault, carelessness and negligence of the defendants jointly, their agent or agents, servants and employees.

11. The said defendants were negligent in that they failed to provide sufficient and proper equipment and machinery; in that the said machinery and equipment were defective, out of repair, inadequate, insufficient and unsuited for the purpose of handling cargo; in that the ropes forming part of the said equipment were worn, frayed and damaged and were used with knowledge of that fact; in that the defendants failed and neglected to inform or notify plaintiff of the hazardous and dangerous condition of the said equipment and of the hazardous and dangerous condition of the employment on the said steamship at the time of the accident; in that the defendants allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment on said steamship; in that the defendants gave him no warning of any kind, so as to permit him an opportunity to get out of the way of the said broken and defective boom or equipment.

12. As the result of the premises, the plaintiff sustained the following injuries: His entire body was bruised and permanently injured, causing an opening in the abdomen, so that he is now suffering from a hernia, which condition is permanent; his internal organs were seriously and permanently injured and he was severely and permanently injured internally and externally about the head, body and limbs, so that he still

is and will continue permanently to be sick, sore, lame and disabled, and will be compelled to undergo treatment and surgical operations in order to alleviate his pain and suffering.

13. As the result of the premises plaintiff was compelled and still does expend large sums of money in and about endeavoring to heal and cure himself of the aforesaid injuries; as the result of the premises, plaintiff is and for a long period of time will be incapacitated from following his usual employment, resulting in great monetary damage.

Plaintiff demands judgment against the defendants for the sum of $25,000, besides costs.

KENT & KENT,
Attorneys for Plaintiff,
160 Market Street, Paterson, N. J.

NOTICE OF MOTION TO STRIKE OUT COMPLAINT.

Filed April 28, 1924.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., a corporation, and ELERMAN'S WILSON LINE, LTD., a corporation, *Defendants.*	*Action at Law.* *Notice of Motion to Strike Out Complaint.*

To Messrs. Kent & Kent, attorneys of plaintiff.

SIRS:

TAKE NOTICE, that on May 3, 1924, at ten o'clock (Daylight Saving Time) in the forenoon or as soon thereafter as counsel can be heard, at the Court House, Jersey City, before the Justice hearing motions in the above court, we shall move to strike out the complaint as against the defendant, John T. Clark & Son, Inc., in the above-entitled action, on the following grounds:

1. It fails to allege facts sufficient to state a cause of action.

2. Plaintiff's exclusive remedy is in the Admiralty Court of the United States.

3. Under Section 8 of the New Jersey Compensation Act (Chap. 95, P. L. 1911), the plaintiff and the defendant, John T. Clark & Son,

Notice of Motion to Strike Out Complaint.

Inc., entered into an agreement and surrendered their rights to any other method, form or amount of compensation or determination than as provided in Section 2 of said act, and said agreement, under the terms of said Section 8, binds the plaintiff.

4. This Court has no jurisdiction.

5. This Court has no jurisdiction in the present action to hear or determine any rights or obligations as between the plaintiff and the defendant, John T. Clark & Son, Inc., involving any admiralty or maritime tort.

Dated, April 24, 1924.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant,
John T. Clark & Son, Inc.

Opinion Denying Motion to Strike Out.

OPINION DENYING MOTION TO STRIKE OUT.

Filed July 3, 1925.

NEW JERSEY SUPREME COURT.

SALVATORE TUCCILLO,
Plaintiff,

vs.

JOHN T. CLARK & SON, INC., and ELERMAN'S WILSON LINE, LTD.,
Defendants.

Kent & Kent for the plaintiff.
Collins & Corbin for defendant Clark & Son.

MINTURN, *J.*

After an examination of the briefs in the above-entitled action, I have concluded that in view of the determination of the Chief Justice in Young *v.* Sterling Leather Works (96 Atl. 1016), there is enough doubt in the situation created by the pleading to warrant a refusal of the motion to strike out the complaint, as against the defendant John T. Clark & Son, Inc.

Such will be the order.

ORDER DENYING MOTION TO STRIKE OUT COMPLAINT.

Filed July 16, 1925.

NEW JERSEY SUPREME COURT.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., and ELERMAN'S WILSON LINE, LTD., *Defendants.*	*On Motion to Strike Out Complaint.* *Rule Denying Motion.*

A motion having been made herein by the defendant, John T. Clark & Son, Inc., to strike out the complaint, and Kent & Kent, appearing for the plaintiff and Collins & Corbin, Esqs., appearing for the said defendant, and argument having been duly had;

Now, on motion of Kent & Kent, attorneys for the plaintiff, it is on this 15th day of July, 1925,

ORDERED, that the motion be and the same is in all respects denied, and that the defendant have twenty days from the date of service of a copy hereof upon it or its attorneys within which to file its answer.

JAMES F. MINTURN,
Justice of the Supreme Court.

A true copy.

KENT & KENT.

ANSWER.

Filed July 21, 1925.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., a corporation, and ELERMAN'S WILSON LINE, LTD., a corporation, *Defendants.*	*Action at Law.* *Answer.*

John T. Clark & Son, Inc., a corporation of the State of New York, for answer to the complaint herein says that:

FIRST DEFENSE.

1. It admits paragraph 1.

2. It has no knowledge or information sufficient to form a belief as to paragraph 2.

3. It denies paragraph 3.

4. It has no knowledge or information sufficient to form a belief as to paragraph 4.

5. It has no knowledge or information sufficient to form a belief as to paragraph 5.

6. It has no knowledge or information sufficient to form a belief as to paragraph 6.

7. It denies paragraph 7.

8. It denies paragraph 8.

Answer.

9. It denies paragraph 9.

10. It denies paragraph 10.

11. It denies paragraph 11.

12. It denies paragraph 12.

13. It denies paragraph 13.

SECOND DEFENSE.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff.

THIRD DEFENSE.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff in failing to exercise reasonable care for his own safety.

FOURTH DEFENSE.

1. The complaint filed herein alleges that the plaintiff was an employee of the defendant.

2. As such employee the plaintiff's exclusive remedy against the defendant is either under the New Jersey Compensation Act, or if he was employed in work of a maritime nature, under the Admiralty law of the United States.

3. This Court has no jurisdiction to determine how much, if any, compensation the plaintiff would be entitled to under the New Jersey Compensation Act or to determine what, if anything, he would be entitled to under the Admiralty law of the United States.

4. As this Court has no jurisdiction the cause should be dismissed.

Answer.

FIFTH DEFENSE.

1. The plaintiff is engaged in the business of stevedoring and in said business contracts for the service of himself and a gang of stevedores skilled in the unloading of goods from lighters to vessels and from vessels to lighters.

2. On or before the date alleged in the complaint the plaintiff contracted with the defendant to load part of a cargo on the steamship "Marengo" from lighters and to stow it in the hold of the said steamship.

3. In the course of said work the plaintiff or his employees used a certain boom, which boom and its incidental tackle was owned by and found upon the steamship "Marengo," no part of it being owned, possessed or controlled by the defendant.

4. While the plaintiff was so using said boom erected by him and being operated under his direct command, supervision and control, one of the lines or devices used to steady the boom gave way, so that the draft being raised swung across the deck of the said steamship, and in order to avoid being struck by said draft plaintiff ran and fell over an object placed thereon by himself or his employees in the course of the work aforesaid.

5. The alleged accident was due in no part to any negligence on the part of this defendant, but solely to the carelessness and negligence of the plaintiff or one or more of his employees as aforesaid.

Answer.

SIXTH DEFENSE.

1. The alleged accident set forth in the complaint was due to the negligence of a fellow-servant of the plaintiff and the plaintiff, therefore, cannot recover against the defendant for such negligence.

SEVENTH DEFENSE.

1. The alleged accident set forth in the complaint was due to one of the risks of injury assumed by the plaintiff as part of the terms of his contract of employment with the defendant.

COLLINS & CORBIN,
Attorneys of Defendant,
John T. Clark & Son.

Reply.

REPLY.

Filed July 23, 1925.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., a corporation, and ELERMAN'S WILSON LINE, LTD., a corporation, *Defendants.*	*Action at Law.* *Reply.*

The plaintiff denies each and every allegation contained in the answer of the defendant John T. Clark & Son, Inc.

KENT & KENT,
Attorneys for Plaintiff,
Office and P. O. Address,
No. 160 Market Street, Paterson, N. J.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., a corporation, and ELERMAN'S WILSON LINE, LTD., a corporation, *Defendants.*	*Before Hon. Willard W. Cutler, Judge, and a Jury.*

Jersey City, New Jersey,
April 21, 1926.

Appearances:

Messrs. Kent & Kent, attorneys for plaintiff; Nathaniel Kent, Esq., of counsel.

Messrs. Collins & Corbin, attorneys for defendant, John T. Clark & Son, Ltd. Mr. Markley of counsel.

A jury was empanelled, declared satisfactory, and sworn.

PLAINTIFF'S OPENING.

Mr. Kent: May it please the Court and gentlemen of the jury, this action is brought by a man named Salvatore Tuccillo, who lived in Union City, against John T. Clark & Son. Originally we joined the Elerman's Wilson Line as a defendant but were unable to get jurisdiction on them, so this action proceeds, as far as this action is concerned, solely against the stevedoring corporation, John T. Clark & Son.

The facts briefly are these: On the 23rd of February, 1924, the plaintiff Tuccillo was doing what is popularly known as longshoreman work, and he had been working on a ship called the Marengo, which was then lying along Pier 9, Hoboken, and during that week he had been engaged in removing cargo, and a portion of the time in loading cargo. I believe the 23rd of February was a Saturday, and they were very anxious to get the ship out. He had started to work at seven o'clock in the morning, and had continued at it until this accident happened, somewhere around eight o'clock at night.

About the time of the accident, they were engaged in taking boxes of apples out of a lighter that was alongside the ship, and swinging them on to the ship; and this was their method of working. They had a big board or something of that kind, which they called an aeroplane, and they loaded forty or fifty, or thereabouts, of the boxes of apples on that board, with slings passed under it, and then it was lifted up, on to the ship and into the hold of the ship. Approximately a box of apples is fifty or sixty pounds, and there were somewhere in the neighborhood of two tons in each load.

After they had been doing this work some time, at about eight o'clock that day, he noticed that the boom, or the upright, that was used for lifting the load did not come down to take the next load, and one of the men on the ship stated that the guide rope, or one of the ropes that kept the boom in place, had broken.

I assume all of you gentlemen know what a boom is. Most of us call it a derrick. A piece of wood, or whatever it is, juts out, and it is kept in place by the piece of wood, and one of

the men who was manipulating that boom told Tuccillo that the boom had broken, and he then went out to see what was the matter, and he found them trying to put that old rope together again, splicing it or something, and as soon as he saw what they were doing he told the men that that would be dangerous and it should not be done in that way, since it had already broken, and he made a request that they get a new rope or chain. One of the men employed by the defendant corporation thereupon went to their gear room, as they call it, and told them what was wanted, and came back with a chain, which Tuccillo started to work on in order to put the chain in place of the rope that had broken. While he was in the midst of his work and was doing it as expeditiously as he could consistent with safety, the general man in charge of the operation came along there and started to swear at him, and called him some names that are not usually used in polite society; he told him they were wasting too much time, and told him to "get to hell out of here." Some of you men may not understand that thoroughly, but he was ordered away, and he went off to the side of the ship near the lighter where he was working, and down to the lighter.

Now, Tuccillo was a man of experience; he had been working hard all that day, and he felt considerably abused, under the circumstances. Well, while he was waiting there, not knowing what to do for the moment, it seems they had at last got the chain on and were trying it out, and at the first operation, or attempt at operation, while he was standing near the side of the ship and was about to go down where he was working, that boom snapped again, and whether part of the

chain or rope struck him—I don't know what it was—he was struck in the stomach and knocked unconscious.

He had not received the slightest warning about anything being wrong, he had not had the slightest warning so that he might have got out of the way and avoided being struck. After he had been struck he was taken to the office which they had on the dock, and from there was sent home and treated.

The blow or the force of the blow had punctured his abdomen, it was found, and in addition to that he has a serious condition, a kind of hernia and the usual things that come from that situation. You will see the man here. He is a man of strong physique, as a man doing that sort of work ought to be, but since that accident he has not been able to do that kind of work; he has not the ability or capacity to do the necessary climbing or anything else of an arduous nature that is involved in the work; and he has had to start wearing an abdominal truss or rather an abdominal belt. I do not know whether any of you gentlemen know anything about a situation of that kind, but if he coughs or eats a hearty meal, it brings on serious complications. He has been asked, or it has been suggested to him, to undergo an operation, but he has one of these fears of an operation, and he has dreaded it.

After we show you all these things, gentlemen, we are going to ask at your hands a substantial verdict.

Some of you may ask at the outset, why a man who was injured while at work is suing in this court; does not the workmen's compensation act

apply; and all we can say to you is that in this case it does not apply. The United States Supreme Court has recently held that the workmen's compensation act does not apply to man who does stevedoring work—that is decided by the State courts. The United States Supreme Court has also held—

Mr. Markley: I object to what the United States Supreme Court has said, and ask your Honor to instruct the jury to disregard whatever the United States Supreme Court may have said.

The Court: I do not think they have anything to do with that.

Mr. Kent: Well, gentlemen, we are here because this is the only place where we can get any relief, and we shall ask at your hands a verdict for his loss of time and his pain and suffering.

Mr. Markley: I have a motion to make, to clarify the issue also, and I make it now at this time because all of the facts appear in Mr. Kent's opening, and I think he would like me to make the motion also because, if your Honor grants the motion, I do not think there is any need to waste further time. In Mr. Kent's opening, which has been taken stenographically, he says this happened either on a lighter or a steamship—I believe these men were on a steamship, according to your opening?

Mr. Kent: On the steamship.

Mr. Markley: On the steamship Marengo, and that we were loading cases of apples on that steamship, the vessel being in navigable waters, the Hudson River; and the suit is brought by an employee against his employer to recover damages for injuries received. The fourth paragraph of the defense, the fourth paragraph of

the answer squarely raises the point that he has no action under the common law of this State.

Under Bockhop *v.* Phoenix Transit Co. (97 N. J.), and the later case of Marsh *v.* Vulcan Iron Works, the plaintiff's remedy is either in the Compensation Court or in the Admiralty Courts of the United States. Assuming the Compensation Act of the State of New Jersey cannot apply, then his exclusive remedy is in the United States Admiralty courts. There is no common law existing today in the State of New Jersey; any common law that existed before in the State of New Jersey has been wiped out by the repealer contained in the Compensation Act. That is what our Court of Errors and Appeals held in the Bockhop case, and it was reiterated recently, when the Court of Errors reversed Justice Minturn in Marsh *v.* Vulcan Iron Works (127 Atl.)

(Mr. Markley quotes decisions in above cases at length, and cites further the cases of

State of Washington *v.* Dawson,

Grant, Smith & Porter Shipping Co. *v.* Rhode,

Great Lakes Dredging & Dock Co. *v.* Kierejewski,

Clyde SS. Co. *v.* Walker,

O'Brien *v.* Scandinavian Line,

and other cases, and concludes):

Mr. Markley: In other words, if this plaintiff has any right at all, it is either in the Admiralty courts of the United States, or, if that jurisdiction is not applied to, then he must come under the Compensation Act of New Jersey.

The Court: I will hear you, Mr. Kent.

Mr. Kent: I want to say, at the outset, there is no question in my mind but that the courts of this State have jurisdiction.

(He follows in opposition to Mr. Markley's conclusions on the law in the Marsh and Bockhop cases, and cites Southern Pacific Co. *v.* Chesinski (129 Atl.), also quoting the Judiciary Act of 1879, section 266, and citing other cases.)

The Court: This case came up before Mr. Justice Minturn on a motion to strike out, did it not?

Mr. Kent: Yes; he declined to strike it out.

Mr. Markley: No. He declined to strike out—that is, he said he would prefer to have this wait until the trial of the case.

Now, I think that presents it squarely to your Honor. It seems to me that the Marsh case is my way, and I cannot see any other way. He particularly says there, that this employee, who was engaged in a maritime employment, has his sole remedy in the Admiralty jurisdiction.

The Court: What is your motion now, Mr. Markley? Your motion is to non-suit the plaintiff, on the opening?

Mr. Markley: Yes, on the ground that it appears that this Court has no jurisdiction in this case, because the plaintiff's remedy is either under the Workmen's Compensation Act (assuming that that act is applicable at all, which I do not contend it is, it is merely as an alternative that I urge it), or under the exclusive Admiralty jurisdiction of the Federal Court.

Furthermore, the ground of my objection is that the Federal Judiciary Act says, where the common law is competent to come in you can take advantage of it, but in this State the common law

is no longer competent, because any right an employee has against an employer in this State has been repealed and wiped out by that Act, and the only remedy now is, within the jurisdiction of this Court, or this State, under the Compensation Act; and if we assume that Act is not applicable because this man was engaged in work of a maritime nature, then under Justice Parker's recent decision in the Court of Appeals, the case is one pertaining solely to the Admiralty jurisdiction of the Federal Courts.

Those are the grounds of my motion.

The Court: Here is what Justice Minturn said: "After an examination of the briefs in the above-entitled action, I have concluded, in view of the determination of the Chief Justice, there is enough now in the situation created by the pleadings to warrant a refusal of the motion to strike out the complaint as against the defendant."

It seems to me with that opinion filed, in this case, I cannot help but let the case go to trial, as indicated by Justice Minturn. The parties there taking their appeal from such ruling as the Court may make, you can then go to the Court of Errors and Appeals and get an official determination. I feel bound to be governed by Justice Minturn's decision in this case, and therefore deny your motion. The whole question came up before him, and I certainly cannot reverse Justice Minturn in this application now.

Mr. Markley: I did not intend you to decide this point.

The Court: That is the only conclusion I can make out of that. He says: "After an examination of the briefs in the above-entitled action, I

have concluded, in view of the determination of the Chief Justice in Young *v.* Sterling, there is enough now in the situation created by the pleadings to warrant a refusal of the motion to strike out."

Mr. Markley: The motion to strike out was a different motion.

The Court: It is the same thing; it was on the opening—on the opening counsel stated practically what he sets up in his complaint.

Mr. Markley: I do not wish to argue with your Honor, if your Honor feels that way about it.

The Court: That is what I feel bound to do—unless counsel wants me to rule on that and let you go up on your pleading. I do not believe Mr. Kent wants that. It might be a quicker way to take a rule on that and go up, instead of waiting for the testimony and going up afterwards. The case could go up to the Court of Errors and Appeals on an agreed state of facts. I am willing to do whatever counsel desire me to do on that.

Mr. Kent: I think this one trial will dispose of everything. If they do make up their minds to go up—I am not so sure that they will after the case is determined, but assuming that they do, I think since we are here in court ready to try it, that way would not save anything, because I am quite sure what the Court of Appeals would do—and then we would have to come back and try the issue on the merits.

The Court: All right, gentlemen, I have made my ruling.

Mr. Markley: Yes, sir, and may I have my exception noted?

The Court: Yes. Now, Mr. Markley, you may open your case.

Mr. Markley thereupon opened the case to the jury on behalf of the defendant.

SALVATORE TUCCILLO, sworn as a witness, testifies:

Direct examination by Mr. Kent:

Q Mr. Tuccillo, where do you live? A 520 Ege street, Union City, used to be called West Hoboken.

Q Speak up so every man on the jury can hear you. How old are you? A Forty-nine.

Q Are you married? A Yes, sir.

Q On the 23rd day of February, 1924, where were you working? A I was working at Pier 9, Hoboken.

Q For whom were you working? A For John T. Clark.

Q What kind of work were you doing on that day? A We were taking in all kinds of stuff; at the time I got hurt we were taking in apples.

Q How long had you been working at Pier 9? A I was working there already before John Clark got the contract.

Q But at this time how long had you been working there? A I had been there about two weeks or a week and a half.

Q On the same ship was it? A Well, we had two ships there.

Q What was the name of the ship you were loading freight into on the twenty-third of February? A The Marengo.

Q How long had you been working around the ship Marengo? A About a week.

Q What time did you go to work on the twenty-third? A We started at seven o'clock in the morning.

Q And about when did this accident happen to you? A It was around eight o'clock or so.

Q Was that during the day or during the night? A It was the night, after seven o'clock at night.

Q Just tell us what kind of work you were doing that night? A Taking in apples.

Q Tell us how you were taking them in? A Well, we got a platform like an aeroplane—we call them aeroplanes; we pile them up, so much on each side, and we get pulley and put it over, and when it go over the ship, so, the up-fall take them up and the down-fall put it in the ship.

Q Were you on the ship or by the ship doing this work? A I was on the lighter to show men what to do; I was foreman of the gang and the gang was working taking the apples up.

Q What kind of work were you doing? A I was foreman.

Q What work were you doing? A What work—a foreman is all round.

Q Did you do any of the loading, helping the men? A Oh, yes.

Q You say you were on the lighter? A Yes, I was on the lighter.

Q And you say your work was to see the boxes of apples were put on that aeroplane board all right, and then it was taken to the ship? A Yes.

Q How was it taken up to the ship? A With the fall, one boom over to the side and one boom on the edge.

Q Where was the fall, on the lighter or on the ship? A Well, it goes in and out; there is one boom over the side and one boom over the edge.

Q Where were the booms, will you explain that? A One square with the edge and one on the side.

Q Where was it fastened, on the lighter or on the ship? A On the ship.

Q Who operated the boom? A Who operated it?

Q Yes, who worked it? A We did, we worked it.

Q Well, which man did it? A We call them sailors, we had a gang of sailors there.

Q Who was operating the boom that night about the time you were hurt? A We were there.

Q What was the name of the man who was on the boom, the winchman, who was operating the winch? A I had two men on the winch of the steam shovel.

Q For whom were those men on the winch working? A John T. Clark.

Q Who would give the signal? A One of my gang, one of the men who was in the gang, a gangway man we call him.

Q What happened about eight o'clock? A Well, while we were working I see all of a sudden a stopping, and I was in the lighter, and I called to the gang of men and said: "What's the trouble there"? and he says to me: "A guy carry away." So I climbed up on Jacob's ladder, I go up on the deck of the ship and I see the gang were trying to put some junk around the guy, and looking at it, it didn't suit me, and I said: "No, boys, that will only carry away again," I says, "The best we can do is to go in the gear room and get a chain," so finally one of the men went over and got the chain.

Q Where did he go to get the chain? A In the gear room.

Q Where was the gear room? A The gear room was on the dock.

Q To whom did the gear room belong? A Well, to John T. Clark.

Q Did you get a chain there? A Well, I had it in my hands; I had one and I wanted to put it up right away.

Q Tell us what happened then? A The minute I wanted to fix the guy, the boss or general foreman, whatever they call him, came along.

Q What was his name? A Julius Farr, or some name like that, I know we called him Julius.

Q Is he in court here today? A I think so.

Mr. Kent: Stand up.

(A man stands up.)

Q Is that the man you refer to? A Yes, that's the man.

Q And you say he was general foreman? A He was foreman in charge of the ship.

Q Whom did you get your orders from? A Julius Farr.

Q Tell us what happened when the general foreman came along? A He came along and saw the guy standing still and he got wild. He came to me because I had charge of the gang and he was raising hell because we hadn't it all right, and I said: "Give us a chance until we get fixed up" and he was cursing, and he said: "You lazy bastards, get out of here, get to hell out of here," so I was all excite, I had to go away. I didn't know what to do because so he

took charge, took everything out of my hands, and I went toward the after part of the ship and —I didn't know myself what to do—got down on the lighter and sat down in the hold, so what to do with myself I was all puzzle up. He told the gangway man to go ahead, and then, all of a sudden, the gear carry away. The way the gear was I don't know; I know there was a block hit me on the stomach and I fell on the deck.

Q A block hit you on the stomach; what sort of a block? A A pulley block; and when I was in the office—it was a warm room there—it was a cold night on the 23rd of February, 1924—was a fellow named Hagen sent me to the hospital, he want to send me to hospital because I was sick, I sending stuff out of my mouth, and I no want to go to hospital and I said: "Please call a taxi" and I get in taxi and went home, and I send for doctor when I get home and the doctor reaches the house about eleven o'clock.

Q Were you unconscious any time? A I was only unconscious about ten minutes.

Q Prior to this accident was anything the matter with you? A Oh, rheumatism in the foot, in the right foot; I suffered from rheumatism in the right foot every now and then.

Q But was anything the matter with you round the stomach? A No, sir.

Q Did you ever have any pain there? A No, sir.

Q Did you ever wear an abdominal belt or anything before this accident? A No, sir.

Q Now, after you got home what was done for you, after the doctor had got there? A Well, I laid on the bed and he got a big belt and put it round me, to hold my stomach up.

Q What was the matter with your stomach at that time? A I was hurt inside, with contusions, all broke, everything was ripped, and it hurt like anything.

Q How long were you home? A I was home between five and six weeks. Of course, I went around and tried to get to work, and then I have a family to supply something, and I tried to get light work. I went to the place where I was working before, they know me before, and I speak to the boss and I said—

Mr. Markley: I object.

Q You can't tell what somebody else said to you; you finally got some work; you got some work afterwards? A Oh, yes.

Q What kind of work are you doing now? A Driving a winch, whenever I can get it.

Q What kind of work is that? A Just turning on steam and just watching it and let it go up and down, that's all.

Q You do not have to do any hard work? A No.

Q While working on the winch do you have to do any hard work like lifting or pulling? A No; the steam it is up; all you have to do is to turn on the—what you call—to turn on and off the—the revolver, that's all.

Q What is the matter with you now, Tuccillo? A There's nothing the matter with me; if it wasn't for that I would be a healthy man walking the street the same as other people.

Q How often do you work nowadays? A I could work every day; I could take everything before I was hurted, but now, if they take me on the winch, all right; if not I go home again.

Q Can you do the lifting work you did before the accident? A No.

Q What happens to you now if you attempt to do lifting? A Hurt me inside.

Q What part of the stomach hurts you? A Right up here (indicating middle of stomach).

Q Just about there? A Yes, right here (indicating as before).

Mr. Kent: Indicating about the navel region. That is my guess.

Mr. Markley: I think that is a pretty good guess.

Q Have you any pain there now? A Not while I am sitting quiet, but when I am coughing or sneezing, or any kind of movement, I feel it in the belly.

Q At the time of the accident how much were you making a week? A I used to make forty dollars every week.

Q And you used to work every week regularly? A Yes, if I don't work one place I used to jump to the other place.

Q Now, how long do you work, Mr. Tuccillo? A Well, if I get on a ship and I get a winch, and that easy work, I take it all; if it comes to a point where sometimes, in some place, they want to give the sailors a chance to go on the dock, and they want you to push a truck or lift for half a day, I have to stay away.

Q How much have you been averaging now a week since you have returned to work? A Well, I average thirty-four dollars, thirty-five dollars, thirty-six dollars, maybe, more or less.

Q Depending on how long you work, I suppose? A Yes.

Q Now, you mentioned before that you have a belt around you; you said before you had a belt around you now? A Yes, I have a belt around me.

Q When did you get that belt? A (Producing.) Here is the bill.

Q Do you know what date it was you got it? A (Shows paper.) I can't read.

Q March 20, 1924; will that help you? A Yes.

Q How much did you pay for that belt? A Twenty-five dollars.

Q Now, you mentioned before that the pulley or something struck you? A Yes.

Q Where did that pulley come from? A From the side of the boom, from the side of the beam.

Q Was that the beam that was leading from your part of the lighter to the ship? A Yes, sir.

Q I mean the one that broke. A The one that was over the side.

Cross examination by Mr. Markley.

Q This case of apples did not hit you, did it? A No.

Q You say now it was a pulley that struck you? A Yes, sir.

Q You say at the time the pulley struck you that you had quit work? A I quit work—two men carried me in the office, in the warm office.

Q I mean before the pulley struck you, the general foreman told you to get out of there? A But I was on deck.

Q But how long was it after the general foreman said, "Get out of here," you told us the pulley struck you? A A couple of minutes; I don't know how he done it.

Q You had been working with that brake on the up and down fall, hadn't you? A Yes.

Q The brake and fall was on the offshore side, was it? A Yes.

Q On the offshore side of the steamship? A Yes.

Q And the brake and fall extended over to the lighter? A Yes, sir.

Q In other words—the lighter was on the offshore side of the steamship, wasn't it? A Yes, sir.

Q In other words, the pier or dock came first, then the steamship, and then the lighter; is that right? A Yes.

Q You were on the steamship, weren't you? A Yes, sir.

Q And both these falls, both these pulleys and beams were all on the steamship? A Yes.

Q And the Burton fall was the one that would go over the side of the steamship to the lighter? A Yes.

Q And that fall would lift up the load? A Yes.

Q And with the up and down fall you would pull it over to the hatch of the steamship? A Yes, sir.

Q And lower it into the hold, into the hatch? A Yes.

Q That was called the up and down fall? A Yes.

Q You had to work the two falls together? A Yes.

Q You had to take the load from the lighter and put it into the hatch of the steamship? A Yes.

Q And you had been using that same hatch all day to put the stuff in the bottom of the boat; is that so? A Yes.

Q And that was number 4 hatch? A That was number 4 hatch, yes.

Q You had been loading automobiles, hadn't you, there; didn't you do the loading of the automobiles? A Maybe they done it after I went home.

Q I mean that was before you went home, didn't you load automobiles? A No, I don't remember no automobiles.

Q You were foreman of the gang, weren't you? A Yes.

Q It was your duty to supervise the men; you would tell them what to do? A Where to put it, and work at the same time.

Q And you were there to look after the rigging, too? A Well, I was working on it all day.

Q It was your job to hurry the work along and see everything was all right? A Yes.

Q And if the rigging was not all right and had to be attended to, you as the foreman had to see it was attended to? A Yes, sir.

Q That was your job? A Yes.

Q And the general foreman was Mr. Hart? A Well, we called him Julius.

Q He is the man who stood up before here? A Yes.

Q And he wanted to go to work on this particular hatch, didn't he, with these two falls? A He did; yes.

Q And you started there that morning with them? A Yes.

Q What time did you start to work? A Seven o'clock in the morning.

Q And you worked all day? A Yes.

Q And you quit at seven o'clock, did you? A I quit at six o'clock.

Q And went off to get something to eat? A Yes.

Q And after getting something to eat, you came back to work at seven? A Yes.

Q And you were working there with these two booms and two falls from seven until after eight o'clock? A Yes.

Q Now, before this accident to you, one of the guys gave way, didn't it? A Yes, sir.

Q And that was before you used the chain, wasn't it? A Yes, sir.

Q The guy on the offshore side of the steamship gave way, didn't it? A Yes.

Q What was that guy made of, do you know? A Of rope.

Q There were two guys, weren't there, and one was on the offshore side? A Well, there is two guys for holding the boom on both sides.

Q And the guy rope that supported the boom on the offshore side of the steamship gave way? A Yes.

Q You say you went up a ladder? A I went up, yes.

Q What kind of ladder was that? A Jacob's ladder, tied on one side of the ship.

Q What did you go up for? A I went up to see what was the matter.

Q What did you find? A I found the guy had carried away.

Q What did you do? A There was a man there trying to fix it up, putting a little junk around.

Q What do you mean by putting a little junk around? A He was putting a little rope around it.

Q They were trying to put rope around to support the guy? A Yes.

Q And you did not think it was enough? A No.

Q And you wanted a chain in place of that? A Yes.

Q Why did you think you wanted a chain to repair that guy? A Because it was stronger.

Q You had been using it a couple of days? A It was broke.

Q You had been using it a couple of days? A For something else.

Q That was a cable you had been using that day from seven o'clock in the morning, two cables, and both cables were made of rope? A Yes, sir.

Q And you had worked with them all that day, hadn't you? A Yes.

Q And this offshore guy had been used all day? A Yes.

Q This offshore guy cable did not come away until after you came back that night; that was the first time? A Well, we worked it a little while.

Q You worked it from seven o'clock until after eight? A Yes.

Q And then you found it had come away? A Yes.

Q And it had come away because there had been too much strain on it, isn't that it? A It must be—well, it would be wearing out.

Q Because it had a lot of strain on it all day long? A I don't know about the strain.

Q The guy on the offshore side and also the other guy were put there to help support your boom? A Yes.

Q And help support your load when you lift it up from the deck of the lighter and put it in the hatch of the steamship? A Yes.

Q That is why you had the guys? A To hold the boom right.

Q And working there all day, had you had a lot of stress and strain on those guys? A Yes.

Q So when you came back that night after supper at seven o'clock, and you worked there until after eight, you found that the offshore guy had come away, the cable, did you not? A Yes.

Q You found it had given way? A Yes.

Q And you found these other men going to work some more cable rope with it? A Yes.

Q And rather than use some other cable you suggested that they get a chain? A Yes.

Q Because you thought a chain was stronger than the rope would be, isn't that right? A Yes.

Q And you sent one of your men to the gear room on the steamship? A No, not on the steamship, on the dock.

Q You sent him to the gear room on the dock? A Yes.

Q And he brought you back a new chain? A It wasn't a new chain he brought back, it was a used chain, an old chain.

Q Was it all right to use? A It was all right but it was an old chain?

Q Did you feel, as foreman of the gang, that it was fit to use that chain? A Yes, the chain was fit to use.

Q And you were about to put up the chain? A Yes.

Q Was it tacked on? A I was about to put up the chain but I was put off the job.

Q Was the chain put on at all? A No; I had it in my hands to put on.

Q And you did not put it on? A No.

Q Was the chain put on the offshore guy before this load of apples was lifted up? A That I couldn't tell you.

Q A load of apples could not be heaved up before that offshore guy had been fixed, could it? A I was off the job.

Q Where did you go? A Twenty-five feet away from it.

Q Did you feel you were through? A I was put away, they didn't give me a chance, you see.

Q Did you quit, were you going ashore? A No, I was there waiting to start up again, trying to make up my mind what to do.

Q Then you had not quit, had you? A No, I hadn't quit; he put me away and I stayed away from there.

Q When you moved away, you went where? A It was the idea I had, when this chain was fixed, to go back to ask him why he put me away.

Q You did not intend to go home? A No, I wasn't going home, but I didn't know what to do at the time.

Q You did not feel you were all through? A I said to myself if he could do better than I can, let him do it.

Q What I understand, then, is you were going to let him fix the offshore guy? A I wanted to fix it and I was there to fix it, and then the boss come around, wild, and called me a name and put me off the job, so he will fix it, I don't know who fix it.

Q Well, when he got the chain fixed on the offshore guy, you were going back to boss the gang again? A Sure.

Q So just what do you mean when you say he put you off the job? A He didn't tell me to go home, he said, "You are taking too long."

Q He did not say you were through? A He put me off the job, he fixed it, he took it out of my hands, I know that.

Q He took the job away from you of fixing the guy, is that what you mean? A Yes.

Q When the guy was fixed you were going right back to work again? A Whatever he wanted me to do, I didn't know.

Q Don't you know to fix a chain on that offshore guy yourself, don't you know that you fixed that before the general foreman came along? A No, sir.

Q Didn't you put the chain on there yourself? A No, sir; I had it in my hands to put it up, and he put me off.

Q Wasn't it the fact that the general foreman did not come along until after it broke the second time? A No; the time he was there, that is the time it broke.

Q Didn't the general foreman come along after you were hurt? A No, sir.

Q Wasn't that the time he came along there? A No chance.

Q And after he found out about the damage you were using the chain? A No, sir, he took the work out of my hands.

Q As a matter of fact, was not the chain used in lifting that load of apples just before the time you were hurt? A What do I know then?

Q I don't know. You say you were only twenty feet away? A It was dark, it is kind of dark at nights there, not so light, and I was excite.

Q You had electric lights there? A Yes.

Q What you mean to tell this jury is that, after the boss, the general foreman, came on the

job, he took the chain, and you do not know what he did with it, you do not know whether he put it into the offshore guy or not? A I don't know what was done.

Q You do not know whether it was in the offshore guy when the load was lifted up? A No.

Q All you know is you were struck by a pulley? A That's all I can guess. He took the work out of my hands.

Q And you were standing only twenty feet away from him? A Yes.

Q Waiting to go back to work again? A I was waiting to go to work again.

Q Now, when you took over that Burton fall and the up and down fall, the first fall I refer to was reeved? A (No response.)

Q Do you know what I mean by reeved? A (No response.)

Q Do you know what a block is—to have the boom reeved down to a block? A (No response.)

Q Did the brake and fall come down to a steel heel in the deck of the boat; was it fastened here (indicating), that fall? A What do you mean? I don't understand.

Q You do not understand that? A No.

Q You know what the boom is? A Yes.

Q You know what the fall is? A Yes.

Q What is it? A A rope fall or cable.

Q A fall is the cable that runs up to the boom, and out? A With the winch.

Q Was that fall fastened down to the deck of the steamship at all? A No.

Q Was there a heel at the foot of the boom through which the fall ran? A Yes, there is a block here and there (indicating) so as it goes

to the chain block of the boom and goes into the winch.

Q And helps to support it, that helps to support it, doesn't it, takes the weight off the boom? A That is what put the strain on the boom.

Q Don't you know the fall was reeved down through the boom, and that that came right down to the deck, where it was supported? A It didn't see the deck, it went right on the gooseneck, right from the mast to the winch.

Q Do you know what heel block guy is? A No, sir, I don't know that.

Q Do you know whether there was a heel block guy on this boom or fall? A Heel block?

Q Yes. A You mean a relief block?

Q Yes, a relief block—call it that if you will. A Yes; we have to have that, otherwise you can't work it.

Q You were the one who had charge of the rigging, didn't you? A No, sir.

Q Didn't you have to see the rigging was all right? A Everything was all right.

Q Wasn't that your job? A We looked it over, we had the sailors working on it.

Q The rigging of these booms and falls, you as foreman of your job had charge of that, hadn't you? A Yes.

Q And the lifting of the loads, and the amount of strain to be put on the falls and blocks, you had charge of that, didn't you? A Yes.

Q You had supervision of the loading? A Yes.

Q And if it was not right it was your fault? A It was right up to the time it had to be fixed.

Q And up to the time the foreman came, it was your job to see it was right? A Yes.

Q And if it was not right, it was your fault, wasn't it? A If it wasn't.

Q If it was not right it was your fault? A I don't understand.

Q Suppose the general foreman was not there at all, and suppose this chain was put in there and the chain broke up, and you put the chain on and somebody was hurt, that would have been your fault then, wouldn't it? A That would have been my fault.

Q How much do you weigh? A Two hundred pounds.

Q How tall are you? A About five feet eleven.

Q Would it be asking you too much to show the jury where you claim you have this injury? A Sure.

Q Just step down here so the jury can see. Do not exhibit any more of yourself than you have to.

(Witness leaves stand, removes belt, opens vest and exhibits his stomach to the jury.)

Q Where is it? A Here (indicating region of navel).

Q Right above the navel? A Yes.

Q That is the point where you say you have this trouble? A Yes.

Q Just point again to the other jurors, who did not see, at the point where you say the area of your trouble is?

(Witness indicates as before.)

Q Now you may return to the stand?

(Witness returns to stand.)

Q You say you went back to work in five or six weeks? A Yes.

Q And you went to work for the Commercial and Stevedoring Company, didn't you? A Yes.

Q And your first pay was on April 3, 1924? A Yes, sir.

Q And do you know that you earned that week thirty-nine dollars? A I don't know.

Q Well, you would not dispute that, would you? A No.

Q You worked the next week, didn't you, the week of April 10th? A Maybe I did.

Q And you worked the week of April 17th, didn't you? A (No response.)

Q Do you remember whether you worked the week of April 17th? A Maybe I did work.

Q Do you know how much you made that week? A No, sir.

Q Do you know how many days you worked that week? A No, sir.

Q You worked the week of April 24th for the same company? A Yes.

Q Do you know how much you earned that week? A No, sir.

Q Have you any idea? A No, sir.

Q This is back in 1924, within five or six weeks after the accident, that you worked for that company? A Yes, I told you I worked.

Q Don't you know you went to work for the Commercial Stevedoring Company, and went to work on March 3rd? A Sometimes I work, I can't remember the date.

Q And you made as high as how much over there working for that company? A (No response.)

Q Do you know? A No, sir.

Q Don't you know what your pay was over there? A No, sir.

Q Your highest pay? A No, sir.

Q Haven't you any idea? A Two years ago—how can a man remember?

Q You made as high as sixty dollars a week, didn't you? A Sixty dollars?

Q Yes; the week ending May 15, 1924, you made $66.60, didn't you? A I doubt it. There are two brothers of mine working over there and they are in the same gang.

Q What are their names? A One name is George and the other Frank.

Q But "S. J." is you? A Yes.

Q And do you say you did not earn, during the week ending May 15, 1924, $66.60? A Well, I had to go to work after five or six weeks.

Q I know you had to go to work, but all I am asking you is, didn't you go to work and didn't you work for the Commercial Stevedoring Company beginning five weeks after this accident? A Yes, sir.

Q And you made as high as sixty dollars a week when there were boats in? A Yes, because the boss gave me all kinds of work because I was hurt.

Q What was your pay; you worked by the hour? A Yes.

Q As a winch man? A Yes.

Q What was your pay by the hour as winchman? A $1.20 an hour.

Q All stevedores get that, don't they? A Yes.

Q And you are a stevedore? A Longshoreman.

Q All longshoremen get the same rate of pay, don't they? A Yes.

Q $1.20 an hour? A Yes.

Q And they get that whether they work the winch or work at something else? A Yes.

Q The same rate of pay? A Yes.

Q And you worked for the Commercial Stevedoring Company all the way through to 1925, didn't you? A Yes, sir.

Q Then where did you go to work? A I was sick.

Q What was the matter with you? A I had a very heavy cold and part of the night I wasn't able to sleep at all.

Q You had the grippe, hadn't you? A I had a kind of cold; when I was coughing I couldn't hold my stomach up.

Q You were laid up in bed? A Yes.

Q Wasn't it influenza? A No, it was just a cold.

Q How many days were you in bed? A Some days.

Q Did you have a doctor? A Yes.

Q Who was your doctor? A Di Jacerno.

Q Spell his name? A D-i J-a-c-e-r-n-o. I don't know really.

Q How long were you laid up altogether in bed and in the house? A I was laid up, not all the time in bed.

Q How many days? A I don't know.

Q You have not any idea how long you were laid up? A No.

Q When did you go to work again after this heavy cold? A July, I guess it was.

Q Whom did you go to work for in July? A Black Diamond Steamship Company.

Q How long did you work for them? A That's my hangout now.

Q What is your rate of pay over there as a longshoreman? A Same thing.

Q You had two men on the winch, you say, on this night? A Yes.

Q Why did you have two men on the winch? A Because one handled the fall and the other the up and down.

Q You had to have two men, one to work the brake and the other the up and down? A Yes.

Q You were the boss of those men, weren't you? A Yes.

Q Did you work with those men? A Yes.

Q Worked right with them? A Yes.

Q Helped them on the winch if they wanted you? A They have a relief man to do that.

Q But if you were needed you would work on the winch yourself? A Yes, sir.

Q And if you could do anything like lifting a load, you would do that just like your workmen? A Yes.

Q You did the same as your men did? A No.

Q What other different work did you do than they did? A I was foreman; I worked down in the hold, and sometimes took an automobile or heavy stuff; it was up to me to work on the winch and push them along.

Q You were boss of the men? A Yes.

Q And you worked right with them? A Yes.

Q And did the same work that they did? A The same work they did.

Q Now, what was it that struck you, Mr. Tuccillo? A A pulley block.

Q What? A A block, pulley block, the block for holding guys.

Q Which guys? A The offshore guy.

Q You say it was the pulley that was on the offshore guy? A Yes.

Q Where was that pulley located on the offshore guy? A Right alongside the ship.

Q Where—on the deck of the boat? A Right on the rail, on one of the deck stanchions, they make it fast on stanchion.

Q Did the cable go through that pulley? A Sure.

Q And that pulley was right on the stanchion on the deck of the boat? A Yes.

Q On the offshore side guy? A Yes, sir.

Q How far away were you from that at the time you were struck, how far from the offshore guy? A From twenty to twenty-five feet.

Q And when you say that, you know you were twenty to twenty-five feet from the pulley where it was supposed to be on the upright stanchion? A Yes.

Q You stood twenty to twenty-five feet away from it—can you indicate that distance here? A About from here to there (indicating).

Q How far would that pulley be from you if it were in this court room, can you point to something to show the distance it would be from you?

(No response.)

Q How far would it be from where you are sitting to some object here, in order to show where the pulley would be? A He gave a signal.

Q Was it as far away from you as I am? A A little further from here, from here to that gentleman (pointing).

Q This man (indicating)? A Yes.

Q In other words, it was about from Mr. Clancy here to where you are? A Yes.

Q And you say that is about twenty-five feet? A Yes.

Q Then after the pulley came loose, it left the point where it was in the stanchion and struck you? A Yes.

Q Was it still on the guy rope? A No, it was on the wire at the bottom of the rope.

Q Was it still on the rope when it struck you? A I don't know; I gotta struck from a pulley but don't know what it was hanging on.

Q Was there anything attached to the pulley when it struck you? A How could I know? I was laid on the floor, I didn't see anything.

Q I am talking about before it struck you; as it came towards you, didn't you see it come towards you? A I heard a noise and was trying to get away but can't.

Q Were you looking at the pulley as it came towards you? A No; I was standing on the deck and want to get down on the lighter again and, all of a sudden, the pulley struck me.

Q If the pulley struck you in the stomach, you must have been facing in the direction from which the pulley came? A I was facing forward because the Jacob's ladder was on this side here (indicating with hands); I had to jump like that to get over the rail and on the ladder, but it was too late.

Q You were standing on the deck of the steamship about twenty-five feet from where the pulley was? A Yes.

Q And the pulley had to leave its place on the rail and come towards you? A Yes.

Q And it came towards you and struck you in the stomach? A Yes.

Q You must have seen it coming? A How could I?

Q You were facing that way? A I don't know what I was doing, I was standing, not decided what to do.

Q Then you did not see it until it struck you? A It struck me and I laid on the floor.

Q You did not know what struck you then? A There was the pulley coming.

Q How do you know if you did not see it? A I did see it.

Q When? A When it was coming, and I tried to get away.

Q I thought you said you did not see it coming; didn't you say you did not see the pulley coming towards you? A Well, I heard a noise that the pulley was broke and, all of a sudden, I got hurt.

Q Well, you did not see the pulley then, did you? A I see the pulley coming, I see the pulley broke, the guy rope, and hit me.

Q What I am asking you is whether you saw this pulley at all before it struck you? A Sure, I saw the pulley strike me.

Q You saw it before it struck you?

(No response.)

Q Did you see it coming towards you from the upright stanchion? A Yes, I see it creeping.

Q Was it creeping towards you? A Yes.

Q Was it on the guy rope as it came towards you? A I don't know, I don't think anything was on.

Q Just the pulley all alone? A Just the pulley, I think, and I tripped on the floor.

Joseph Gopor, direct.

Q Isn't it a fact that you tripped over a cable or a piece of rope on the deck of the boat? A No, sir.

Q You were running, weren't you? A No, sir.

Q When this cable broke you started to run? A No, sir.

Q And didn't you trip over your own feet over a piece of rope that was on the deck of the boat? A No, sir.

Re-direct examination by Mr. Kent.

Q Mr. Tuccillo, this boom was on the ship when you got there, wasn't it? A Yes, sir, everything was on the ship.

Q You did not have to fix it up when you went to work, did you? A No, sir.

Q It was all there ready for you to go to work, when you got there? A Yes, sir.

JOSEPH GOPOR, sworn as a witness, testifies:

Direct examination by Mr. Kent.

Q What is your name? A Joseph Gopor.

Q Where do you live? A Hoboken, 305 First street.

Q On the 23rd of February, 1924, where were you working? A On the up and down fall.

Q For whom were you working? A For Tuccillo, the foreman.

Q What was the name of the company you worked for? A John Clark.

Q Were you there when Tuccillo was hurt? A Yes.

Joseph Gopor, direct.

Q Do you know what hit him; do you know how Tuccillo was hurt? A A block and a cable and chain, all together.

Q Where did the block come from? A From offshore side.

Q Who fixed that boom before he was hurt, who did the fixing? A Nobody.

Q Was the general foreman there before the boom broke? A No, sir.

Q Was Julius there before the boom broke? A No. We started to work there about half an hour or three-quarters of an hour, and after the break of the guy the gang want to tighten up and fix, and then Tuccillo was on the boat, offshore, and he see the gang stop and he says: "What's the matter, what trouble here?" He come up and see the fall gang want to fix, and he says: "That's no good."

Q Who said that? A Tuccillo says that to the gang man, "That no good" because it's rotten, and he say: "Take a chain, a double chain, and put on here." Then this man and he go there and take a double chain and come back and start to fix it double on the block, and same time he come, this Julius come, and say: "What you going to do here? You stop gang go to work," and Tuccillo say: "I want to fix the chain because the guy broke." He said: "Go to work, I fix"; and same time he fix and we start to work again. Then we start, and I was on the bow chain, on the up and down, and then the cable is strained off from the block, and the block and Tuccillo fall down.

Mr. Kent: That is all.

(No cross examination.)

Nick Papparelli, direct.

NICK PAPPARELLI, sworn as a witness, testifies:

Direct examination by Mr. Kent.

Q What is your name? A Nick Papparelli.
Q Where do you live? A Hoboken, 419 Grand street.
Q On the 23rd of February, 1924, where were you working? A On the Wilson Line, pier 9.
Q What ship? A On the Marengo.
Q What kind of work were you doing there? A Loading the ship.
Q Were you working on number 4 hatch? A Yes, sir.
Q Were you there about eight o'clock at night? A No, got there seven o'clock at night.
Q I know, but were you working at eight o'clock? A Yes.
Q Did you see Tuccillo there about eight o'clock that night? A Yes, sir.
Q Did you see Tuccillo get hurt? A Yes, sir, right in front of my feet.
Q Did you see the general foreman, Julius, there before Tuccillo got hurt? A Yes, sir.
Q What did Julius, the general foreman, do before Tuccillo got hurt? A The general foreman did nothing, just he looked.
Q I know, but before what did Julius, the general foreman, do? A The general foreman look round the ship to see to the gang, to see that gang going fast or that gang going slow, or stop.
Q Were you there when Tuccillo tried to fix the boom? A The boom was fixed.
Q But before that, were you there when Tuccillo tried to fix it? A No, sir, the boom was fixed.

Nick Papparelli, direct.

Q No; listen to me.

Mr. Markley: I think the witness ought to be allowed to finish his answer. He was evidently going to add something.

The Court: Proceed.

Q Were you there when Tuccillo tried to fix the boom? A Now, when the guy was broke off the boom, I want to fix it up and the gang stopped, and then Tuccillo came up and he say, "What's the matter?" I say guy broke. He said, "What you do there?" I say, "I put two new guys," and Tuccillo say, "No, the boom too much strain, you know what the guy do to it. You go to the gear room and get double chain." He want to put double chain. So, I say all right, and went to the store room.
Q Where did you go? A To the store room.
Q Whose store room was it? A On the dock.
Q Whose store room was it? A Clark's.
Q To whom did it belong? A Mr. John Clark.
Q Whom did you see there, a man? A Nobody. When I go over there I can't find nobody except a stevedore outside, and the stevedore looked to me, and he said, "What you doing here?" I say the guy broke; I say, "I come down, I want to put a pulley chain on." He said, "All right, I will give it to you."
Q Who was that? A Julius.
Q That is the foreman? A Yes.
Q Did he pick out the chain for you? A He give it to me; he took it and said, "You fix it up." And then I come back, and we are fixing it and he come along and say, "You are fixing it up wrong, what are you doing?" And fellows

was with me fixing it when this man come there and say, "You too lazy," and this and that, and, "Get to hell out of here;" he said to Tuccillo, "you all alike," and he say to Tuccillo, "What you doing?" I say I want to put the chain double, and he say, "No, you lose too much time," and I put it single, and I put it fast on the stanchion. He say, "You put it fast on the stanchion," and he say, "Go ahead and start," and I said, "That chain will be broke because the strain is too heavy." And Tuccillo was on this side (indicating) and I was on this side, and I said, "Get away, watch yourself. You see that chain going to be broke." And Tuccillo say, easily, like that, "You can't do that." I say, "All right," and I gave the sign to the winch man to go ahead, and I look to the guy and the guy go "rr-r rr-r rr-r," and the guy broke. I put my head down, and Tuccillo was over here (indicating), and he fell down. I said to the stevedore when he fall down, "Do you see what you done?" He said, "All right; keep your mouth shut. Take him to the office," and when we got there Julius come there and says to me—

Mr. Markley: I object to what happened with reference to any conversation.

The Court: I do not see how that is competent.

Mr. Kent: You mean after the accident?

The Court: Yes. How could what they said at that time make any difference?

Mr. Kent: That is the representative, the general foreman, the master's representative at that point.

The Court: No, I think you had better not let that go in.

Mr. Kent: I take an exception.

You can't tell what happened after that. That is all.

Cross examination by Mr. Markley.

Q You had this guy all fixed, hadn't you? A Yes, sir.

Q And it broke, didn't it? A Yes.

Q That is, the offshore guy broke? A Yes.

Q After you had had it all fixed? A Yes.

Q As I understand you to say, you had two new guy ropes in there? A Good guys, perfect guys.

Q Two new, perfect guys? A Yes.

Q You had it all rigged up? A Instead of—

Q And then Tuccillo came along and he said he didn't want these guys in there? A Yes.

Q He wanted you to get a chain? A Yes.

Q You had been using the guys all day; you had been working there all day, hadn't you? A Yes.

Q What was your position? A Gangway man.

Q You did not have any chain before then, did you? A No.

Q Did Tuccillo tell you to get a chain? A Yes.

Q And Tuccillo being your boss, you did what he told you? A Yes.

Q And you left the steamship? A Yes, sir.

Q You went to the dock, the pier? A Yes.

Q What was the pier? A Pier 9.

Q Where did you go on the pier? A To the store room to get the chain.

Q You went to the store room, on the dock or pier, to get a chain? A Yes.

Q How far was that away? A About one hundred feet or more than that.

Q One hundred feet away from the steamship? A Yes.

Q That is, you had to walk along the dock for one hundred feet after you left the steamship? A Yes.

Q How did you get off the steamship? A Well, the gangway.

Q And then, after you got off the ship, you had to walk one hundred feet to the store house? A Yes.

Q And you say when you got down to the store house there was nobody in there? A No.

Q It was empty? A Yes.

Q And you looked for the chain you wanted in the empty store house? A No; I looked for the man.

Q What man? A A man around the store house.

Q Who was he? A Anybody. I found Julius, and Julius gave me the chain.

Q You say there was nobody in the store house? A No.

Q And then you went out looking for Julius Hart, the general foreman? A Yes.

Q And where did you find him? A On the dock.

Q How far away from the store house? A About ten or fifteen feet.

Q And you went up to the general foreman and said, "I want a chain"? A Yes.

Q What did he say? A He said, "What have you got?" I say, "The guy is broke and this and that on the deck."

Q What do you mean by "this and that"? A You know, the guy is broke and we have to

put another guy there, and a fellow there say there wasn't time, and I put in two perfect guys.

Q And you told him the foreman did not want the regular guy, did you? A Yes.

Q He wanted a chain? A He wanted to put a chain.

Q And that was Julius you spoke to? A It was Julius, yes.

Q What did Julius do? A He give the chain to me.

Q Did he go back to the store house with you? A Yes.

Q And you went back together, did you, to the ship? A Yes.

Q And he gave you a chain? A Yes.

Q And he said, "Here is a chain; go back to the ship," did he? A Yes.

Q Did he go back with you? A Not with me, no.

Q He did not go back with you? A I went first and he after.

Q You went on yourself with the chain? A Yes.

Q And you went back on the steamship with the chain by yourself? A Yes.

Q And what did you do with it? A I started to rig up, I said, "Charlie, there's the chain," and he said, "All right; go ahead," and he gave hands to me and we put the chain on double up.

Q You put the chain, you and he together doubled it on the offshore guy? A Yes; and then Julius come.

Q How long after you started to rig it up was it that Julius came? A Four or five minutes later.

Q What did he say? A "What's the matter? Haven't you got through with that?"

Nick Papparelli, cross.

Q Then, after you started to rig up, Julius came along on the steamship? A Yes.

Q You had left him over on the dock? A Yes.

Q In the store house? A Yes; well, on the dock.

Q Did he come out of the store house? A Yes; he came out of the store house with me.

Q Don't you know he was not in the store house at all? A Who?

Q Julius? A No, sir.

Q Don't you know he was not in that store house at all? A No, sir.

Q Don't you know Julius did not give you any chain at all? A No, sir.

Q Don't you know he was general foreman on the steamship, and not on the dock at all? A No; he did several things.

Q Don't you know he was on the steamship all the time and not in the store house? A Sometimes on the ship, sometimes in the store house, and all over.

Q I mean that night; don't you know when you went to the store house to get the chain, Julius was not there at all? A No one was in the store house.

Q He did not go to the store house with you? A He came to the store house with me and give me the chain himself; the man of the store house had gone home.

Q Don't you know Julius did not know anything about the chain being used until after the accident happened?

(No response.)

Q You are a friend of Tuccillo, aren't you? A Just in work with him.

Nick Papparelli, cross.

Q He is a friend of yours? A No friend of mine; he was my boss at that time.

Q Didn't you talk to him about this accident afterwards? A No, sir.

Q Did you talk to Tuccillo about this accident after it happened? A I did seven or eight weeks after, more than that.

Q Didn't you go over and see him about it? A Yes, I went three or four times there.

Q And you talked to his lawyer about it, too, didn't you? A No, sir.

Q Didn't you talk to his lawyer about this case? A No, sir, I am telling you just what I said.

Q How did you come to be here today? A Tuccillo said to me: "Come around because I have a case, then you can say what you know that time," and this and that, "that trouble over there," and I say: "Yes," and he says: "Come with me."

Q You went to see Tuccillo, and when you came to the house he said: "Come to court with me"? A I found him up on the dock.

Q He told you to come to court with him? A Yes.

Q Did he tell you where you were to come? A Yes.

Q Did you come with him? A Yes.

Q Did you come over in a trolley car together? A No, I come alone.

Q Did you get a subpoena? A What is that?

Q A paper, did you get a paper to come here? A Yes, I got a paper.

Q Let me see the paper.

(Witness produces subpoena and hands same to Mr. Markley.)

Q Who gave you that? A Tuccillo gave me that.

Q When last did you see him before this? A Last week.

Q Where did he give this to you? A On the dock.

Q And he gave you this to come to court on the seventh of April? A Yes.

Q That is what it says, you were to be here on the seventh of April? A Yes.

Q That was all he gave you, was it? A Yes.

Q What did he say? A To show that in court.

Q He said: "Show that in court"? A He said: "Show this, if anybody asks you when you come to court."

Q He said that to you, did he? A Yes.

Q You work down at the same place he does, on the dock, don't you? A Who?

Q Tuccillo? A Yes, sir.

RECESS.

AFTERNOON SESSION.

April 21, 1926.

DR. JOHN A. BOTTI, sworn as a witness, testifies:

Direct examination by Mr. Kent.

Q Doctor, you are a practicing physician and surgeon of this State? A Yes, sir.

Q Are you connected with any of our local institutions, doctor? A Not at the present time.

Q Have you been connected with any hospital? A With the Jersey City Hospital.

Q Did you examine the plaintiff in this case, Salvatore Tuccillo? A I did.

Q When did you make the examination? A On March twenty-fourth.

Q March twenty-fourth of this year? A Of this year, yes.

Q Where was this examination held? A At my office.

Q Will you please tell us what you found at that time? A I found that this man had a hernia, a rupture in the epigastrium, the region of the abdomen, right up here (indicating), as you say, in the pit of the stomach.

Q Is that condition that you found there a permanent one? A It is if not operated on.

Q And an operation would entail what, doctor? A Well, an operation would entail just what it explains itself, an operation with the usual dangers that go with an operation.

Q Is that a major or a minor operation? A It is a major operation.

Q With this condition that he has at the present time, would it be possible for him to do hard manual labor? A No, I do not think so.

Q Would it be possible for him to lift heavy weights? A I would not recommend him to do so.

Q What would that tend to do? A It would tend to enlarge the rupture, possibly strangulate it.

Q Assuming, doctor, that the plaintiff was in good health on the 23rd day of February, 1924, and at that time was doing longshore work, which involved the lifting of heavy boxes, freight and other things, and did that work consistently

and uniformly for a long period of time, and that on that day, while on board the steamship Marengo, moored at pier 9, at Hoboken, he was struck by a block or piece of chain in the stomach about the place you mentioned, the abdominal region, and that as the result of that he was knocked unconscious, removed to an office on the pier, and then was taken home and was incapacitated at home for a period of five or six weeks, roughly speaking, and that since that time he has not been able to do that sort of hard work but is only able to do work that does not require heavy lifting, such as running a winch, would you say an accident such as I have described would be a competent producing cause of what you found in the abdominal region of this man?

Mr. Markley: I object to that on the ground that the witness has not been qualified to answer the question.

The Court: In what respect? He is a practising physician.

Mr. Markley: All that appears is that he is a doctor, and I do not think he is competent to answer a question of that character.

The Court: That may be so.

Q I will ask you, how long have you been practising, doctor? A Approximately ten years.

Q Are you in active practice? A Yes, sir.

Q Have you treated cases involving abdominal injuries and hernia? A Yes, sir.

Q And have you been treating them during all the ten years? A Yes, sir.

Q Roughly speaking, about how many cases involving injuries of that kind have you had in your practice? A Well, my practice in the past eight years, seven years to be more exact, has been limited to traumatic injuries, to industrial traumatic injuries, and in the general nature of my work I may say I have seen a great many or at least five or six thousand injuries.

Q What kind? A Abdominal injuries and injuries to the human system generally.

The Court: I think he is qualified, unless Mr. Markley desires to ask him some questions.

Mr. Markley: I would like to ask the doctor a question or two.

The Court: You may.

By Mr. Markley.

Q Where is your office, doctor? A 236 Summit avenue, Jersey City.

Q You are not connected with any hospital, you say? A Not at present.

Q You were connected at one time with the Jersey City Hospital? A Yes.

Q In what capacity were you connected with that hospital? A Attending physician at clinics at the City Hospital.

Q What did you do when you were in attendance there? A Just treated patients as they came in to the clinic.

Q You mean anyone that happened to come into the clinic, you would treat them? A Yes.

Q You were not surgeon? A No.

Q Assistant or attending surgeon or anything of that sort? A No, I was not.

Q That was the extent of your experience, then, in the Jersey City Hospital, in the clinic? A In so far as institutional work is concerned, yes.

Q You are not a surgeon, are you? A No, I am not.

Q And your work, your practice, has consisted in doing what? A As I stated, in the last seven years I have been doing traumatic industrial injuries almost exclusively, I would not say exclusively but quite extensively.

Q By traumatic industrial injuries, what do you mean when you say you doing that almost exclusively? A Well, I have been doing treatments, treating and examining cases in certain concerns, where I happen to meet more traumatic injuries than the ordinary physician would.

Q And when you find them, what do you do? A I examine and treat them.

Q Do you operate on them? A No, I would not operate them.

Q In other words, you work for certain companies in giving first aid to traumatic injuries? A No, not first aid.

Q You would send them to a surgeon? A Yes, to our surgeon.

Q You were not the surgeon? A No, I was not.

Q Have you a general practice of private patients? A Yes, sir.

Q You have? A Yes, sir.

Mr. Markley: That is all.

The Court: I think he may answer.

Mr. Kent: I would like the question repeated.

By Mr. Kent.

Q (Repeated by stenographer.) Assuming, doctor, that the plaintiff was in good health on the 23rd day of February, 1924, and at that time was doing longshore work, which involved the lifting of heavy boxes, freight and other things, and did that work consistently and uniformly for a long period of time, and that on that day, while on board the steamship Marengo, moored at pier 9, at Hoboken, he was struck by a block or piece of chain in the stomach about the place you mentioned, the abdominal region, and that as the result of that he was knocked unconscious, removed to an office on the pier, and then was taken home and was incapacitated at home for a period of five or six weeks, roughly speaking, and that since that time he has not been able to do that sort of work but is only able to do work that does not require heavy lifting, such as running a winch, would you say an accident such as I have described would be a competent producing cause of what you found in the abdominal region of this man?

Mr. Markley: Same objection.

The Court: Objection overruled.

Mr. Markley: I take an exception.

A Yes.

Q Doctor, would the cause in any way affect this man and his injury? A Yes, it would.

Q Would any kind of unusual strain in any way affect his injury? A Yes, sir.

Cross examination by Mr. Markley.

Q What do you say he is suffering from? A He has a hernia in the epigastric region of the abdomen.

Q Is it visible to the eye? A Yes.

Q Could you see it when you examined him on March 24, 1926? A Yes.

Q Was there a protrusion there at that time? A Yes.

Q A protrusion of what? A A protrusion of the abdomen, like the gut.

Q You could not see that, could you? A You couldn't see the gut but you could see the bulging.

Q This man has a pendulum stomach, hasn't he? A A what?

Q A pendulum stomach, a large stomach? A Yes, he has a quite large stomach; yes.

Q And you could see this hernia protruded, could you, just by looking at him? A By examining that area, yes.

Q Just by your sight? A With sight and with feeling.

Q Did you ever see a ventral hernia of traumatic origin before? A Yes.

Q How many have you seen? A I don't recall but I have seen them in the course of my practice.

Q Haven't you any idea of how many you have seen of ventral hernias as the result of a blow or a trauma? A Yes, I have seen a dozen.

Q How many? A Well, possibly, three or four, that is my recollection.

Q In ten years? A In ten years.

Q Hernia is usually due to disease, isn't it? A I wouldn't say so.

Q Isn't that a fact that is well recognized, that hernia is due to disease? A Some are, yes, but not all.

Q Isn't it a recognized fact among medical practitioners that hernia is due to disease? A No, I don't think so.

Q And you say you treat industrial traumatic cases? A Yes.

Q Don't you know it is so well recognized that it has been enacted as a statute in this State? A It may have been but, if so, I don't agree with the enactment, I do not think that all hernias are due to disease.

Q Do you know what statute I am referring to? A Yes, I think I do.

Q What am I referring to? A Probably the Compensation Act.

Q And you know the Compensation Act has put in it, as a legislative fact, that hernia is due to disease and not to trauma?

Mr. Kent: I object to what the statute says, although it says before you can hold the employer you must give instant notice, and, if you do not, he is let out under that statute.

Q Haven't you testified, time after time, that hernia is due to congenital defect, in these Federal cases? A Yes.

Q Have you testified in Federal cases? A I certainly have.

Q I mean have you testified in Federal cases in cases of hernia? A I do not think I have testified in a case of hernia in an industrial case.

Q What is your specialty in these industrial cases? A At the present time, I am doing eye and ear, that is, my specialty in them.

Q You testify in eye and ear troubles? A Yes.

Q And you come here to testify to an abdominal hernia? A Yes.

Q Do you consider hernia is, in a great many cases, due to congenital disease? A Yes.

Q What does that term mean? A Congenital means that it has a tendency to occur from the parents.

Q Not due to trauma at all in those cases, is it? A No.

Q Are not hernias of this character quite common in any men and in any women? A I would not say they were common.

Q Do you know, one way or the other? A They are not common.

Q You say they are not? A They are not in my experience.

Q What experience have you had? A I mean in examining fat people.

Q How many fat people have you examined? A I don't know.

Q More than one? A I should hope to say so.

Q How many? A I don't know.

Q You haven't any idea? A Well, I will say it is several thousands.

Q Several thousands of fat people? A Yes.

Q That you have examined for hernia? A Oh, not for hernia but that I have examined in general.

Q And you attend on these compensation cases in the Compensation Court of New Jersey? A Maybe four or five times a year.

Q And you have had occasion to refer to this statute, haven't you, in the way referred to? A What is that?

Q I say you have had occasion to refer to this statute we have been referring to? A I don't understand what you mean.

Mr. Markley: I will repeat the question then.

Q (Last question repeated by stenographer.) A Do you refer to the Compensation statute?

Q Yes. A Well, many a time I have, yes.

Q Have you had occasion to refer to the section on hernia? A Yes.

Q And you say you do not agree with that section, is that what you say? A That I do not agree with it?

Q Yes. A No, I do not agree with that section.

Q Which part do you disagree with? A I don't agree with the wording of one or two of the points on the requirement for the establishment of hernia as a compensation case.

Q Do you agree with that part of the statute which says that hernia is usually congenital, and not due to a blow? A Usually congenital, did you say?

Q Yes. A Usually, yes, that is all right.

Q Now, you only saw this man on one occasion, did you? A Yes.

Q And that was in this year, 1926? A Yes.

Q Suppose you had been called in immediately after this accident happened, or within a few days after, would you expect to find some objective manifestations of the blow? A Yes.

Q What would they be? A Probably by a bulging and an impulsive coughing.

Q Would there be any sign of a blow there? A There probably would.

Q There would be some sort of discoloration? A There might be, yes.

Q Would you expect extravasation of blood? A Yes.

Q You would look for that, wouldn't you? A Yes.

Q Suppose you did not find it? A Suppose I did not find the discoloration?

Q Yes, or any objective symptoms there? A The conclusion would be there was not any hernia.

Q You certainly would find he did not have any traumatic hernia? A Yes.

Q Now, this hernia you say this man has may be congenital, as far as you know? A Congenital hernia, I do not believe so, but the ventral hernia such as I found in this man is very commonly of a congenital nature.

Q You do not know, from the symptom of this man's hernia, whether it is congenital or whether it is due to trauma, do you? A No, I do not know definitely.

Q And you have to take this history which Mr. Kent has given you, in order to arrive at a conclusion on it? A To a certain extent.

Q Were you called in to treat this man? A No.

Q You were called in just for the purpose of testifying? A Yes.

Mr. Markley: Then I ask that the witness' testimony be all stricken out, because he was simply called to examine this man for the purpose of testifying, and he could not form an opinion that the plaintiff had hernia without the history, and a man called in to testify has no right to rely on any history but only on what he finds himself.

The Court: Is not that what the courts have held, that a physician cannot use a history of a case in forming a conclusion?

Mr. Kent: He testified in reply to a hypothetical question, and he testified that he found a condition there, which he sees and observes, and then I put in the history which the man has given.

The Court: I think the hypothetical question was proper, as far as that is concerned, but what he testified to himself—

Mr. Markley: I am not objecting to the hypothetical question, but I say his testimony where he concludes this is a traumatic hernia must be stricken out, because he says he could not give that opinion unless he had the history.

The Court: Yes, strike that out.

Q Now, looking at this man on the day you saw him, on March 24, 1926, you could not tell whether that condition you saw was caused one year, five years, ten years or fifteen years ago, could you? A No, I could not.

Re-direct examination by Mr. Kent.

Q Doctor, the condition you found there was readily apparent? A Yes.

Q And you found that condition, did you, by laying him down or what? A By laying him down and making a regular abdominal examination.

Q Can that condition be observed unless the man lies down or unless he is under strain or pressure? A It can be observed just as he is.

Q Can it be observed if he stands up and you apply pressure to that part? A Yes.

Q In other words, there can be an indentation observed there, or what? A He has a bulge in there.

Q And can that be forced through, can you put your finger there? A Well, I find the signs there that go with the hernia.

Mr. Markley: The statute referred to is in the "Compiled Statutes, under Workmen's Compensation."

Re-cross examination by Mr. Markley.

Q The part of the statute I referred to is this: "Hernia is a disease which ordinarily develops gradually, being rarely the result of accident." Do you agree with that? A I do not, not from my experience.

Q Is not that an accepted proposition among the foremost medical men? A It is an accepted proposition but I do not agree with it.

Q But you do agree that is an accepted conclusion among the foremost medical men? A On the percentage of hernia cases, yes.

Q And you know it has been so accepted as right in this State? A Yes.

Q And yet you say you disagree with it? A Certainly, my experience has shown me different.

Q And most cases are regarded as congenital, are they not, and of self-development? A I would not say most cases of hernia, but I would say most cases of inguinal hernia.

Q But this statute does not say that? A That is why I disagree with it.

Q Notwithstanding it is accepted among leading medical men in the country, you disagree with

it? A Yes; I am speaking here of my own experience.

Q How old are you, doctor? A I am thirty-three.

Q Seven years in active practice? A Approximately ten years with my army practice.

Q How long have you been admitted to practice? A I was admitted in 1916.

Q You would rather take your ten years experience than a well settled rule of the foremost medical men? A I don't care what they say, I take it from my individual experience.

Q You would rather take your own individual experience than that of the foremost medical men? A Yes, it is more to me than any book.

Q Notwithstanding the fact that you are not a surgeon and never operated on a hernia? A Yes.

By Mr. Kent.

Q Doctor, the act specifically states that hernias being rarely the result of an accident—where hernia comes not resulting from an accident, then, of course, it is either congenital or comes from something else, but where there is an accident and then hernia develops, would you or any other doctor dare to say it was congenital, where you have a history of an accident or a blow? A No, certainly not.

Q And in any case where a man is injured, struck a heavy blow in the stomach, would any doctor dare to say the hernia was congenital?

Mr. Markley: I object to that.

The Court: He cannot say what other doctors would say.

Mr. Kent: May I read the statute to the jury, since there has been some talk about it?

The Court: I do not think that is quite proper.

Q Have you had occasion to read the statute, doctor? A Just offhand. I don't think I have read it through.

Q Do you remember this clause: "Where there is traumatic hernia resulting from the application of force to the abdominal wall, and penetrating the wall, compensation will be allowed; do you know that? A Yes.

Mr. Kent: That is all. That is our case with the exception of the family doctor, who has not arrived yet. The plaintiff rests.

Mr. Markley: I have my doctors here, but I do not want to call them until all the medical testimony is in for the plaintiff.

JULIUS HART, sworn as a witness for the defense, testifies:

Direct examination by Mr. Markley.

Q Mr. Hart, where do you live? A 183 Columbia avenue, Jersey City.

Q By whom are you employed? A John T. Clark & Son.

Q In what capacity are you employed by John T. Clark & Son? A General foreman stevedore.

Q Are you still employed by that company? A Yes, sir.

Q Were you employed by them on February 23, 1924? A Yes.

Q Were you the general foreman in charge of the loading of the steamship Marengo from a lighter? A Yes, sir.

Q Did you see working there that day this man Tuccillo? A Yes, sir.

Q The men that he had under him, where did they come from? A He more or less hired them himself.

Q He hired those men himself?

Mr. Kent: I object to your misquoting the witness.

Mr. Markley: That is what he said.

Mr. Kent: He said "more or less."

Q What do you mean by his more or less hiring them himself? A He brings a certain number of men he knows and the rest are filled in by me.

Q How many men did he have under him? A Twenty men, or twenty-one.

Q What was he doing with those men that he had under him on this day, February 23rd? A He was loading a ship from number 4 hatch from the inshore side.

Q When was he doing that? A Up to six o'clock.

Q You say from the inshore side? A Yes, from the dock.

Q I see; he was loading number 4 hatch from the dock or inshore side, from the dock to the hatch? A Yes.

Q They had supper then? A Yes.

Q What time did they have supper? A From six to seven.

Q And then when they came back what did they do? A I told them to shift off there and take in the apples off the lighter.

Q In shifting, what would be done, if anything, with the booms? A The first thing, he asked us where were the booms; the inshore would be up and down, and the other would be offshore, and he has to reverse the booms just the opposite way.

Q So, they started to work offshore from the lighter to number 4 hatch, after supper? A Yes.

Q Who ran these two falls and booms? A The hatch force, as we call them, and deck hands.

Q Did you see them when they were rigging for the offshore work, previously? A Not the day previous, but night in this case.

Q Have you made a model to illustrate how that rigging ought to be? A Yes.

Q (Producing model.) And is this the model I have here? A Yes.

Q Did you make this model? A Yes, sir.

Q Would you mind stepping down here and explaining this model to the jury?

(Witness leaves the stand and continues with the model from the counsel table.)

Q Which is the offshore side of the steamship here? A This here (indicating side of model).

Q And which inshore? A This side.

Q Taking these two pieces of wood, which form two sides of a triangle, what are they? A The smokestack. This is the Burton boom and this the up-and-down boom.

Q This (indicating) is the Burton boom? A Yes.

Q And this (indicating) is the up-and-down boom? A Yes.

Q As we look at this Burton boom, is that supported by guys? A Yes, sir.

Q Point to them? A One here and one here (indicating).

Q Which is the offshore guy? A This one (indicating).

Q Running from the eyebolt of the Burton boom? A Yes.

Q That is the offshore guy? A Yes.

Q And the other guy, what is that called? A The inshore guy.

Q What is this piece of wood that is on the line? A That is supposed to be the draft of apples.

Q Let us suppose the draft of apples is over here (indicating); can you let that down?

(Witness moves apparatus and lets down load.)

Q Now it is down on the steamship? A No, on the lighter.

Q What is the first movement—that is, when that goes up? A This is the winch (indicating); it makes a turn; this winch continues with this rope.

Q This is pulled by the winch? A Yes (operates winch on model).

Q The Burton boom helps it up? A Yes.

Q What does the up-and-down boom do? A Pulls it in and then slacks off and it goes in the hatch.

Q Now lift it out again.

(Witness does so.)

Q I notice that you have a line running parallel to your Burton boom? A Yes.

Q What is that called? A That is the Burton fall.

Q And I notice that fall runs down through a pulley? A A pulley block; we call it a heel block.

Q In other words, this Burton fall does not go directly over to your deck house? A No.

Q But down to your heel block? A Yes, to a leading block.

Q What is the purpose of that heel block? A To minimize the stress of the guy on the boom.

Q If you took that heel block out, then what would happen to the boom or to the strain on it? A You can't depend on it; in this case, the boom carried it away.

Q If you take that out and carry it up to your deck house, does that put more or less strain on your boom? A More.

Q And does that put any more or any less stress on your offshore guy? A At least tenfold.

Q When did you first come in contact with this accident, in point of time? A I came along here (indicating) on the leeway; you couldn't see what was going on, on account of a narrow passage, and the man put on the chain. When I got there I saw something was up, and I asked him what was doing, and he said, "A guy has carried away," which happens frequently from different causes.

Q When you came there, what was the status of the affair or how had it progressed? A They had hardly done anything. I had had the same accident happen. I think the same accident had happened before to the boom; the guy gave way, and they were going to refix it again.

Q Tell the jury in your own words what happened from the moment you got there until the thing was all over. A Well, I came along there and saw a man putting a chain on here (indicating), onto the offshore guy; when it was finished, the gangman gave the sign to go ahead, and the draft goes up as high as the deck, and the strain from the up and down doubles the strain, the guy carried away, and the man laid on his belly right down here (indicating).

Q Did you have anything to do with putting in that chain? A No, sir.

Q Did anything strike Tuccillo? A Not that I know of; no.

Q Did you see anything strike him? A No.

Q And you were standing right there at the time? A I was standing right here (indicating).

Q Did you examine this heel block after the accident? A The moment I seen the boom spring in, I looked at the heel block, and I said, "No wonder it carried away, because of the change in the load."

Q Where was that? A Down here (indicating); after the accident the block was up here; by what reason I don't know.

Q In other words, the stress and strain on the heel block wasn't there at all? A No.

Q Because the line had been removed from the heel block and put on the deck house? A Yes.

Q And would you say that put ten times the amount of stretch on your offshore guy? A Yes.

Q Do you know if that knee bolt was tacked on when they started work? A That is solid.

Q Was your fall over your brake in there when they started work? A During the day

nothing happened; they had the boom on the inshore side; when this happened it was shifted offshore.

Q Whose duty was it to see it was changed properly? A It was on the deckhand.

Q Was that up to Tuccillo? A Tuccillo and the gangway man.

Q The gangway man is one of the gang? A Yes.

Q And he and the foreman of the gang are supposed to see the rigging is proper? A Yes.

Q Now, it was testified by the gangway man, one of the men in the gang, that he went over to the store house on the dock or pier, and that he went in the store house to get a chain and there was nobody there, and that he met you on the dock a few minutes before this happened and you went with him to the store house and got him this chain; is that so? A No, sir.

Q Did you do anything about getting the chain at all? A No, sir.

Q Where was your job? A General supervision.

Q On the boat or on the dock? A Both, on the ship and on the dock.

Q It has also been testified here that you yourself personally fixed up this chain on the offshore guy; did you do that? A No, sir.

Q If the fall had been properly rigged, would it have made any difference whether they had any chain or not on the offshore guy? A An old piece of junk would have done for the same purpose.

Q It was because the fall was improperly rigged that gave this extreme stress? A Yes.

Q Now, I think the plaintiff also said you used some very vile language to him when you

fixed the chain; is that so? A I wouldn't say that, but you know we have to be pretty gabby-gab; you know they're not all gentlemen.

Q You can say, "Please do so-and-so"? A No; it's out of the question.

Q You have to tell them to get to work, don't you? A Something like it.

Q Did you call him a "bastard"? A No, sir; I don't think the man would stand for that stuff.

Q He is a somewhat bigger man than you are, too, isn't he? A I guess he is.

Q You might tell him to get to hell out of there, though? A I wouldn't deny that, because we have to bawl the men out when it's necessary, but he isn't hurt by it, and they are protected by the union.

Q I understand this particular chain was up when you came there? A Yes.

Q And they were about lifting a load of apples when the offshore guy gave? A Yes.

Q That was about the time of your appearance on the scene? A Yes.

Q Is this (model) a fair representation of the way the booms were rigged there? A Yes, sir.

Q This fall that follows down the offshore boom was not tacked in the way it is here (on the model) to the knee bolt? A No.

Q But it ran directly over to the deck house? A Afterwards it was shifted, yes, sir.

Q That is the way you found it? A After it was on deck I looked round.

Q Did you see this offshore guy strike him? A No.

Q How far were you from him? A About five feet away.

Q What did you see him do? A He fell down and lay on his belly.

Q What made him fall, do you know? A To my remembrance, it was the guy that laid in a heap on the deck, and he tripped.

Q And he tripped over that?

Mr. Kent: He did not say that; he has been constantly putting words into this man's mouth while he has been on the stand, and I have deliberately permitted it.

Mr. Markley: I object to that statement. It is counsel's privilege to object, if he wants, but not to make speeches.

Mr. Kent: I have not objected.

Mr. Markley: I understood the witness to say that he slipped or tripped over the rope.

Q Is that right or not? A Yes, sir.

Q And the rope was in a coil on the deck? A Yes.

Mr. Markley: I would like to offer that model in evidence.

Received and marked Exhibit D. 1.

Cross examination by Mr. Kent.

Q Mr. Hart, you were in charge of the work on that ship? A Yes, sir.

Q And the men did whatever you told them to do? A Yes.

Q And you directed him what part of the hold to go to? A Yes, sir.

Q And you directed what machinery and equipment they should use? A No, sir.

Q Well, when you would send him to hold No. 4 didn't you tell him what to use? A No, sir.

Mr. Markley: I object to counsel talking to the plaintiff about this exhibit; if he wants to look at it, I think he ought to look at it himself without discussing it with counsel in the case. I do not think he ought to be coaching on this exhibit.

Mr. Kent: I think that is an unwarranted and unfair statement to make, about coaching.

Mr. Markley: Why is it necessary for counsel to explain it to him?

Mr. Kent: I merely asked the witness on the stand about the movement and he was going to explain it.

Q Who was in charge of the gear room? A The store keeper.

Q When did he work that day? A He worked all day.

Q When did he quit that day? A I couldn't tell you that, our books will show you that.

Q Is the gear man in court? A No, sir.

Q You were there about eight o'clock that night, is that correct? A I was there all day.

Q And you were there all night? A Yes, sir.

Q And the men were working overtime, weren't they? A Yes.

Q They were working overtime because you were anxious to get the ship out? A I don't know about anxious to get the ship out, that doesn't concern us, that is for the steamship company.

Q But there was a reason for keeping the men on all night? A There must be.

Q Don't you know the reason? A Yes, sir; I worked under orders.

Q Under orders from whom? A From the steamship line.

Q The men got paid for time and a half for nighttime? A Yes.

Q Was there any reason for keeping them at night? A Not to my knowledge, I don't know it myself.

Q When did you stop working that night? A I think it was eleven or twelve. This gang knocked off before, they only worked till nine o'clock.

Q They came back at seven o'clock and worked only two hours longer? A Yes, sir.

Q At that time had they finished loading all the apples? A No.

Q And you say your regular gang went on when? A At seven o'clock.

Q Well, these men continued working from seven o'clock on? A Didn't you ask me when they finished?

Q Well, when did they finish? A Eleven or twelve o'clock that night.

Q Did they finish loading all the apples? A No, it was done the next day.

Q By the same gang? A I don't remember that.

Q Do you say now you do not remember whether the finishing of the loading was done by the same men or not by the same men, on the No. 4 hold? A I can't tell you that.

Q You in doing your work made the rounds of the ship? A Yes.

Q And if you found something that was wrong, you supervised the correcting of that, didn't you? A Well, if things come up that way, yes.

Q And if a boom went wrong and you could not load freight, it was part of your duties to see that was corrected at once? A Well, no, the hatch boss corrected it.

Q But it was your duty to see they were all at work? A Yes.

Q Because if twenty or twenty-one men were not working, they were getting pay for time and a half for doing nothing? A Yes.

Q And it was up to you to see they worked? A Yes.

Q Did you know when the guy rope broke the first time? A No, sir.

Q Do you know when it broke? A Shortly before it happened the second time.

Q When did you first learn of it? A When I came along the deck around eight o'clock.

Q Is that the first time you heard of it? A Yes.

Q As you were making your rounds? A Yes.

Q And when you got there what did you see? A I saw the men putting a chain on the guy.

Q You are sure they were putting a chain on? A Yes, sir.

Q They had not finished yet? A Yes, they had finished within a hitch or so.

Q Just a hitch or so? A Yes.

Q What did you do? A I asked the men what was the matter, and they told me a guy got away, and I didn't do anything further; when they told me a guy got away they put a chain on, and I didn't do anything further except

watch the proceeding; then when the man gave the signal to go ahead—

Q Who gave the signal? A The man on the deck, the gangway man.

Q Do you mean Papperelli gave a signal to go ahead? A I don't know him by name, I know him by sight.

Q Was that one of the men who testified this morning? A Yes.

Q You say he gave the signal to go ahead? A Yes.

Q And did you stay there watching him? A Yes.

Q Did you say anything to anybody? A I must have talked.

Q Did you tell them to get to hell out of there? A No; if the deckhand goes away the gang is crippled.

Q Did you say anything to them? A I may have ordered them out.

Q What did you say? A I can't remember that.

Q But you remember everything else? A I consider details—

Q Don't you remember what you said to the men at that time? A I remember after the accident I said: "It's no wonder it happened because you made the lead wrong."

Q You did not say that before? A No, because it was in this small passageway, you see, you can't see them (indicating by use of model).

Q But you said you saw them when the men had started the work? A I didn't say it.

Q Is that your best answer to me, you didn't say it? A I didn't say it until the accident happened.

Q Do you mean to tell me when you came along that passageway and you saw this thing was out of line there, you did not say it? A No, you couldn't see it because the house obstructs the view.

Q Couldn't you see it as it was coming along from the top? A After the accident I saw it.

Q That is the first time you saw it? A Yes, sir.

Q And when you came up there and watched the men putting on the chain, you say you said nothing at all? A I didn't say anything? I told you I may have said something.

Q But you do not know what you said? A No, sir, I don't remember the words.

Q Was Tuccillo working on the chain when you were there? A (No response.)

Q Why do you hesitate? A I want to find out who the man is.

Q Don't you know who Tuccillo is? A No.

Mr. Kent: Stand up, Mr. Tuccillo.

(The plaintiff Tuccillo stands up.)

Q You have been in court all morning? A At that time, that man was giving the name of Patsy.

Q You saw him in court, on the stand, this morning? A Yes.

Q You heard him testify? A Yes.

Q And do you mean to tell me now you did not know who Tuccillo was? A Well, I wanted to be sure.

By the Court.

Q You say you knew him by what name? A Tootsy.

Julius Hart, cross.

By Mr. Kent.

Q And what do you say now as to whether you saw him at work on the chain or not? A Yes.

Q You saw him at work? A Yes.

Q And you say you saw him finish it? A I saw him working on it.

Q Is that the only answer you want to give me? A That's the only answer I can give you.

Q Did you see him finish the work on the chain? A I seen him working on the chain, yes.

Q Did you see him finish it? A No, sir.

Q Where were you? A I was right alongside of him.

Q Did he leave it unfinished? A No; it was finished.

Q Then you saw him finish the work, didn't you? A (No response.)

Q Did you see him finish the work? A I told you, no.

Q Well, who finished the work? A The gang that was around, there was more than one man around, I don't know who he placed there.

Q He went away from there, didn't he? A Not to my knowledge.

Q But you did not see him finish the work? A I can't answer you in any different way than I do.

Q Are you sure this is a correct representation of the pulleys that were there? A Yes.

Q Wasn't there another fall below there (indicating on model)? A On this guy, yes.

Q Another pulley I mean? A Yes.

Q Why didn't you show that? A Well, it is the best view as it is.

Julius Hart, cross.

Q Which pulley struck him? A To my knowledge, none.

Q Why did you purposely leave out the bottom pulley on this model? A Well, to tell you the truth, I didn't know it was necessary.

Q Is that the first time you are telling the truth? A Oh, no.

Q Don't you know that was the pulley that hit him? A No, sir.

Mr. Kent: I object now to that model going in evidence.

Mr. Markley: It is in evidence already, but irrespective of that, I do not mind the objection but I want to ask him another question about it.

By Mr. Markley.

Q As I understand it, there were two pulleys at the bottom of the offshore guy? A Yes.

Q And in putting this guy down here, you did not show two pulleys? A No.

Q Only one? A Yes, because when I made that thing I made it to show the principle of it.

Q You did not put everything in it? A No, I didn't put the whole of the ship in; I wanted to show the working of the boom.

Q And that was the only purpose of it? A That was the only purpose.

Mr. Kent: I ask again that the exhibit be stricken out.

The Court: No; what is there is proper.

Mr. Kent: I take an exception.

Henry A. Somers, direct.

HENRY A. SOMERS, sworn as a witness, testifies:

Direct examination by Mr. Markley.

Q Where do you live, Mr. Somers? A 109 50th street, Corona.

Q Did you come over here with the payroll sheets of the Commercial Stevedoring Company, which I hold in my hand? A Yes.

Q You are employed in that concern, are you? A Yes.

Q In what capacity are you with them? A Timekeeper.

Q Did you keep the time of a man named Salvatore Tuccillo from the time he came with you to the time he left? A Yes.

Q When did he come with your company? A About six or seven years ago.

Q I mean in 1924? A March twenty-first.

Q How long did he continue with you? A He continued, according to my recollection, during the period up to whatever day we had him on the payroll.

Q The week ending August 6, 1925? A The week ending August 6, 1925.

Q Was he employed by your company as longshoreman? A Yes.

Q Did he receive longshoreman's pay? A Yes.

Q And when he would ask work to do as longshoreman, would he get work? A The same as any other man.

Q Can you tell me what his maximum pay was for a week? A (Refers to sheets.) The week ending April 3rd S. Tuccillo made $35.

Henry A. Somers, direct.

Q That would be four days. You say he began work March 31st? A (Examines sheet.) That is starting Monday, March 31st.

Q Then for four days he made $35? A Yes.

Q Without going through all these sheets, can you tell me offhand what was his maximum pay per week? A (Examines sheets.) S. Tuccillo, one week he made $56.60.

Q What week was that? A The week ending May 15th.

Q $56.60? A Yes, sir.

Q Give us some of the other weeks as you go through them? A The week ending June 12th he made $19.80, the following week $4.40.

The following week he made $26.40.
The following week he made $33.60.
The following week he made $17.60.
The following week he made $19.20.
The following week he made $29.05.
The following week he made $ 8.00.
The following week he made $41.32.
The following week he made $ 7.20.
The following week he made $16.80.
The following week he made $ 2.00.
The following week he made $10.19.
The following week he made $ 5.20.
The following week he made $45.00.
The following week he made ———.

Q Does it depend on whether you have work or not? A Of course, if we have no work, there is no gang, it depends on what work we have in.

Q And does that also appear of other men you have in there? A You can see the different wages each man had. S Bushnick, for instance, only made $6.40; Bowen made $6.40, Banco made $29.25.

Q It all depends on whether you had on hand work? A Yes.

Q If you had a lot of work the men got big pay, and if you had not you cut down? A Yes.

Q Had you known this man prior to August, 1925, or prior to March, 1924? A Yes, sir.

Q How long prior to that time had you known him? A I judge in the neighborhood of three years.

Q And while he was working for you during those three years, had you had occasion to observe him? A Yes; he was one of my hatch foremen.

Q And did you observe him after he came back in 1925? A Yes.

Q Did he complain to you that he could not do his work as a longshoreman? A He wouldn't have occasion to complain to me.

Q You were his timekeeper? A Yes.

Q Whom would he complain to, if he did complain? A To the foreman.

Q He did not complain to you? A No.

Q And you saw him working during that period between March, 1924, and August, 1925? A Yes, sir; he was a winch driver.

Q As a winch driver what was his work? A He was supposed to run a winch, sit there and pull a lever and run the winch.

Q Was any distinction made in the pay of the men? A No; eighty cents outside the gangway man.

Q And he got five cents extra? A Yes.

Cross examination by Mr. Kent.

Q Mr. Somers, after he had this accident he did not act any more as gang foreman? A

Well, even before the accident he was a longshoreman for me.

Q But you said something to the effect that he was gang foreman? A That was a few years before.

Q And as winchman he would sit and pull a lever? A Yes.

Q You have noticed as you went over your sheets of the men you had regularly on your sheets, he drew the lowest pay of the groups, some or most of the men got more money? A Some did and some didn't.

Re-direct examination by Mr. Markley.

Q All he did for you was winchman? A Yes.

Q On April 3rd he earned how much? A $35.

Q And that was more than anybody else, wasn't it, for that week, except one other man, who also earned $35? A It was as much as anybody with us got for that week.

Q And some of them got as little as ten dollars for that week? A One made $8.40.

Q He made as much as the highest man for that week? A Yes, for that week.

Q He got as much as the highest that week? A Yes, on that sheet.

Q Of course, there are other sheets, you have other sheets for longshoremen? A I have fifteen each week.

Mr. Markley: Now, your Honor, I do not think he has a right to call his medical testimony after mine is in.

The Court: Have you put on all your lay witnesses?

Mr. Markley: I have no more lay witnesses.

Mr. Kent: I have been expecting my doctor all this time, if your Honor will indulge me a little longer.

The Court: I do not see how I can wait.

Mr. Kent: I do not believe the case can finish today any way; I only want to call the doctor who treated this man—he is not an expert: I do not see why we can't put him on afterwards, he cannot affect the testimony of Mr. Markley's doctor.

Mr. Markley: I say he will.

Mr. Kent: If you like, I will show you the statement of what he will testify.

The Court: Have you a statement from him?

Mr. Kent: Yes; he made it over a month ago.

The Court: Show it to the other side.

(Statement handed to Mr. Markley.)

Mr. Markley: I cannot consent to that; it states a number of conclusions, which are clearly conclusions, and I have a right to cross examine on them.

Mr. Kent: I merely ask if the doctor comes in before the case finishes, that your Honor permit me to put him on, even after Mr. Markley's doctor has testified.

The Court: I cannot do that.

Mr. Kent: He is on an emergency case, and it has been evidently impossible for him to have been here, as arranged.

The Court: I cannot hold up the case for that. Proceed.

DR. WILLIAM J. ARLITZ, sworn as a witness for the defense, testifies:

Direct examination by Mr. Markley.

Q Dr. Arlitz, what is your profession? A I am a surgeon.

Q How long have you been a surgeon? A At least twenty years.

Q What hospitals have you been connected with? A Christ Hospital, State Hospital, North Hudson Hospital, Moses Taylor Hospital.

Q How long have you been practicing altogether? A Thirty-five years.

Q Did you have occasion to examine this man, Tucillo? A I had occasion to examine and treat him.

Q Just state the circumstances under which he was brought to your attention? A He came to my office on the 24th of February, 1924, for treatment.

Q That was the day after the accident? A Yes.

Q He came to your office? A Yes.

Q Go on? A I saw him then for a period of two weeks; he came into my office from time to time, alleging that he had a pain in his abdomen, at the upper portion. I examined him on a number of occasions, and I found no evidence of any trauma. I found, however, that he had a separation of the rectus abdominal muscle that runs upwards from the bony connection below, approximately, to the breast bone, and that that muscle was separated at its upper portion. On the third visit, if I recall rightly, he stated that he had been to see Dr. Ducerno, who said he required an immediate operation for hernia. I examined him again, and re-examined him, and

I told him my best judgment was that he had something there which was not traumatic in character, and he said he wanted to be sure of it, to be sure that nothing serious was going to transpire. I asked him if he had a preference about any other doctor in the county, and he said he had heard Dr. Dickinson was a very good surgeon, and I referred him to Dr. Dickinson for diagnosis. He came back to me on several occasions after that and, as I said before, I found no evidence of injury on any of these occasions except this separation of the rectus muscle. I do not know what became of him after the two weeks—perhaps fifteen, eighteen or twenty days. I have no record of the service I renderd him except that I know he came there for about two weeks or more.

Q Did you have a consultation with Dr. Dickinson as the result of sending him there? A No, except Dr. Dickinson called me up, and I would rather he should repeat what he found.

Q I will have him do so. As a result of your conversation with him, did you change your opinion? A No, he concurred that it was not a hernia.

Q This separation of the muscle, is that a traumatic condition? A There was no evidence of trauma. My best judgment is that it was one of those defects which are found very frequently in people with large abdomens, both men and women.

Q When he called on you the day after the accident, February 24, 1924, was there any evidence then of an injury? A There was no evidence of any swelling or discoloration, no evidence of any protrusion of the gut; there was the separation of the muscle.

Q What might that be due to? A I have already said I thought it was a congenital defect of the character of those defects that progress. Pathology, or the disease, no matter which you call it, it is the same as a hernia.

Q What do you mean by a congenital defect, doctor? A By congenital I mean something that the individual is born with.

Q Then, if I understand you correctly, you can find no injury to this man resulting from a blow or trauma, as we call it; that is, you could find no such injury on him on February 24, 1924, or thereafter? A I found no evidence of trauma at that time.

Q Did you examine with your hands; feel? A I percussed and palpated; I made such examination as a surgeon would make.

Q And you could find nothing except this separation of the muscle? A That was all.

Q Now, even assuming there was a hernia there, doctor, and that you might possibly be mistaken about this separation of the muscle, if there was hernia was it due to accident or blow? A Perhaps I have not made myself clear. Where there is a separation of muscle in the abdomen, the probabilities are that, sooner or later, there will be a protrusion, a swelling, because there is always that abdominal pressure in such cases of the gut and a tendency to push forward and make the breach wider.

Q But, assuming there is a hernia, would that be the result of a blow, in your opinion? A My best judgment is it is a congenital defect.

Q Why do you say that? A For this reason, a traumatic hernia, if there is such a thing, is brought about in two ways; it is brought about by a penetration; penetration means in that par-

ticular instance an open wound, and the hernia or the gut protrudes through the wound. A traumatic hernia can also be brought about by a blow, which lacerates and tears the muscles, and the laceration and tearing of the muscles causes separation with a protrusion of the gut. In a hernia of that kind there are some very decided objective manifestations. The first symptom is a very decided shocking of the patient; the patient is decidedly pale, he has a lot of cold sweating, there is a very noticeable disturbance of the circulation, and he is made so sick that he cannot even stand in an upright posture; there is also a loss or extravasation of blood; and to that is added a considerable swelling because of the bruising to the parts. Now, when I saw him there was nothing of that kind in evidence. I would again like to explain to you why I say this is a congenital hernia. Of course, this man might have had an injury to his abdomen many years ago that could produce a condition like this, but it could not have been produced the day before, because I would have to find some of the symptoms that I have related.

Q And you found none of those? A No symptoms other than the separation of the rectus muscle.

Q And that of itself indicated, if anything, that it was congenital and had existed for years? A It indicated to me that it was not a recent matter.

Cross examination by Mr. Kent.

Q Doctor, were you physician, for the time, for John T. Clark & Son? A I presume so; he came to my office for his first treatment.

Q To whom did you render your bill? A That I can't say.

Q But you rendered it to somebody? A Yes, somebody paid it.

Q Don't you remember who paid it, doctor? A No; I have nothing to do with the rendering of accounts; my secretary did that, but somebody paid the bill.

Q And you do not know who paid? A No.

Q Don't you really know who paid you? A No, because I have a great many accounts.

Q Have you got your memoranda that you made at the time? A No.

Q Haven't you any memorandum with you? A I have a letter, which I think Mr. Markley has, which I wrote.

Q But where are your original memoranda, doctor? A At my office.

Q You knew you were coming here to testify, didn't you? A Yes.

Q You knew it was in this case you were going to testify? A Yes.

Q And still you say, from your recollection of your memorandum, you cannot tell who paid you for this man's treatment? A It may be—this is not conclusive—it was either the Aetna Life Insurance Company or the Travelers Insurance Company; it was some insurance company that paid me.

Q You represent a great many insurance companies? A Well, I am called on by a lot of them; I am glad and willing to have anybody send their business to my office.

Q And you testify for a great many insurance companies? A Yes; that is so.

Q In fact, it is a great part of your business, to testify in that way? A I do quite a lot of it; you know that.

Q And the reason you get that business is because you get results, I assume, doctor? A Perhaps I am somewhat indelicate in saying it, but I believe people who send me business think I have a good knowledge of my profession, and all labor is worthy of its hire.

Q What I want to know is that you are a trained and expert testifier in courts; is not that so? A Well, I have some knowledge of it.

Q And you are continuously in the courts? A Well, I would not so testify, but I make an appearance here quite frequently.

Q And for insurance carriers and railroads? A Well, you know my class of work; I come to your office quite often.

Q But you do not come at my request, do you, doctor? A Well, perhaps, I might say yes.

Q Did Tuccillo tell you he had been knocked unconscious the day before? A I would not be surprised if he did—not unconscious—if I am not mistaken, he said he had been struck by a draft.

Q A draft? A Yes; that is, a load they were lifting up, a bulky substance that hit him in the abdomen.

Q There is no doubt he has a condition there? A I have not disputed it.

Q I do not know, doctor, whether in your researches you have come across the character and nature of work that longshoremen have? A I have seen them work.

Q And you know these longshoremen carry tremendous weights? A Yes.

Q Would that condition that you found on the 23rd of February in this man prevent him carrying tremendous weights? A I do not think this disables him in the slightest—excuse me if I have trespassed.

Q You have not trespassed; you have overridden me. But could that man in the condition he is now carry tremendous weights? A He could, sir.

Q Climb and do everything else his calling calls for? A Yes.

Q Is that your best judgment? A My best surgical judgment.

Q That man with a rupture here (indicating) —that is, with an opening in the muscle—could do that work without straining himself? A I have already said these conditions tend to progress, but there is no work which this man could not do at this particular time, I am positive of that.

Q For instance, if he carried weights of 200 pounds? A I do not think men ordinarily carry 200 pounds, longshoremen or otherwise.

Q Suppose he should carry a box of apples, weighing sixty to seventy-five pounds? A I think he can do that.

Q Without any bother? A As I said, I think it is going to progress.

Q If he had done that with ease for years before, would that indicate anything? A It would not indicate anything at all.

Q But if he had no trouble doing that prior to 1924? A This answer is based on my best judgment. In doing laborious work in his present condition, he does not suffer pain or discomfort, because the thing is too common; it is a very common condition, in my mind.

Q Assuming that prior to the 23rd of February, 1924, that man had been working for years doing that hard, laborious work without any pain, without any discomfort, and he is suddenly struck a blow that knocks him un-

conscious—a blow on the pit of the stomach—wouldn't you attribute something to that blow? A Well, I suppose you have had a good punch in the belly and been knocked out. I have. That is common. A blow in the abdomen makes a man sick for the time being, but his recovery is almost immediate.

Q You have to take into consideration the physical circumstances. Here is a heavy block supporting a load, with a rope or chain, and one of these ropes snaps and has the force to swing it against you with probably any number of times the force of an ordinary blow traveling five or six inches, or even a foot. Did the blow you got come before you testified or— A I am rather inclined to infer you are trying to put one over now. Anyone knows what a blow in the stomach does; anyone, of the time, knows what happened to Corbett at Reno many years ago. What I suppose you want to know is whether a blow of this type could produce the damage to the abdomen. Well, if it did, something of that kind, there would be a manifestation, somebody would be sick.

Q How many patients do you see during the day, doctor? A Well, some days I see a hundred people, some days fifty, some days twenty-five.

Q And you can't recollect afterwards just the condition of the patient, unless you refer to your notes? A Yes, I can recollect this case. I can't ordinarily, but I can this case. I recollect it because this man was not satisfied with the doctor he consulted; he was also more or less dissatisfied with me; and I am also going to say to you here that I have made some mistakes in my life, and I sent this man to the very best man

in the county for his judgment; that was Dr. Dickinson.

DR. NICHOLAS F. FEUREY, sworn as a witness for the defense, testifies:

Direct examination by Mr. Markley.

Q Dr. Feurey, what is your profession? A Physician and surgeon.

Q How long have you been a physician and surgeon? A Twenty-nine years.

Q Where is your office? A At 47 Duncan avenue, Jersey City.

Q Did you make an examination of Salvatore Tuccillo, the plaintiff here, at my request? A I did.

Q When did you make the examination? A On the 25th day of October, 1925, in Mr. Markley's office.

Q At my office in Jersey City? A Yes.

Q Tell the jury what you found? A I found that this man had a separation of the rectus muscle; that is a muscle running up the abdomen, the strands of which run in that direction (indicating), to the right of the umbilicus, on a transverse line with the umbilicus. The separation was probably two inches long. There was no hernia, there was no protrusion. It was my opinion that this was a congenital condition; I mean by congenital condition a condition that he was either born with or born with the tendency to.

(No cross examination.)

Mr. Markley: We have Dr. Dickinson operating at Christ Hospital, but we have no more right to ask your Honor to wait than has the other side.

The Court: No.

Mr. Markley: Then the defense will have to close.

Mr. Kent: That is all for the plaintiff.

Mr. Markley: Now, your Honor having already ruled on my motion for a non-suit, may I make a motion now?

The Court: Yes.

Mr. Markley: I respectfully move for the direction of a verdict in favor of the defendant, John T. Clark & Son, Inc., on the following grounds:

First: This Court has no jurisdiction on this controversy.

Second: Plaintiff's remedy is either in the Compensation Court of the State of New Jersey, under the Workmen's Compensation Act of 1911-1913, and the supplements and amendments thereof, or under the exclusive admiralty and maritime jurisdiction of the Federal courts.

Third: That any right that the plaintiff has to sue his employer under the law of the State of New Jersey is contained in the Compensation Act, all other common law rights of his having been repealed by the repealer in that act, and if he has any right under the State law, he must be remitted to that tribunal for that purpose, under the Compensation Act.

Fourth: That as a matter of fact in this case, as well as a matter of law, his right to sue his employer is exclusively in the Federal Court,

because this is purely a maritime act, happening on the Hudson River, or, if it is not that, it must be under the Compensation Act.

Fifth: The next ground is that he was guilty of contributory negligence, as a matter of law.

Sixth: That any negligence here is that of a fellow servant, and under the common law of this State, if it comes under the common law, that is a defense.

Seventh: That the plaintiff assumed the risk of the injury that he received.

The Court: The motion is refused.

Mr. Markley: I will take an exception.

Case adjourned to tomorrow, April 22, 1926.

April 22, 1926.

The trial was resumed.

Appearances as before.

Mr. Kent: If your Honor please, may I make a request to your Honor to reopen the case so we may put on the doctor?

The Court: Not unless the other side consent.

Mr. Markley: If your Honor will hold this case open until I can get Dr. Dickinson here, I will agree. Otherwise, the case is closed, and there is no preparation allowed me for the proposed testimony, which comes to me as an entire surprise this morning.

The Court: I will not open the case unless you consent.

Mr. Markley sums up for the defense.

Mr. Kent sums up for the plaintiff.

The Court thereupon charged the jury:

CHARGE TO JURY.

THE COURT.

Gentlemen of the Jury: This suit is brought by Salvatore Tuccillo to recover damages from John T. Clark & Son, Incorporated, and Elerman's Wilson Line, Ltd., a corporation, for injuries which he received on February 23, 1924, while at work on the steamship Marengo at a time when it was tied up to Pier 9 in Hoboken.

The defendant Elerman's Wilson Line, Ltd., is not before the Court at this time, so you are only to consider what the plaintiff claims actually as against the defendant John T. Clark & Son, Incorporated. You have nothing whatever to do with any claim that the plaintiff may have against Elerman's Wilson Line, Ltd. They are not before you at this time.

The plaintiff, when he comes into court, must set out in his pleadings the ground on which he asks a verdict against the defendant; so in this case he has set out in the pleadings what his cause of action is, and the negligence which he charges against John T. Clark & Son, Incorporated, that warrants him in seeking damages against them. In the ninth paragraph of the complaint he says:

"On or about the said 23rd day of February, 1924, while employed as aforesaid, the defendants jointly, by their agent or agents, servants and employees, negligently and carelessly caused, allowed and permitted a boom to swing up and against the plaintiff, severely and permanently injuring him, as hereinafter set out."

And then in the eleventh paragraph of the complaint he alleges the negligence which he

asks a verdict at your hands to be based upon, as follows:

"The said defendants were negligent in that they failed to provide sufficient and proper equipment and machinery, in that the said machinery and equipment were defective, out of repair, inadequate, insufficient and unsuited for the purpose of handling cargo, in that the ropes forming part of the said equipment were worn, frayed and damaged, and were used with knowledge of that fact, in that the defendants failed and neglected to inform and notify plaintiff of the hazardous and dangerous condition of the employment on the said steamship at the time of the accident; in that the defendants allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment on said steamship; in that the defendants gave him no warning of any kind so as to permit him an opportunity to get out of the way of the said broken and defective boom or equipment."

The plaintiff must establish the acts of negligence set out in the complaint, or one of them. It is not necessary for the plaintiff to show that the defendant was negligent in all the ways and manner which he alleges, but he must show to your satisfaction, by a preponderance of the evidence, that the proximate cause of his injury was one of the acts of negligence which he sets out in his complaint. Of course, if he shows more, he has a perfect right to prove them all.

In ordinary cases, if an employee is injured—either by his own negligence or through the negligence of a fellow servant, or as the result of some accident, it makes no difference—he recovers under what is known as the Workmen's Compensation Act. But in this instance, the

man was working on a vessel, on navigable waters, and the Court of Errors and Appeals in this State has held that the Workmen's Compensation Act does not apply to such a situation. In other words, this man cannot apply the rules of the Workmen's Compensation Act to his case. So, in order to recover, the plaintiff, having brought his action in this court based on a common law remedy, must show the act or acts of negligence on the part of the defendant that were the proximate cause of his injury. That is the law of the land. He has to show by the evidence in this case that this defendant, John T. Clark & Son, Incorporated, was negligent and that its negligence was the proximate cause of his injury, and if he has failed to do that, under the law as it exists he cannot recover in this action.

The mere fact that the plaintiff was injured cannot avail him anything in this action unless he has, by a preponderance of the evidence, satisfied you that the injury complained of was caused by the negligence of this particular defendant. That is the duty which the law casts upon him before he can ask a verdict at your hands.

Keeping this fact in mind, it becomes your duty to determine just how the accident occurred.

What was the duty devolving upon the defendant, John T. Clark & Son? It was the duty of John T. Clark & Son to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on its business of stevedoring, including the duty of making inspection and repairs of such machinery and appliances at proper intervals. It was also the duty of the defendant to use reasonable care to

provide a safe place to work as well as to supply sufficient machinery and appliances.

The defendant, John T. Clark & Son, Incorporated, was not an insurer of the plaintiff against accidents. It was only required to use reasonable care and skill to furnish suitable and safe machinery and appliances for the work for which the plaintiff was employed, and to use reasonable care to see that the place where the plaintiff was at work was safe for such work to be carried on. The defendant was also required to make, from time to time, reasonable inspection of the machinery and appliances so used and of the place where the plaintiff was working, to see they were reasonably safe for the use for which they were intended, and, if not, to use reasonable care to have any defect that was discovered remedied within a reasonable time. The defendant could not escape liability by delegating the duty of using reasonable care in the performance of its duties to someone else.

Now keeping in mind what the duty of the defendant was, you are to determine from the evidence how the plaintiff was injured.

You must do this from the evidence you have heard. It is not what counsel contend the evidence has been, not what conclusions or inferences counsel ask you to draw from the evidence, but what you in your jury room find the evidence has been, and the weight and credit you will give to the various witnesses you have heard, and, after considering all the evidence, determine how the accident occurred.

I do not intend, gentlemen of the jury, to refer to the evidence as to how this accident occurred. You have heard it, and you have heard counsel

comment upon it. When you get into your jury room, it is your duty to determine how the accident occurred, and whether it was due to the negligence of John T. Clark & Son, Incorporated. If you find the boom was in proper order and was used in loading the vessel, during the day, through hatch No. 4, and that someone, either the plaintiff or some other man in his gang, changed the position of the rope on the boom so that the strain caused the guy to break, and that the broken guy was repaired or replaced with a chain, and the chain broke, when the boom was used, by the additional strain, then you should determine whether the defendant knew, or should have known if it had used reasonable care to ascertain, whether the boom was in proper condition to be used. If the defendant failed to use proper care in making an inspection, then, of course, there would be negligence on its part.

If there was negligence on the part of the defendant, which was the cause of the accident, there can be a recovery by the plaintiff, if the accident was not the result of the risk which he assumed when he undertook the business, or if the accident was not caused by the negligence of a fellow servant, or if you find that the plaintiff was not himself negligent, which negligence on his part contributed to the accident.

When a defendant sets up as a defense contributory negligence on the part of the plaintiff, he is required to prove such negligence by a preponderance of the evidence, just as the plaintiff is required to prove negligence of the defendant by a preponderance of the evidence.

Now, the risks that the plaintiff assumed were not all risks of the employment but only such

risks as were obvious and incident to the very nature of the employment. If you find that the injury of the plaintiff was caused by the negligence of this defendant and was not due to the risk assumed by the plaintiff in pursuance of his employment, and that the plaintiff was not guilty of contributory negligence, then the plaintiff can recover, and the amount of his recovery will be a sum that will compensate him for the injury which he received in this accident.

He is entitled to be compensated, if entitled to recover at all, for the pain and suffering which he endured as the result of this accident. This is not an arbitrary sum or a sum to be guessed at by you in the jury room, but you should consider the length of time he suffered, the severity of the pain, and if you find there is any evidence that he will suffer in the future, that should be considered by you as well, and, after considering all those facts, determine, as sensible men, what will be a sum that will compensate him for the pain and suffering which he had to endure as the result of this accident—if you find the accident was caused by the negligence of the defendant. In addition to compensation for pain and suffering, the plaintiff is entitled to recover any loss of wages that was the result of this particular accident, and you will have to determine that, not by guess but from the evidence you have heard. If he had an attending physician, if there is any evidence as to what amount was laid out or expended by him for the physician, or for medicines, he is entitled to be compensated for that; but as I recall—you being the sole judges of what the evidence has been—the only evidence on that was the price he paid for an abdominal belt, and, of course, if that belt was required as

the result of this accident, he is entitled to be compensated for that. If he has any permanent injury resulting from this accident, he would be entitled to be compensated for such permanent injury. But he is not entitled to be compensated for any previously existing injury or other condition not the result of this accident.

You have had medical testimony, which you can consider. The plaintiff claims he has a hernia. Dr. Feurey, for the defendant, says there is no hernia; that there was a spreading and separation of the rectus muscle, which was not the result of this accident but was congenital. Of course, if that condition was congenital and it was not the result of this accident, the plaintiff cannot ask compensation for it. If, on the contrary, you find from the evidence that that condition was the result of this particular accident, and that the accident was due to the negligence of the defendant, the plaintiff should be compensated for that, as well as for the pain and suffering.

But you must remember, members of the jury, that the plaintiff must establish not only the fact of the negligence of the defendant, in order to recover, but in order to fix the damages which he asks you to award him, he must also by a preponderance of the evidence satisfy you of the extent of the injury for which he asks compensation.

Now, after considering all the evidence, if you reach the conclusion that the accident was not caused by the negligence of this defendant, or if you find that there was a risk assumed by the plaintiff in his employment, it would be immaterial what damage had been caused, because

there was no liability, and of course the verdict would be a verdict for the defendant. If, however, there was liability, you will assess the damages in the way and manner I have indicated.

There was a motion made, in the beginning of this case, for a non-suit. You gentlemen have nothing whatever to do with that. That question was a legal question, which has to be decided in some other tribunal. You have to determine the case upon the evidence that you have heard. There has been some dispute between counsel as to what the standing of this plaintiff is here. You have nothing to do with that. The Court, in dealing with this matter, has dealt with it as a case which can be tried in this court. It might have been tried somewhere else. It might have been tried in a Court of Admiralty, but it was not brought there. It was brought in this court, and you must determine it, under the law which the Court lays down for your guidance in determining this particular case—not what counsel may think the law should be, not what you think it ought to be, but what the law is in this particular situation. It is an unusual situation, and you are to take the law from the Court and apply it in this case.

So here your determination, as in every case that is being tried before a jury, is a final determination of this case. Of course, it might go up on appeal, but with that you have nothing to do; you are to determine this case as now presented to you, and you have nothing whatever to do with any other case so far as John T. Clark & Son, Incorporated, is concerned—and with Elerman's Wilson Line, Ltd., you have nothing to do.

I have been asked to charge certain principles of law, and I am going to dispose, first, of the defendant's requests to charge, and then of the plaintiff's requests to charge.

I refuse to charge defendant's requests 1, 2 and 3.

4. The burden is on the plaintiff to establish his case as alleged in the complaint by the greater weight of the evidence. If he has failed to do so, then he cannot recover and your verdict must be for the defendant.

I so charge.

5. This suit is not against any insurance company. The only defendant in this case is John T. Clark & Son and it does not appear that that company is insured. You have no right to bring in a verdict in favor of the plaintiff on the theory that some insurance company might be compelled to pay the amount you award.

I so charge.

6. There is no evidence in this case that if you give a verdict against the defendant John T. Clark & Son some insurance company might pay that verdict. The only person who would be liable to pay the judgment based on your verdict in this case would be the defendant.

I so charge.

7. For all you know, the defendant John T. Clark & Son has no insurance, and so far as you are concerned it makes no difference whether it has or not.

I so charge.

8. For all you know, even assuming that the defendant had insurance, it might be only to

cover payments under the New Jersey Compensation Act and not a suit at common law in this court. You are utterly in the dark and therefore it would be most unfair for you to consider even for a moment whether there was or was not insurance to cover this particular claim. The matter of insurance should be dismissed from your minds entirely in considering the merits of this case.

I so charge.

9. The mere fact that an accident happened does not entitle the plaintiff to recover anything against the defendant. In this case the plaintiff must prove by the greater weight of the evidence that the accident for which he sues was caused by the fault, carelessness or negligence of the defendant and that the fault, carelessness or negligence of the defendant was the proximate cause of the accident.

I so charge.

10. If he has failed to prove that the accident was caused by the carelessness of the defendant then he cannot recover and your verdict must be for the defendant.

I so charge.

11. Even if the defendant was negligent, still, if the defendant's negligence was not the proximate cause of the accident, then again the plaintiff cannot recover and your verdict must be for the defendant.

I so charge.

The 12th request of the defendant I refuse to charge other than I have charged.

The 13th request I refuse to charge.

The 14th request I refuse to charge other than I have charged.

15. It is for you gentlemen to say from the evidence whether or not there is any evidence that this cable was worn, frayed or damaged prior to the time when it broke first. You must determine that from the evidence.

The 16th request I refuse to charge other than I have charged?

The 17th request I refuse to charge other than I have charged.

The 18th request I refuse to charge other than I have charged.

19. The plaintiff was foreman of the gang that was doing the work. It was his duty to exercise reasonable care for his own safety. If he did not do so, then he cannot recover and your verdict must be for the defendant.

I so charge.

20. If the plaintiff was in the slightest degree guilty of negligence which contributed to the accident, then he cannot recover and your verdict must be for the defendant.

I so charge.

21. Even if you find that the defendant was negligent, still, if you also find that the plaintiff by his negligence contributed to the happening, that is to say, that both were negligent and that both by their negligence caused the accident, then the plaintiff cannot recover and your verdict must be for the defendant.

I so charge.

22. The law does not attempt to measure how much each of the parties was negligent. If the

law finds that both were negligent, then neither can recover as against the other.

I so charge.

23. If you find that the accident was caused by the negligence of a fellow servant of the plaintiff, then the plaintiff cannot recover and your verdict must be for the defendant.

I so charge.

24. If you find that the plaintiff assumed the risk of the injury which he received as a part of the terms of his contract of employment with the defendant, then he cannot recover and your verdict must be for the defendant.

I so charge.

The 25th request I refuse to charge other than I have charged.

The 26th request I refuse to charge other than I have charged.

The 27th request I refuse to charge other than I have charged.

Now, the plaintiff's requests to charge:

1. It was the duty of the defendant, John T. Clark & Son, to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on its business of stevedoring and in keeping such machinery and appliances in repair, including the duty of making inspections and repairs at proper intervals.

I so charge.

2. If the defendant selected or designated its superintendent, Julius Hart, to perform this duty for it, and that superintendent failed to exercise reasonable care and skill in its performance, the

defendant, John T. Clark & Son, is responsible for the fault.

I so charge.

3. The superintendent, Julius Hart, in this case was not a fellow servant of the plaintiff, but represented the master, John T. Clark & Son.

I so charge.

4. It was the duty of the defendant to use reasonable care to provide a safe place to work, and also to supply safe machinery and appliances, and the defendant, John T. Clark & Son, cannot escape liability by intrusting the performance of such duties to others, be they managers, agents or fellow servants.

I so charge.

5. The defendant, John T. Clark & Son, knew or should have known, if it had used ordinary care to ascertain the facts, that the boom or ropes which it provided for the use of servants were unsafe or structurally defective, and that the plaintiff, without contributory fault, suffered injury thereby, the defendant, John T. Clark & Son, is liable therefor.

That, gentlemen of the jury, is a question for you to determine from the evidence, whether or not if John T. Clark & Son knew, or should have known, it used ordinary care to ascertain whether or not the appliances, the boom and cable, were in safe condition to be used. If the plaintiff has failed to show that they were in a bad condition, and Clark & Son did not use reasonable care in discovering it, and there was negligence, then there can be a recovery unless, as I have said, the plaintiff assumed the risk and was guilty of contributory negligence. If he failed to show

negligence on the part of Clark & Son, then, of course, there can be no recovery.

That is the case you have to decide. It is important to both parties. You should consider it carefully and then render such verdict as you believe the evidence warrants you in giving.

(The jury retire.)

Mr. Kent: I would except to that part of your Honor's charge where you charge the requests of the defendant in reference to insurance carriers.

The Court: All right.

Mr. Kent: My exception to that is that those facts were all brought out on the defendant's case, by its own witnesses; they were not brought out by the plaintiff, and the requests were not proper and were simply unduly emphasizing by counsel for defendant.

Mr. Markley: May I note my exception to your Honor's charge where you charge each of the plaintiff's requests to charge numbered 1, 2, 3, 4 and 5?

I also except to your Honor's refusal to charge each one of the defendant's requests numbered 1, 2, 3, 12, 13, 14, 15 as modified, 16, 17, 18, 25, 26 and 27.

I would also like to note an exception to that part of your Honor's charge which instructed the jury that the defendant was bound, in this case, to make reasonable inspection of its appliances and machinery on the steamship and to have same safe—to have the appliances safe and the machinery safe.

I except to that part of your Honor's charge where you said on the question of having the

boom and rigging in proper condition, that the liability therefor could not be delegated—liability could not be escaped, as far as that is concerned, by delegation. Notifying the man to look after the rigging, that was the man who is suing, and he could recover if it was defective.

Then, I except to your Honor leaving the jury to determine how the accident happened, and whether, in any event, under any set of circumstances, there was negligence, without limiting the jury, first, to the allegations of the complaint, and secondly, to the allegations of the complaint which were in fact proven.

I except to that part of your Honor's charge wherein you said, "You must determine whether the defendant had exercised proper care and made proper inspection to determine whether the boom was proper or not."

I except to your Honor reading to the jury all the allegations of paragraph 11 of the complaint, on the ground that there are a number of allegations therein which have no evidence to support them, and therefore should have been withdrawn from the charge.

I except to that part of your Honor's charge wherein your Honor instructed the jury, as a matter of law, that the Workmen's Compensation Act did not apply in this case.

I except to your Honor's charge where your Honor said that the defendant was bound to furnish machinery and appliances in reasonably good condition and repair and was bound to make inspection and report at proper intervals, and it was for the jury to determine in this case whether or not they had done that, and whether or not the machinery and appliances were inspected at intervals and were in reasonably good condition.

I except to that part of your Honor's charge where your Honor said that if the jury found that the accident was caused by the negligence of the defendant, then the plaintiff was entitled to recover, without limiting the jury by the further proviso that, even if the defendant was negligent and the defendant's negligence was the proximate cause of the accident, still the plaintiff could not recover if he assumed the risk, or if he was guilty of contributory negligence.

I except also to your Honor leaving the jury to say whether or not it should allow anything for doctors' bills.

The Court: You can except to whatever I said on the subject.

Mr. Markley: I except to what your Honor said, and to your Honor saying to the jury that they could, in this case, determine whether or not there was a permanent injury, and whether or not there was a hernia.

DEFENDANT'S REQUESTS TO CHARGE.

1. In this case the plaintiff was admittedly an employee of the defendant. As such employee the plaintiff's exclusive remedy against the defendant is either under the New Jersey Compensation Act or, if he was employed in work of a maritime nature, under the admiralty law of the United States.

2. The present case is one pertaining solely to the admiralty jurisdiction of the Federal courts and, therefore, this Court has no jurisdic-

tion at common law to entertain this action on behalf of the plaintiff.

3. This Court, also, has no jurisdiction to determine how much, if any, compensation the plaintiff would be entitled to under the New Jersey Workmen's Compensation Act. That act provides its own tribunal for the purpose of determining what compensation, if any, an employee in any given case is entitled to.

4. The burden is on the plaintiff to establish his case as alleged in the complaint by the greater weight of the evidence. If he has failed to do so, then he cannot recover and your verdict must be for the defendant.

5. This suit is not against any insurance company. The only defendant in this case is John T. Clark & Son, and it does not appear that that company is insured. You have no right to bring in a verdict in favor of the plaintiff on the theory that some insurance company might be compelled to pay the amount you award.

6. There is no evidence in this case that if you give a verdict against the defendant, John T. Clark & Son, some insurance company might pay that verdict. The only person who would be liable to pay the judgment based on your verdict in this case would be the defendant.

7. For all you know, the defendant, John T. Clark & Son, has no insurance, and so far as you are concerned, it makes no difference whether it has or not.

8. For all you know, even assuming that the defendant had insurance, it might be only to cover payments under the New Jersey Compensation Act and not a suit at common law in

this Court. You are utterly in the dark and, therefore, it would be most unfair for you to consider even for a moment whether there was or was not insurance to cover this particular claim. The matter of insurance should be dismissed from your minds entirely in considering the merits of this case.

9. The mere fact that an accident happened does not entitle the plaintiff to recover anything against the defendant. In this case, the plaintiff must prove by the greater weight of the evidence that the accident for which he sues was caused by the fault, carelessness or negligence of the defendant and that the fault, carelessness or negligence of the defendant was the proximate cause of the accident.

10. If he has failed to prove that the accident was caused by the carelessness of the defendant, then he cannot recover and your verdict must be for the defendant.

11. Even if the defendant was negligent, still, if the defendant's negligence was not the proximate cause of the accident, then, again, the plaintiff cannot recover and your verdict must be for the defendant.

12. The only proof in this case offered by the plaintiff tending to prove that the defendant was negligent is with respect to the manner in which the offshore guy rope was set up, the plaintiff claiming in his testimony that he was about to use a chain instead of the rope cable to secure the offshore guy supporting the boom of the Burton fall when the general foreman, Hart, came along and attended to the repair of that offshore guy himself, and it is claimed by the plaintiff that the general foreman, Hart, in fix-

ing the offshore guy did so negligently, so that it gave way, causing a pulley to strike him. If the plaintiff has failed to prove that contention by the greater weight of the evidence, then he cannot recover and your verdict must be for the defendant.

13. There is no evidence in this case that the defendant negligently failed to provide sufficient and proper equipment and machinery.

14. There is no evidence in this case that the machinery and equipment were defective, out of repair, inadequate, insufficient or unsuited for the purpose of handling the cargo.

15. There is no evidence in this case that the ropes or cables forming part of the equipment were worn, frayed and damaged.

16. There is no evidence in this case that the defendant failed and neglected to inform or notify the plaintiff of the hazardous and dangerous condition of the equipment.

17. There is no evidence in this case that the defendant failed and neglected to inform the plaintiff of the hazardous and dangerous condition of the employment which he was following on the steamship at the time of the accident.

18. There is no evidence in this case that the defendant allowed and permitted incompetent help and superintendents to operate and direct the boom and equipment.

19. The plaintiff was foreman of the gang that was doing the work. It was his duty to exercise reasonable care for his own safty. If he did not do so, then he cannot recover and your verdict must be for the defendant.

20. If the plaintiff was in the slightest degree guilty of negligence which contributed to the accident, then he cannot recover, and your verdict must be for the defendant.

21. Even if you find that the defendant was negligent, still, if you also find that the plaintiff by his negligence contributed to the happening, that is to say, that both were negligent and that both by their negligence caused the accident, then the plaintiff cannot recover and your verdict must be for the defendant.

22. The law does not attempt to measure how much each of the parties was negligent. If the law finds that both were negligent, then neither can recover as against the other.

23. If you find that the accident was caused by the negligence of a fellow servant of the plaintiff, then the plaintiff cannot recover and your verdict must be for the defendant.

24. If you find that the plaintiff assumed the risk of the injury which he received as a part of the terms of his contract of employment with the defendant, then he cannot recover and your verdict must be for the defendant.

25. Even assuming that the plaintiff has a hernia, there is no evidence in this case that the hernia resulted from the accident for which the plaintiff sues.

26. You can allow the plaintiff nothing for medical expenses or medicines, because he has proven none.

27. You can allow the plaintiff nothing in this case for permanent injury, because he has failed to prove any permanent injury.

PLAINTIFF'S REQUESTS TO CHARGE.

1. It was the duty of the defendant, John T. Clark & Son, to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on its business of stevedoring and in keeping such machinery and appliances in repair, including the duty of making inspections and repairs at proper intervals.

2. If the defendant selected or designated its superintendent, Julius Hart, to perform this duty for it, and that superintendent failed to exercise reasonable care and skill in its performance, the defendant, John T. Clark & Son, is responsible for the fault.

3. The superintendent, Julius Hart, in this case was not a fellow servant of the plaintiff, but represented the master, John T. Clark & Son.

4. It was the duty of the defendant, John T. Clark & Son, to use reasonable care to provide a safe place to work, and also to supply safe machinery and appliances, and the defendant, John T. Clark & Son, cannot escape liability by intrusting the performance of such duties to others, be they managers, agents or fellow servants.

5. The defendant, John T. Clark & Son, knew or should have known if it had used ordinary care to ascertain the facts, that the boom or ropes which it provided for the use of servants were unsafe or structurally defective, and that the plaintiff, without contributory fault, suffered injury thereby, the defendant John T. Clark & Son is liable therefor.

VERDICT.

Rendered April 22, 1926.

The jury found a verdict in favor of the plaintiff and against the defendant, John T. Clark & Son, Inc., and assessed the damages at the sum of $3,000.

RULE TO SHOW CAUSE.

Filed April 26, 1926.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

SALVATORE TUCCILLO, *Plaintiff,* vs. JOHN T. CLARK & SON, INC., *Defendant.*	*Action at Law.* *Rule to Show Cause with Reservation of Exceptions.*

On due application;

ORDERED that the plaintiff show cause before the Supreme Court at the next stated term thereof why the verdict rendered in his behalf against the defendant on April 22, 1926, should not be set aside and a new trial ordered;

AND IT IS FURTHER ORDERED that all objections or exceptions taken by the defendant during the course of the trial be and the same hereby are reserved to the defendant for argument on appeal;

Rule to Show Cause.

AND IT IS FURTHER ORDERED that execution be and the same hereby is stayed.

Signed April 23, 1926.

WILLARD W. CUTLER,
C. C. J.

Rule actually entered this 26th day of April, 1926, on motion of

COLLINS & CORBIN,
Attorneys of Defendant.

Reasons.

REASONS.

Filed June 10, 1926.

NEW JERSEY SUPREME COURT.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., a corporation, and ELERMAN'S WILSON LINE, LTD., a corporation, *Defendants.*	*Action at Law.* *Reasons.*

The defendant, John T. Clark & Son, Inc., a corporation, writes down the following reasons upon which it rests its motion for a new trial in the above case:

1. The verdict is against the clear weight of the evidence.

2. The verdict is against the charge of the trial judge.

3. The verdict is excessive.

Dated, June 9, 1926.

COLLINS & CORBIN,
Attorneys of Defendant,
John T. Clark & Son, Inc.

Service acknowledged and consent given to filing as of time.

KENT & KENT,
Attorneys of Plaintiff.

OPINION ON RULE TO SHOW CAUSE.

Filed January 19, 1927.

NEW JERSEY SUPREME COURT.

No. 33, Oct. T., 1926.

SALVATORE TUCCILLO,

vs.

JOHN T. CLARK & SON, INC., *et al.*

Defendants' rule to show cause.

Argued before Gummere, Chief Justice, and Justices Trenchard and Minturn.

For the rule Edward A. Markley.

Contra Nathaniel Kent.

PER CURIAM:

The plaintiff sued to recover compensation for personal injuries sustained by him while working as a longshoreman for the defendant, John T. Clark & Son, Inc. The trial resulted in a verdict in his favor and against that defendant. The other defendant who was the owner of the steamship upon which the accident happened was exonerated by the jury. The plaintiff's damages were assessed at $3,000.

The only question argued before us on this rule is the alleged excessiveness of the verdict. Our examination of the testimony leads us to the conclusion that the award of the jury is not so plainly excessive as to justify our setting it aside.

The rule to show cause will be discharged.

ORDER DISCHARGING RULE TO SHOW CAUSE.

Filed January 28, 1927.

NEW JERSEY SUPREME COURT.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., *et al.,* *Defendants.*	*On Defendant's Rule to Show Cause.*

A rule to show cause having been issued herein, and the matter having been duly argued at the October, 1926 Term, it is,

On this 27th day of January, 1927,

ORDERED, that the said rule to show cause be and hereby is discharged with costs.

KENT & KENT,
Attorneys for Plaintiff.

Rule entered Jan. 28, 1927, on motion of

KENT & KENT.

JUDGMENT FINAL.

Entered January 28, 1927.

NEW JERSEY SUPREME COURT.

SALVATORE TUCCILLO, *Plaintiff,* *vs.* JOHN T. CLARK & SON, INC., a corporation, *Defendant.*	*Action at Law on Postea & R. to S. C.*

Kent & Kent, attorneys.

$3,000.00	Judgment entered this twenty-eighth day of January A. D. nineteen hundred and twenty-seven, as of April 26, 1926, in favor of plaintiff and against the defendant for the sum of three thousand dollars damages and one hundred and seven dollars and fifty-one cents costs.
107.51	
$3,107.51	

WM. S. GUMMERE,
C. J.

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New Jersey Court of Errors and Appeals

SALVATORE TUCCILLO, Plaintiff-Respondent, v. JOHN T. CLARK & SON, INC., a corporation, Defendant-Appellant.	Action at Law.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

Statement of Facts.

This is an appeal by the defendant from a judgment in favor of the plaintiff and against the defendant in an action brought to recover damages for personal injuries sustained on February 23rd, 1924, while doing stevedoring work on the steamship "Morengo", which, at that time, was moored alongside of Pier 9, Hoboken, and in navigable waters; the contention of the plaintiff being that he was engaged in work of a maritime nature; that the injury occasioned to him was a maritime tort; that therefore, the Workmen's Compensation Act of this State did not apply, and this action was therefore brought in the courts of this State, where he rightfully belongs and by choice prefers to remain. After verdict, the defendant obtained a rule to show cause on the grounds that the verdict was against the clear weight of the evidence;

that the verdict was against the charge of the trial Judge, and that the verdict was excessive. The Supreme Court discharged the rule to show cause. This appeal, then, concerns itself almost exclusively with the question of jurisdiction.

The facts concerning the accident, briefly, are as follows:

The defendant is a general stevedore and was engaged in loading the steamship "Morengo" with various kinds of freight. At the time of the accident the ship was being loaded with boxes of apples that were taken out of a lighter alongside of the ship, hoisted up to the deck of the ship by means of a boom operated by a steam winch, and then lowered into the hold of the vessel. The boom was held in place by means of a guy rope on each side of it. In order to make the guy rope taut and to pull in the slack on the ropes, a pulley or block and tackle is attached to the end of the guy rope near the deck. The boxes of apples in loads of approximately two tons, were hoisted up into the ship by means of a sling, called an aeroplane, which is a flat, square, box affair. During the course of the work, the offshore guy rope broke. The plaintiff went on the deck to see what was the matter and he found the men trying to repair the rope; that is, they were trying to splice the frayed ends. The plaintiff stated that that would be dangerous and suggested that they procure a steel chain. The man who was sent to procure that chain saw Julius Hart, the general foreman on the job, who picked out the chain, gave it to him with instructions that said chain should be used. The chain was brought up on the ship and while the plaintiff was in the act of fastening it when the general foreman, Hart, came up, started swearing at the plaintiff because too much time

was being wasted, and ordered him away. The plaintiff stated that the chain had to be put in double, as otherwise it would be insecure and unsafe, and dangerous to use. Hart, in order to save time and in reckless disregard of the safety of his men, attached the chain single strand and hurriedly ordered the work to proceed. The plaintiff, at that time, had walked away about twenty-five feet and was about to proceed down from the ship. At the very first attempt to use that boom, the chain snapped; part of the chain or tackle flew over and struck the plaintiff in the stomach and knocked him unconscious. He was taken home and treated by his family physician; then was treated by various doctors employed by the defendant. The blow produced a tearing of the abdominal muscle, and the plaintiff now has a separation of at least two inches long in the wall of the abdomen through which, at times, the gut protrudes. He still has severe pains in the stomach and is unable to do any heavy or laborious work, such as he had been doing for a great many years.

His work now and when he can get it, is that of winchman, which permits him to sit and operate a lever that starts the operation of a steam winch.

His prior history is, that he has been doing longshore work all his life; the hardest kind of work, and that his only prior ailment was an occasional attack of rheumatism in the right foot; that he never had any trouble with his stomach, never had any pain there, and that he never wore an abdominal belt until after the accident. He now has a serious and permanent condition which is gradually becoming enlarged, and the only possible cure is a serious major operation, which he is afraid to undergo.

Here follows a chronological summary of the

evidence taken at the trial, with the testimony indexed thereto:

SALVATORE TUCCILLO, the plaintiff, testified as follows:

That he is forty-nine years old; married (p. 23, ll. 18-19). Was working on the steamship "Marengo" on February 23, 1924 (p. 23, ll. 36-37). The accident happened around 8 o'clock. He was foreman of his gang; worked with the men, helped with the loading (p. 24, ll. 10-30). About 8 o'clock, a guy carried away, so he climbed up the ship on a Jacob's ladder and he saw the men trying to repair the guy. It appeared to him that the repaired rope would not hold and he suggested that someone go to the gear room and get a chain (p. 25, ll. 30-40). While attempting to fix the chain, the general foreman came along. He used violent and abusive language and ordered him away (p. 26, ll. 10-40). The foreman took everything out of his hands and he went towards the aft part of the ship and stood there. The gangway man was then told to go ahead with the lifting and all of a sudden the gear carried away and the pulley block hit him in the stomach and he fell to the deck. They wanted to send him to the hospital because he was sick and sending stuff out of the mouth. He was unconscious about ten minutes. Prior to the accident, nothing was ever the matter with his stomach; never had any pain; never wore an abdominal belt. When the doctor came, he put a big belt around him to hold the stomach up (p. 27, ll. 1-40). At that time, he was hurt inside with contusions; all broke; everything was ripped and it hurt like anything (p. 28, ll. 1-4). Was home between five and six weeks; had a family to support and he tried to get light work. He now drives a winch, which

is turning on steam and just watching it and let it go up and down. It is not hard work. It does not require any lifting or pulling. Now if they have no work on the winch, he has to go home (p. 28, ll. 10-40). Cannot do the lifting work he did before the accident. If he attempts lifting, it hurts him inside. He indicated the navel region. Has pain when he coughs or sneezes or makes any kind of movement (p. 29, ll. 1-20). Making Forty Dollars a week regularly (p. 29, l. 25). Now wears a belt which he purchased on March 20, 1924 (p. 30, ll. 1-15).

On cross examination, he testified that after the pulley struck him, two men carried him into the office (p. 30, ll. 30-35). Weighs two hundred pounds; is five feet, eleven inches in height. Asked to exhibit to jury where he was injured—"(Witness leaves stand, removes belt, opens vest and exhibits his stomach to the jury)." Indicates to jury the region of the navel, where he has this trouble, and points out to them the area of the trouble (p. 40, ll. 15-35). When he had a cold he couldn't hold his stomach up (p. 43, ll. 10-20).

JOSEPH GOPOR testified for the plaintiff as follows:

That he was working with Tuccillo at the time of the accident (p. 48, ll. 33-34). A block and cable and chain hit Tuccillo (p. 49, ll. 2-3).

No cross examination.

NICK PAPPARELLI testified for the plaintiff as follows:

He was working with Tuccillo and saw him get hurt right in front of his feet (p. 50, ll. 12-19; 26-27). Warned the general foreman that the

chain will be broken because the strain is too heavy, but was ordered to go ahead and start, and after the signal was given for the winchman to go ahead, the guy went rr-r rr-r rr-r and broke. Said to the stevedore when Tuccillo fell down "Do you see what you done?" He said: "All right, keep your mouth shut" (p. 52, ll. 10-25).

On cross examination, he testified generally as to what preceded the accident (pp. 53-58).

DR. JOHN A. BOTTI testified for the plaintiff as follows:

Examined Tuccillo on March 24, 1926 (p. 59, ll. 8-12). Found that Tuccillo had a hernia, a rupture in the epigastrium, the region of the abdomen, right up in the pit of the stomach. His condition is a permanent one if not operated on (p. 59, ll. 12-20). Would require a major operation. In his present condition it is impossible for him to do hard, manual labor. It would tend to enlarge the rupture, possibly strangulate it (p. 59, ll. 25-35).

Practicing approximately ten years (p. 60, fol. 34). Practice consists of treating industrial traumatic injuries and has treated five or six thousand cases (p. 61, fols. 3 to 15). In answer to hypothetical question setting forth the happening of the accident as hereinbefore described, he said that such an accident would be a competent producing cause of the condition he found in the abdominal region (p. 63).

Cross examination.

Referring to the injury to the stomach—

"Q. Is it visible to the eye? A. Yes" (p. 64, l. 9).

"Q. Was there a protrusion there at that time (referring to the examination on March 24, 1926)? A. Yes."

"Q. A protrusion of what? A. A protrusion of the abdomen like the gut" (p. 64, ll. 12-15).

"Q. And you could see this hernia protruded, could you, just by looking at him? A. By examining that area, yes.

"Q. Just by your sight? A. With sight and with feeling" (p. 64, ll. 22-28).

The following testimony was adduced on behalf of the defendant:

JULIUS HART testified as follows:

The general foreman in charge of the job (p. 73, ll. 3-6). He made a model showing the ship rigging (p. 74, ll. 20-28). When he came on the deck, a man was putting a chain on the offshore guy. The draft went up; the guy carried away and Tuccillo laid on his belly. He had nothing to do with putting in the chain (p. 77, ll. 1-12). Nothing that he knows of struck Tuccillo (p. 77, ll. 15-16). His job was on the ship and on the deck (p. 78, ll. 27-28). He saw Tuccillo fall down and lay on his belly.

HENRY A. SOMERS testified as follows:

Employed by Commercial Stevedoring Company. Tuccillo came with them six or seven years before (p. 88, ll. 10-22). After the accident first started work with them on March 31, 1924. After that period, his wages ranged as low as Two Dollars a week and in one week he made $56.60. (However, his average during that period was only $22.19 per week) (p. 89, ll. 1-30). He worked as a winch

driver; had to sit there and pull a lever and run the winch (p. 90, ll. 25-32).

DR. WILLIAM J. ARLITZ testified as follows:

That he examined Tuccillo at his office on February 24, 1924 (p. 93, ll. 20-23). He told him he had pain in the stomach, but found no evidence of any trauma. He found, however, that Tuccillo had a separation of the rectus abdominal muscle that runs upwards from the bony connection below, approximately, to the breast bone, and that the muscle was separated at its upper portion. On the third visit, according to Dr. Arlitz' recollection, Tuccillo stated that he had been to see Dr. Ducerno, who said he required an immediate operation for hernia (p. 93, ll. 28-40). Dr. Arlitz treated him for about two weeks or more, *but he has no record of the services rendered him* (p. 94, ll. 18-20). Thought that it was a congenital defect; that he was born with it (p. 95, ll. 1-10). Stated that a traumatic hernia can also be brought about by a blow, which lacerates and tears the muscles, and the laceration and tearing of the muscles causes separation with a protrusion of the gut (p. 96, ll. 2-12). Stated that this man, of course, might have had an injury to his abdomen many years ago that could produce a condition like this (p. 96, ll. 21-24).

On cross examination, stated that he did not have any memoranda with him as to the treatments (p. 97, l. 15). Tuccillo stated that he had been struck; that a bulky substance had hit him in the abdomen; that there is no doubt but that he has a condition there (p. 98, ll. 20-30). His condition is going to progress (p. 99, l. 25). Sees some days one hundred people, some days fifty, some days twenty-five. Stated he could recollect this case because Tuccillo was not satisfied with the doctors he consulted, nor was he satisfied with him (Dr. Arlitz) (p. 100, ll. 30-40).

DR. NICHOLAS F. FEUREY testified as follows:

Did not examine plaintiff until October 25, 1925, a year and eight months after the accident. At that time he found that Tuccillo had a separation of the rectus muscle; that is a muscle running up the abdomen, the strands of which run to the right of the umbilicus, on a transverse line with the umbilicus. The separation was probably two inches long (p. 101, ll. 27-33). In his opinion it was a congenital condition (p. 101, ll. 38-40).

This completed the defendant's case when court adjourned for the day. When trial resumed the next day, Dr. Di Jacerno, Tuccillo's family physician, who had treated him immediately following the injuries, appeared in court. We requested leave to reopen the case for the purpose of having Dr. Di Jacerno testify, but counsel for the defense refused to consent to the reopening for this purpose, so that the doctor did not testify.

The grounds of appeal may be grouped into two heads:

(1) That the courts of this State have no jurisdiction over the controversy.

(2) That the trial judge erred in his instructions to the jury.

We shall argue the case upon the following propositions:

(1) That the plaintiff is rightfully in the courts of his own State.

(2) The charge of the trial judge was correct.

POINT I.

The plaintiff is rightfully in the courts of his own state.

The defendant in this case has contended from the very outset that the courts of this state did not have jurisdiction. The complaint, as drawn, sets forth solely a cause of action that happened within the navigable waters of the United States and on board a steamship while engaged in doing stevedoring work. The defendant moved to strike out the complaint for the reason set forth. The application came on to be heard before Mr. Justice Minturn, who declined to strike out the complaint. The same application was made before the late Judge Willard M. Cutler, who also declined to strike out the complaint and permitted the case to be tried on the merits. There was a verdict for the plaintiff. A rule to show cause was had before the Supreme Court, and after argument the rule was dismissed.

The question now comes squarely before this court whether the courts of this state must surrender their jurisdiction of actions in personam to the Federal Courts. It may not be amiss at the outset to state that if this state does take such a view, it will stand isolated against the courts of all other states where this question has come up and who have resolved it in favor of the state jurisdiction.

The sole contention of the appellant is predicated upon three decisions in this state, to wit:

O'Brien v. Scandinavian-American Line, 94 N. J. L., 244;

Bockhop v. Phoenix Transit Company, 97 N. J. L., 517;

March v. Vulcan Iron Works, 4 N. J. Adv. Rep., 222.

Let us examine, in order, these cases: All that was decided in the O'Brien case was, that a compensation agreement entered into between the parties under the mutual impression that the accident fell within the operation of the Workmen's Compensation Law, was a valid one, and that the attempt of the defendant to repudiate the agreement was ineffectual.

In the Bockhop case, the court decided that the exclusive features of the Workmen's Compensation Act apply to an accidental injury to a workman making repairs to a vessel lying upon the navigable waters of the state.

In the March case, the court decided that the Workmen's Compensation Act did not cover an employment that came within the purview of the admiralty jurisdiction.

It is evident that this court has not decided the question involved here.

Whatever the dictum may be in these cases, the question of jurisdiction is now up to this court for the first time, and must be decided as a case of first impression.

Even if our courts had decided the question of jurisdiction adversely to us, it is our contention that in view of the ruling of the United States Supreme Court in the recent cases, its decisions are absolutely binding upon the courts of this state and must be followed.

Chancellor Zabriskie aptly stated the law in the case of Stockton v. Dundee Manufacturing Co., 22 N. J. Eq., at page 57:

> "The law as to the effect and constitutionality of acts of Congress, must be received by

the state courts, as it may be from time to time determined and declared by that court. And, although the judges, or the opinions of the judges, of the state courts may not have changed, yet they are bound to give effect to that law, as last declared by the Supreme Court of the United States, however changed by the change of the judges of that court, or the changes in their opinions. What was declared by this court to be the law in Martin's Executors v. Martin, 5 C. E. Green, 421, was then the law. Now it is changed; as much changed as the law of this state would be by statute but not in the same manner. A change by statute is only for the future, a change by decision is retrospective, and makes the law at the time of the first decision as it is declared in the last decision as to all transactions that can be reached by it."

The cases have been collected and the principle clearly enunciated in 7 Ruling Case Law, page 1013, in Section 39, as follows:

"The constitution of the United States, the laws of Congress made in pursuance thereof, and treaties made under the authority of the United States, are by the Constitution of the Untied States made the 'supreme law of the land' and are binding upon all the courts of all the states, anything to the contrary in the Constitution or laws of a state notwithstanding. It follows necessarily from this constitutional provision, that where a suit in the state court involves a question arising under the Constitution, laws or treaties of the United States, or, in other words, what is commonly called a

'federal question', a decision of the United States Supreme Court upon the point at issue is to be regarded as absolutely binding and authoritative, and in such case, if the Supreme Court of a state should entertain a different view, it will follow the federal Supreme Court, reversing and overruling, if necessary, its own previous decisions to the contrary."

15 Corpus Juris, page 930, Section 318.

"Where a question is federal in its nature, the decisions of the Supreme Court of the United States are absolutely binding upon the various state courts and must be followed, regardless of the views of the latter courts, and even though such decisions are inconsistent with prior decisions of the state court. (Citing cases.)

See also Ahearn case, 247 Mass., 512 (142 N. E. Rep., 73), where the court said:

"The Supreme Court of the United States is the final arbiter in marking out the boundary between Federal and State jurisdiction in maritime law."

Since this action is based upon a maritime tort, it is the plaintiff's contention that both the employer and employee are out of the scope of our Workmen's Compensation Act. In other words, the plaintiff proceeds as if such an act was not in existence and that it does not in any way apply to him or limit his cause of action.

The broad and sweeping statement of the appellant that the Workmen's Compensation Act wiped out every other cause of action in this state by an

employee for personal injuries and abrogated the common law, is such sheer legal bunk that we shall not dignify it by attempting to answer.

The fallacy of that argument is constantly being shown by the various amendments to our Workmen's Compensation Act, by the number of cases based upon negligence for causing occupational diseases, as illustrated by Smith v. International Highspeed Co., 1 N. J. Adv. Rep., 198, and the cases brought by infant employees for negligence, starting with Fehr v. Weil, 92 N. J. L., 610, down to the most recent one, Dillon v. Heller, 1 N. J. Adv. Rep., 1220, and the actions brought by employees arising out of a casual employment. Occupational diseases and infants' cases now, by amendment to the Workmen's Compensation Act, are compensable under that act; they were not before the amendment was enacted. This court sustained the judgment in each instance.

Possibly through oversight, the appellant does not cite the recent cases of the United States Supreme Court, which are decisive of the question involved.

This case was brought immediately after the United States Supreme Court handed down its decision in the case of The State of Washington v. Dawson & Co., and Industrial Accident Commission of the State of California v. James Rolph Co., 68 L. Ed., 339, where Mr. Justice McReynolds, writing the opinion for the court, said:

> "That the State Courts have no jurisdiction to award compensation to one killed while actually engaged at maritime work under maritime contract upon a vessel moored at her dock and discharging cargo. That the attempt of Congress in the Act of 1922, saving to others

> than the master of members of the crew, their rights and remedies under the Workmen's Compensation Acts was beyond the power of Congress".

The court followed its earlier decisions in these cases:

> Southern Pacific Co. v. Jensen, 244 U. S., 205;
> Knickerbocker Ice Co. v. Stewart, 253 U. S., 149;
> Grant-Smith-Porter Co. v. Rhode, 257 U. S., 469;
> State Industrial Commission v. Nordenholt, 259 U. S., 567.

The next question that came up was whether a maritime tort can be sued for in the courts of this State. A search of the authorities showed that the State Courts of every State where the question has come up have allowed and permitted recovery for injuries suffered as the result of a maritime tort. The authorities were collected in the case of Crane v. Pacific Steamship Co., 272 Fed. Rep., 204, where the court said as follows:

> "The question presented therefore, is whether one injured by a maritime tort can maintain an action in personam against his employer to recover damages therefor in a common law court. It was decided adversely to the defendant's position by Judge Woolverton in *Williams* v. *Shipping Board, et al.,* on July 23rd, 1920, and his conclusion is supported by the authorities. The statute conferring jurisdiction on the District Court of all civil cases of admiralty and maritime juris-

diction saves 'to suitors in all cases the right of a common law remedy where the common law is competent to give it', and Judge Holmes speaking for the court in *The Hamilton,* 202 U. S., 404, *says the saving clause 'leaves open the common law jurisdiction of the State Courts over torts committed at sea. This, we believe, has always been admitted'."* Citing authorities.

The identical question came up in two very recent cases in the Court of Appeals of the State of New York. In the case of Danielson v. Morse Dry Dock & Repair Co., 235 N. Y., 439, certiorari refused, 262 U. S., 756. Mr. Justice Cardozo speaking for an unanimous court affirmed a judgment which permitted a recovery by the plaintiff, who was a burner repairing bolts and metal plates on board ship, and while so engaged suffered injuries which were due to the defendant's negligence. In the case of Maleeny v. Standard Ship Building Corporation, 237 N. Y., 250, the plaintiff was injured while repairing a ventilating shaft on the ship "Buckeye State", while at the shipyards of the defendant. Mr. Justice Crane speaking for the Court of Appeals, said:

"For an accident such as happened to the plaintiff in this case he could bring his action in admiralty or in the courts of this state.

It is the common law duty of a master to furnish his servant with a proper place to work and reasonably safe appliances; for his neglect of this duty he is liable for the resultant injury. *Crispin* v. *Babbitt,* 81 N. Y., 516, 37 Am. Rep., 521; *Pantzar* v. *Tilly Foster I. M. Co.,* 99 N. Y., 368, 2 N. E., 24. This is

also the law in admiralty, as applicable to those other than seamen. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S., 52, 34 Sup. Ct., 733, 58 L. Ed., 1208, 51 L. R. A. (N. S.), 1157.

Whether there be an admiralty law of master and servant separate and distinct from the common law, as it is known and applied by the states, need not be discussed, as it is neither important nor pertinent.

The fact is that admiralty does apply the common law of master and servant as it has been expounded by the common-law courts.

In *Leathers* v. *Blessing,* 105 U. S., 626, 630 (26 L. Ed., 1192), it was said:

'Nor is the term "tort", when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.'

And Justice Holmes in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S., 149, 167, 40 Sup. Ct., 438, 442 (64 L. Ed., 834, 11 A. L. R., 1145), says:

'But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several states, is not accepted, I can only say, I do not know how, unless by the fiat of the judges.'

As I read the cases I find no disagreement with this statement of Justice Holmes, that

the common law of the states has become the law of admiralty as it relates to master and servant. The only disagreement which I find is in determining what that common law is, or else in its application to situations strictly maritime. *Workman* v. *New York,* 179 U. S., 552, 21 Sup. Ct., 212, 45 L. Ed., 314; *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S., 368, 13 Sup. Ct., 914, 37 L. Ed., 772; *City of Detroit* v. *Osborne,* 135 U. S., 492, 10 Sup. Ct., 1012, 34 L. Ed., 260.

We start, therefore, in our discussion with the concession that for the failure of the master to provide the servant with a reasonably safe place to work and with proper appliances, an action may be brought either in the state courts, or in the United States District Courts. The law to be applied in either tribunal will be the common law; in admiralty it may be called the maritime law. * * *

That the right of a common law remedy which has been saved to suitors is not limited to either the substantive or remedial law, as it was in 1789, has heretofore been decided. Referring to the case of *American S. B. Co.* v. *Chase,* 16 Wall., 522, 21 L. Ed., 369, Mr. Justice Brown in *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S., 638, 646, 20 Sup. Ct., 824, 828 44 L. Ed., 921), said:

> 'Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common-law remedy. The contention was held to be unsound.'

In *The Hamilton,* 207 U. S., 398, 404, 28 Sup. Ct., 133, 134 (52 L. Ed., 264), we find this stated as the opinion of the Supreme Court:

> 'The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, "Saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," Rev. Stats. Sec. 563, cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. * * * And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the Legislature.' "

See also:

> Patrone v. Howlett, 237 N. Y., 397;
> Tammis v. Panama Railroad Co., 202 App. Div., 226;
> Larsen v. Alaska Steamship Co., 96 Wash., 665;
> Rosenberg v. Frank, 58 Calif., 403.

The leading case in the United States Supreme Court on the question of State and Federal concurrent jurisdiction, is The Hamilton, 207 U. S., 398, where Mr. Justice Holmes said as follows:

> "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'Saving to suitors in all cases the right of a common law remedy where the common

law is competent to give it,' Rev. Stats. Sec. 563, cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted."

Whatever doubt there may have been on the question has been dispelled by the following cases in the United States Supreme Court:

Panama Railroad Co. v. Johnson, 264 U. S., 375;
Engel v. Davenport, 271 U. S., 34;
Panama Railroad Co. v. Vasquez, 271 U. S., 557;
International Stevedoring Co. v. Haverty (decided October 18th, 1926).

In the case of Panama Railroad Co. v. Johnson (supra), Mr. Justice Van Devanter delivered the opinion of the court.

This was an action of a seaman against the employer for injuries. It was brought on the common law side of the District Court, and was predicated on Section 20 of the Act of March 4th, 1915, as amended by Section 33 of the Act of 1920, which reads as follows:

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The defendant demurred to the complaint and then answered. The issues were tried before the court and a jury. There was a verdict for the plaintiff. The court held as follows:

"The case arose under a law of the United States and involved the requisite amount, if any was requisite; so there can be no doubt that the case was within the general jurisdiction conferred on the district courts by Sec. 24 of the Judicial Code, unless, as the defendant contends, it was excluded by the concluding provision of the act, which says: 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' Although not happily worded, the provision, taken alone, gives color to the contention. But, as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus de-

liberately settled is not lightly to be assumed. See United States v. Barnes, 222 U. S., 513, 520, 56 L. Ed., 291, 293, 32 Sup. Ct. Rep., 177; United States v. Sweet, 245 U. S., 563, 572, 62 L. ed., 473, 480, 38 Sup. Ct. Rep., 193. The rule is specially pertinent here. Beginning with the Judiciary Act of September 24, 1789 (1 Stat. at L. 73, chap. 20, Comp. Stat., Sec. 1051), Congress has pursued the policy of investing the Federal courts—at first the circuit courts, and later the district courts—with a general jurisdiction expressed in terms applicable alike to all of them, and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant, or in which he has a place of business,—the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will. This policy was carried into the Judicial Code, and is shown in Sections 24 and 51, one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provision now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the district courts as defined in Sec. 24, but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word 'jurisdiction' seems inapt,

and therefore not of special significance. The words 'shall be' are stressed by the defendant, but as they are found also in the earlier provisions which uniformly have been held to relate to venue only, they afford no ground for a distinction."

In the case of Engel v. Davenport (supra), Justice Sanford delivered the opinion of the court.

In this case Engel, the plaintiff, brought his action at law in a Superior Court of California, to recover damages for personal injuries while he was engaged in placing a chain lashing around part of a cargo of lumber. The defendant demurred to the complaint on the ground that the cause of action was barred by the California Code of Civil Procedure. The demurrer was sustained, and the plaintiff appealed to the United States Supreme Court. The court said:

"It is settled by the decision in Panama Railroad Co. v. Johnson, 264 U. S., 375, 68 L. Ed., 748, 44 Sup. Ct. Rep., 391, that S. 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country-wide and uniform in operation; that it brings into the maritime law new rules drawn from the Employers' Liability Act and its amendments,—adopted by the generic reference to 'all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees,'—and 'extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules'; that is, that it grants them, as

an alternative, the common-law remedy of an action 'to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules,' which, as a modification of the maritime law, may be enforced through appropriate proceedings in personam on the common-law side of the courts.

"It is clear that the state courts have jurisdiction, concurrently with the Federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law. This was assumed in Re East River Towing Co., 266 U. S., 355, 368, 69 L. Ed., 324, 327, 45 Sup. Ct. Rep., 114; and expressly held in Lynott v. Great Lakes Transit Corp., supra, affirmed, without opinion, in 234 N. Y., 626, 138 N. E., 473. And it has been implied in various decisions in the district courts, involving the question of the right to remove to a Federal court a suit that had been commenced in a state court.

"By a provision of the Judiciary Act of (September 24), 1789 (1 Stat. at L., 73), now embodied in S. 24, subd. 3, and S. 256, subd. 3 of the Judicial Code, giving district courts original jurisdiction of civil causes of admiralty and maritime jurisdiction, there is saved to suitors in all cases the right of common-law remedy where the common-law is competent to give it."

In the case of Panama Railroad Co. v. Vasquez (supra), Mr. Justice Van Devanter delivered the opinion of the court.

This was an action by the representative of the deceased seaman against the owner of the ship, to

recover damages for the death of the plaintiff's intestate, caused by the owner's negligence. This action had been tried in the courts of New York State, and had been affirmed by the Court of Appeals (see 239 N. Y., 590). The court said as follows:

"The sole question presented is whether state courts may entertain such actions, the defendant's contention being that they are cognizable only in the Federal District Courts.

Amended S. 20, as heretofore construed, changes the prior maritime law of the United States by giving to seamen injured through the negligence of their employers, and to their personal representatives where the injuries result in death, the rights given to railway employees and their personal representatives by the Employers' Liability Act of 1908 and its amendments. Panama R. Co. v. Johnson, 264 U. S., 375, 68 L. ed., 748, 44 Sup. Ct. Rep., 391. And the procedural provisions therein have been construed—when read in connection with Ss 24 (third) and 256 (third) of the Judicial Code, and in the light of constitutional rules respecting admiralty and maritime jurisdiction—to mean that the new substantive rights may be asserted and enforced either in actions in personam against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury; but always taking the changed maritime law as the basis and measure of the rights asserted. Panama R. Co. v. Johnson, supra.

The sections of the Judicial Code just cited, while investing the Federal District Courts

with jurisdiction, 'exclusive of the courts of the several states,' of all 'civil causes of admiralty and maritime jurisdiction,' contain an excepting clause expressly 'saving to suitors in all cases the right to common-law remedy where the common law is competent to give it.' *This clause is a continuation of a like clause in the Judiciary Act of* (*September* 24), 1789 (1 *Stat. at L.* 73, *chap.* 20), *and always has been construed as permitting substantive rights under the maritime law to recover money for service rendered, or as damages for tortious injuries, to be asserted and enforced in actions in personam according to the course of the common law.* Chelentis v. Luckenbach S. S. Co., 247 U. S., 372, 384, 62 L. ed., 1171, 1176, 38 Sup Ct. Rep., 501, 19 N. C. C. A., 309; Panama R. Co. v. Johnson, supra, pages 388, 390 (68 L. ed., 753, 754, 44 Sup. Ct. Rep., 391). *And it uniformly has been regarded as permitting such actions to be brought in either the Federal courts or the state courts, as the possessor of the right may elect.* Leon v. Calceran, 11 Wall., 185, 188, 20 L. ed., 74, 75; Schoonmaker v. Gilmore, 102 U. S., 118, 26 L. ed., 95; Chappell v. Bradshaw, 128 U. S., 132, 134, 32 L. ed., 369, 370, 9 Sup. Ct. Rep., 40; Carlisle Packing Co. v. Sandanger, 259 U. S., 255, 66 L. ed., 927, 42 Sup. Ct. Rep., 475; Red Cross Line v. Atlantic Fruit Co., 264 U. S., 109, 123, 68 L. ed., 582, 586, 44 Sup. Ct. Rep., 274.

In so saying, we must be understood as fully recognizing what often has been held in other cases—that the saving clause does not include suits in rem or other forms of proceeding unknown to the common law. The Moses

Taylor, 4 Wall., 411, 431, 18 L. ed., 397, 402; The Hine v. Trevor, 4 Wall., 555, 571, 18 L. ed., 451, 456; Southern P. Co. v. Jensen, 244 U. S., 205, 218, 61 L. ed., 1086, 1099, L. R. A., 1918-C, 451, 37 Sup. Ct. Rep., 524, Ann. Cas., 1917-E, 900, 14 N. C. C. A., 597. But an action in personam to recover damages for tort is one of the most familiar of the common-law remedies; and it is such a remedy at law that is contemplated by amended S. 20 of the Seamen's Act and invoked in this case.

The defendant insists that the saving clause refers only to rights recognized by the maritime law as existing in 1789, when the clause first was adopted, and therefore does not include rights brought into the maritime law by subsequent legislative changes. We think the clause has a broader meaning, looks to the future as well as the past and includes new as well as old rights, if only they are such as readily admit of assertion and enforcement in actions in personam, according to the course of the common law. This is the view that was taken in American S. B. Co. v. Chase, 16 Wall., 522, 533, 21 L. ed., 369, 372.

The defendant also points to the provision in amended S. 20 *saying, 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located,' and argues therefrom that Congress has manifested a purpose to restrict the enforcement of the newly given rights to the Federal district courts. The provision is not aptly worded to express that purpose, and taken alone is confusing. We think it falls short of that certainty which naturally would be manifested in*

making an intended departure from the long-prevailing policy evidenced by the saving clause in the Judiciary Act of 1789 *and in the two sections of the Judicial Code, and that the more reasonable view is that it is intended to regulate venue and not to deal with jurisdiction as between Federal and state courts.* Panama R. Co. v. Johnson, supra, pages 384, 391 (68 L. ed., 751, 754, 44 Sup. Ct. Rep., 391); Re East River Towing Co., 266 U. S., 355, 368, 69 L. ed., 324, 327, 45 Sup. Ct. Rep., 114; Engel v. Davenport (decided April 12, 1926) (271 U. S., 33, ante, 813, 46 Sup. Ct. Rep., 410).

We well might have rested our decision here on the conclusion reached in Engel v. Davenport, where we said: 'It is clear that the state courts have jurisdiction, concurrently with the Federal Courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law.'"

In the case of International Stevedoring Co. v. Haverty (supra), Mr. Justice Holmes delivered the opinion of the court.

This case is almost identical with the case at bar. The facts as stated in the opinion, are: The action was brought in a State Court seeking a common law remedy for personal injuries sustained by the plaintiff upon a vessel at dock in the harbor of Seattle. The plaintiff was a longshoreman engaged in stowing freight in the hold. Through the negligence of the hatch tender, no warning was given that a load of freight was about to be lowered, and when the load came down the plaintiff was badly hurt. The plaintiff and the hatch tender both were employed by the defendant stevedore.

The defendant asked for a ruling that the plaintiff and the hatch tender were fellow servants and that therefore the plaintiff could not recover. The court ruled that if the failure of the hatch tender to give a signal was the proximate cause of the injury the verdict must be for the plaintiff. A verdict was found for him, and it was affirmed by the Supreme Court of the State (134 Wash., 235). The court held:

> "The petitioner argues that the case is governed by the admiralty law; that the admiralty law has taken up the common law doctrine as to fellow servants, and that by the common law the plaintiff would have no case. Whether this last proposition is true we do not decide. The plaintiff cites a number of decisions of which it is enough to mention The Hoquiam, 253 F. 627, 165 C. C. A., 253, and Cassil v. United States Emergency Fleet Corporation (C. C. A.), 289 F., 774. It also refers to an intimation of this court that whether the established doctrine be good or bad it is not open to courts to do away with it upon their personal notions of what is expedient. It is open to Congress, however, to change the rule and in our opinion it has done so. By the Act of June 5, 1920, c. 250, S. 20, 41 Stat., 988, 1007 (Comp. St. S. 8337a):
>
> 'Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.'

"It is not disputed that the statutes do away with the fellow servant rule in the case of personal injuries to railway employees. Second Employers' Liability Cases, 223 U. S., 1, 49, 32 S. Ct., 169, 56 L. Ed., 327, 38 L. R. A. (N. S.), 44. The question therefore is how far the Act of 1920 should be taken to extend.

It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. Atlantic Transport Co. v. Imbrovek, 234 U. S., 52, 62, 34 S. Ct., 733, 58 L. Ed., 1208, 51 L. R. A. (N. S.), 1157. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field which Congress has disapproved and changed the rule introduced into the common law within less than a century. We are of opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores engaged as the plaintiff was, whatever it might mean in laws of a different kind."

This is the first case in the United States Supreme Court squarely holding that a stevedore comes within the Jones Act, and that therefore the

State Courts have concurrent jurisdiction with the Federal Courts, and squarely decides the question involved on this appeal.

POINT II.

The charge of the trial judge was correct.

(a) As to the alleged error claimed in Point II of appellant's brief, the charge was not only fair but especially favorable to the defendant, as is evident from this excerpt:

> "What was the duty devolving upon the defendant, John T. Clark & Son? It was the duty of John T. Clark & Son to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on its business of stevedoring, including the duty of making inspection and repairs of such machinery and appliances at proper intervals. It was also the duty of the defendant to use reasonable care to provide a safe place to work as well as to supply sufficient machinery and appliances.
>
> The defendant, John T. Clark & Son, Incorporated, was not an insurer of the plaintiff against accidents. It was only required to use reasonable care and skill to furnish suitable and safe machinery and appliances for the work for which the plaintiff was employed, and to use reasonable care to see that the place where the plaintiff was at work was safe for such work to be carried on. The defendant was also required to make, from time to time, reasonable inspection of the machinery and appliances so used and of the place where the plain-

tiff was working, to see they were reasonably safe for the use for which they were intended, and, if not, to use reasonable care to have any defect that was discovered remedied within a reasonable time. The defendant could not escape liability by delegating the duty of using reasonable care in the performance of its duties to someone else."

As to the objection concerning plaintiff's fourth request, it may be pertinent to state that said request is practically in the language of a case in this court—Wilczynski v. Pennsylvania Railroad Co., 90 N. J. L., at page 181, where the court said, in part, as follows:

> "This duty of the master, like the duty to use reasonable care to provide a safe place of work, with which it is closely assimilated in legal principle, is one that the master owes to his servants, and hence is one for the breach of which the master cannot escape liability by entrusting the performance of such duty to others, be they managers, agents, strangers, volunteers or fellow servants."

It is respectfully submitted that the charge, as a whole, laid down the law with clearness and especially did not make the defendant an insurer of the condition of the machinery, as claimed.

The value of appellant's citations may be indicated by the two cases cited in support of its contention:

> State v. Erie Railroad Co., 84 N. J. L., 661;
> State v. Sand, 95 N. J. L., 49.

The first case came up on an indictment for

nuisance, and the second case came up on an indictment for a disorderly house.

Even assuming, for the sake of argument, that error had been committed in the charge, the trial Judge is entitled to have his attention called to it by a properly taken objection, in order that he may correct it, if he is satisfied of the error.

> Shotwell v. Public Service, 3 N. J. Misc. Rep., 435.

The only objection made by the attorney for the defendant was in this language:

> "I would also like to note an exception to that part of your Honor's charge which instructed the jury that the defendant was bound, in this case, to make reasonable inspection of its appliances and machinery on the steamship, and to have same safe—to have the appliances safe and the machinery safe."

That objection misstates the charge, as is evident from a reading of the same, and is so ambiguous and pointless as to be meaningless; and does not point out in what manner the court should have properly charged or the specific error in the charge. Counsel, however, tried to clarify the situation in a latter objection set forth at page 118, lines 33-40, where he used this language:

> "I except to your Honor's charge where your Honor said that the defendant was bound to furnish machinery and appliances in reasonably good condition and repair and was bound to make an inspection and report at proper intervals, and it was for the jury to determine in this case whether or not they had done that,

and whether or not the machinery and appliances were inspected at intervals and were in reasonably good condition."

That objection, however, is not pressed on this appeal and is not argued in the brief.

(b) The trial Judge did not err in reading to the jury the allegations of negligence, as set out in the complaint.

The appellant's brief entirely ignores the facts, and misquotes the evidence, because the proof showed that prior to the happening of the accident one of the ropes attached to the boom had broken and that the men were trying to repair it (splicing the frayed end) when the plaintiff stopped them; that a new rope or chain was sent for; that the defendant's general superintendent picked out the chain that was to be used, which, on inspection, was evident that it was not adequate for the purpose unless it was put on double; that while the plaintiff was so doing, the general superintendent came along, ordered him away and fixed it so, that on the first attempt made to hoist freight, that chain snapped; that he was not given any warning that it was to be used, and no warning was given him of the fact that the chain had snapped so that he could get out of the way; that no notice was given him of any of these facts.

There is no question, from the evidence, that the general foreman was utterly incompetent and showed a reckless disregard of the lives and safety of the men under him.

A careful reading of the testimony will show that all of the allegations set forth in the complaint were proven. However, it is respectfully submitted that even if only one element of negli-

gence had been proven, it would have been sufficient.

These facts effectually dispose of defendant's Requests to Charge marked 12, 13, 14, 16 and 18.

All of the cases cited by appellant have absolutely no bearing upon the questions involved. In each case cited, the court permitted proof that was illegal and had no application in any way to the negligence as alleged.

In the instant case, the evidence tended to prove each and every claim of negligence set forth in the complaint.

(c) The trial Judge did not err in his instructions to the jury concerning his medical expenditures.

The proof showed that the plaintiff did have his own doctor, who came into court too late to testify. However, the court expressly charged the jury that there was no evidence of any medical bill; the only evidence being that paid for an addominal belt. The defendant's request to charge, "you can allow the plaintiff nothing for medical expenses or medicines, because he has proven none", is incorrect and entirely ignores the facts, because he had proven the amount he paid for the medical accessories he had to use.

(d) The trial Judge did not err in submitting to the jury the questions as to his injuries.

The question of the plaintiff's injuries and the amount he is to receive therefor, was solely a jury question.

The appellant, seemingly, is again trying to argue the weight of the evidence.

All of the questions raised in appellant's points

II, III, IV, V and VI, were involved in the argument of defendant's rule to show cause in the Supreme Court, and it is respectfully submitted that the defendant is precluded from rearguing the facts again on this appeal.

POINT III.

It is respectfully submitted that the judgment herein be affirmed.

KENT & KENT,
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NATHANIEL KENT,
SAMUEL KENT,
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[45925]

New Jersey Court of Errors and Appeals

SALVATORE TUCCILLO, Plaintiff-Respondent, v. JOHN T. CLARK & SON, INC., a corporation, Defendant-Appellant.	Action at Law.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

Statement of Facts.

This is an appeal by the defendant from a judgment in favor of the plaintiff and against the defendant in an action brought to recover damages for personal injuries sustained on February 23rd, 1924, while doing stevedoring work on the steamship "Morengo", which, at that time, was moored alongside of Pier 9, Hoboken, and in navigable waters; the contention of the plaintiff being that he was engaged in work of a maritime nature; that the injury occasioned to him was a maritime tort; that therefore, the Workmen's Compensation Act of this State did not apply, and this action was therefore brought in the courts of this State, where he rightfully belongs and by choice prefers to remain. After verdict, the defendant obtained a rule to show cause on the grounds that the verdict was against the clear weight of the evidence;

that the verdict was against the charge of the trial Judge, and that the verdict was excessive. The Supreme Court discharged the rule to show cause. This appeal, then, concerns itself almost exclusively with the question of jurisdiction.

The facts concerning the accident, briefly, are as follows:

The defendant is a general stevedore and was engaged in loading the steamship "Morengo" with various kinds of freight. At the time of the accident the ship was being loaded with boxes of apples that were taken out of a lighter alongside of the ship, hoisted up to the deck of the ship by means of a boom operated by a steam winch, and then lowered into the hold of the vessel. The boom was held in place by means of a guy rope on each side of it. In order to make the guy rope taut and to pull in the slack on the ropes, a pulley or block and tackle is attached to the end of the guy rope near the deck. The boxes of apples in loads of approximately two tons, were hoisted up into the ship by means of a sling, called an aeroplane, which is a flat, square, box affair. During the course of the work, the offshore guy rope broke. The plaintiff went on the deck to see what was the matter and he found the men trying to repair the rope; that is, they were trying to splice the frayed ends. The plaintiff stated that that would be dangerous and suggested that they procure a steel chain. The man who was sent to procure that chain saw Julius Hart, the general foreman on the job, who picked out the chain, gave it to him with instructions that said chain should be used. The chain was brought up on the ship and while the plaintiff was in the act of fastening it when the general foreman, Hart, came up, started swearing at the plaintiff because too much time

was being wasted, and ordered him away. The plaintiff stated that the chain had to be put in double, as otherwise it would be insecure and unsafe, and dangerous to use. Hart, in order to save time and in reckless disregard of the safety of his men, attached the chain single strand and hurriedly ordered the work to proceed. The plaintiff, at that time, had walked away about twenty-five feet and was about to proceed down from the ship. At the very first attempt to use that boom, the chain snapped; part of the chain or tackle flew over and struck the plaintiff in the stomach and knocked him unconscious. He was taken home and treated by his family physician; then was treated by various doctors employed by the defendant. The blow produced a tearing of the abdominal muscle, and the plaintiff now has a separation of at least two inches long in the wall of the abdomen through which, at times, the gut protrudes. He still has severe pains in the stomach and is unable to do any heavy or laborious work, such as he had been doing for a great many years.

His work now and when he can get it, is that of winchman, which permits him to sit and operate a lever that starts the operation of a steam winch.

His prior history is, that he has been doing longshore work all his life; the hardest kind of work, and that his only prior ailment was an occasional attack of rheumatism in the right foot; that he never had any trouble with his stomach, never had any pain there, and that he never wore an abdominal belt until after the accident. He now has a serious and permanent condition which is gradually becoming enlarged, and the only possible cure is a serious major operation, which he is afraid to undergo.

Here follows a chronological summary of the

evidence taken at the trial, with the testimony indexed thereto:

SALVATORE TUCCILLO, the plaintiff, testified as follows:

That he is forty-nine years old; married (p. 23, ll. 18-19). Was working on the steamship "Marengo" on February 23, 1924 (p. 23, ll. 36-37). The accident happened around 8 o'clock. He was foreman of his gang; worked with the men, helped with the loading (p. 24, ll. 10-30). About 8 o'clock, a guy carried away, so he climbed up the ship on a Jacob's ladder and he saw the men trying to repair the guy. It appeared to him that the repaired rope would not hold and he suggested that someone go to the gear room and get a chain (p. 25, ll. 30-40). While attempting to fix the chain, the general foreman came along. He used violent and abusive language and ordered him away (p. 26, ll. 10-40). The foreman took everything out of his hands and he went towards the aft part of the ship and stood there. The gangway man was then told to go ahead with the lifting and all of a sudden the gear carried away and the pulley block hit him in the stomach and he fell to the deck. They wanted to send him to the hospital because he was sick and sending stuff out of the mouth. He was unconscious about ten minutes. Prior to the accident, nothing was ever the matter with his stomach; never had any pain; never wore an abdominal belt. When the doctor came, he put a big belt around him to hold the stomach up (p. 27, ll. 1-40). At that time, he was hurt inside with contusions; all broke; everything was ripped and it hurt like anything (p. 28, ll. 1-4). Was home between five and six weeks; had a family to support and he tried to get light work. He now drives a winch, which

is turning on steam and just watching it and let it go up and down. It is not hard work. It does not require any lifting or pulling. Now if they have no work on the winch, he has to go home (p. 28, ll. 10-40). Cannot do the lifting work he did before the accident. If he attempts lifting, it hurts him inside. He indicated the navel region. Has pain when he coughs or sneezes or makes any kind of movement (p. 29, ll. 1-20). Making Forty Dollars a week regularly (p. 29, l. 25). Now wears a belt which he purchased on March 20, 1924 (p. 30, ll. 1-15).

On cross examination, he testified that after the pulley struck him, two men carried him into the office (p. 30, ll. 30-35). Weighs two hundred pounds; is five feet, eleven inches in height. Asked to exhibit to jury where he was injured—"(Witness leaves stand, removes belt, opens vest and exhibits his stomach to the jury)." Indicates to jury the region of the navel, where he has this trouble, and points out to them the area of the trouble (p. 40, ll. 15-35). When he had a cold he couldn't hold his stomach up (p. 43, ll. 10-20).

JOSEPH GOPOR testified for the plaintiff as follows:

That he was working with Tuccillo at the time of the accident (p. 48, ll. 33-34). A block and cable and chain hit Tuccillo (p. 49, ll. 2-3).

No cross examination.

NICK PAPPARELLI testified for the plaintiff as follows:

He was working with Tuccillo and saw him get hurt right in front of his feet (p. 50, ll. 12-19; 26-27). Warned the general foreman that the

chain will be broken because the strain is too heavy, but was ordered to go ahead and start, and after the signal was given for the winchman to go ahead, the guy went rr-r rr-r rr-r and broke. Said to the stevedore when Tuccillo fell down "Do you see what you done?" He said: "All right, keep your mouth shut" (p. 52, ll. 10-25).

On cross examination, he testified generally as to what preceded the accident (pp. 53-58).

DR. JOHN A. BOTTI testified for the plaintiff as follows:

Examined Tuccillo on March 24, 1926 (p. 59, ll. 8-12). Found that Tuccillo had a hernia, a rupture in the epigastrium, the region of the abdomen, right up in the pit of the stomach. His condition is a permanent one if not operated on (p. 59, ll. 12-20). Would require a major operation. In his present condition it is impossible for him to do hard, manual labor. It would tend to enlarge the rupture, possibly strangulate it (p. 59, ll. 25-35).

Practicing approximately ten years (p. 60, fol. 34). Practice consists of treating industrial traumatic injuries and has treated five or six thousand cases (p. 61, fols. 3 to 15). In answer to hypothetical question setting forth the happening of the accident as hereinbefore described, he said that such an accident would be a competent producing cause of the condition he found in the abdominal region (p. 63).

Cross examination.

Referring to the injury to the stomach—

"Q. Is it visible to the eye? A. Yes" (p. 64, l. 9).

"Q. Was there a protrusion there at that time (referring to the examination on March 24, 1926)? A. Yes."

"Q. A protrusion of what? A. A protrusion of the abdomen like the gut" (p. 64, ll. 12-15).

"Q. And you could see this hernia protruded, could you, just by looking at him? A. By examining that area, yes.

"Q. Just by your sight? A. With sight and with feeling" (p. 64, ll. 22-28).

The following testimony was adduced on behalf of the defendant:

JULIUS HART testified as follows:

The general foreman in charge of the job (p. 73, ll. 3-6). He made a model showing the ship rigging (p. 74, ll. 20-28). When he came on the deck, a man was putting a chain on the offshore guy. The draft went up; the guy carried away and Tuccillo laid on his belly. He had nothing to do with putting in the chain (p. 77, ll. 1-12). Nothing that he knows of struck Tuccillo (p. 77, ll. 15-16). His job was on the ship and on the deck (p. 78, ll. 27-28). He saw Tuccillo fall down and lay on his belly.

HENRY A. SOMERS testified as follows:

Employed by Commercial Stevedoring Company. Tuccillo came with them six or seven years before (p. 88, ll. 10-22). After the accident first started work with them on March 31, 1924. After that period, his wages ranged as low as Two Dollars a week and in one week he made $56.60. (However, his average during that period was only $22.19 per week) (p. 89, ll. 1-30). He worked as a winch

driver; had to sit there and pull a lever and run the winch (p. 90, ll. 25-32).

DR. WILLIAM J. ARLITZ testified as follows:

That he examined Tuccillo at his office on February 24, 1924 (p. 93, ll. 20-23). He told him he had pain in the stomach, but found no evidence of any trauma. He found, however, that Tuccillo had a separation of the rectus abdominal muscle that runs upwards from the bony connection below, approximately, to the breast bone, and that the muscle was separated at its upper portion. On the third visit, according to Dr. Arlitz' recollection, Tuccillo stated that he had been to see Dr. Ducerno, who said he required an immediate operation for hernia (p. 93, ll. 28-40). Dr. Arlitz treated him for about two weeks or more, *but he has no record of the services rendered him* (p. 94, ll. 18-20). Thought that it was a congenital defect; that he was born with it (p. 95, ll. 1-10). Stated that a traumatic hernia can also be brought about by a blow, which lacerates and tears the muscles, and the laceration and tearing of the muscles causes separation with a protrusion of the gut (p. 96, ll. 2-12). Stated that this man, of course, might have had an injury to his abdomen many years ago that could produce a condition like this (p. 96, ll. 21-24).

On cross examination, stated that he did not have any memoranda with him as to the treatments (p. 97, l. 15). Tuccillo stated that he had been struck; that a bulky substance had hit him in the abdomen; that there is no doubt but that he has a condition there (p. 98, ll. 20-30). His condition is going to progress (p. 99, l. 25). Sees some days one hundred people, some days fifty, some days twenty-five. Stated he could recollect this case because Tuccillo was not satisfied with the doctors he consulted, nor was he satisfied with him (Dr. Arlitz) (p. 100, ll. 30-40).

DR. NICHOLAS F. FEUREY testified as follows:

Did not examine plaintiff until October 25, 1925, a year and eight months after the accident. At that time he found that Tuccillo had a separation of the rectus muscle; that is a muscle running up the abdomen, the strands of which run to the right of the umbilicus, on a transverse line with the umbilicus. The separation was probably two inches long (p. 101, ll. 27-33). In his opinion it was a congenital condition (p. 101, ll. 38-40).

This completed the defendant's case when court adjourned for the day. When trial resumed the next day, Dr. Di Jacerno, Tuccillo's family physician, who had treated him immediately following the injuries, appeared in court. We requested leave to reopen the case for the purpose of having Dr. Di Jacerno testify, but counsel for the defense refused to consent to the reopening for this purpose, so that the doctor did not testify.

The grounds of appeal may be grouped into two heads:

(1) That the courts of this State have no jurisdiction over the controversy.

(2) That the trial judge erred in his instructions to the jury.

We shall argue the case upon the following propositions:

(1) That the plaintiff is rightfully in the courts of his own State.

(2) The charge of the trial judge was correct.

POINT I.

The plaintiff is rightfully in the courts of his own state.

The defendant in this case has contended from the very outset that the courts of this state did not have jurisdiction. The complaint, as drawn, sets forth solely a cause of action that happened within the navigable waters of the United States and on board a steamship while engaged in doing stevedoring work. The defendant moved to strike out the complaint for the reason set forth. The application came on to be heard before Mr. Justice Minturn, who declined to strike out the complaint. The same application was made before the late Judge Willard M. Cutler, who also declined to strike out the complaint and permitted the case to be tried on the merits. There was a verdict for the plaintiff. A rule to show cause was had before the Supreme Court, and after argument the rule was dismissed.

The question now comes squarely before this court whether the courts of this state must surrender their jurisdiction of actions in personam to the Federal Courts. It may not be amiss at the outset to state that if this state does take such a view, it will stand isolated against the courts of all other states where this question has come up and who have resolved it in favor of the state jurisdiction.

The sole contention of the appellant is predicated upon three decisions in this state, to wit:

O'Brien v. Scandinavian-American Line, 94 N. J. L., 244;
Bockhop v. Phoenix Transit Company, 97 N. J. L., 517;

March v. Vulcan Iron Works, 4 N. J. Adv. Rep., 222.

Let us examine, in order, these cases: All that was decided in the O'Brien case was, that a compensation agreement entered into between the parties under the mutual impression that the accident fell within the operation of the Workmen's Compensation Law, was a valid one, and that the attempt of the defendant to repudiate the agreement was ineffectual.

In the Bockhop case, the court decided that the exclusive features of the Workmen's Compensation Act apply to an accidental injury to a workman making repairs to a vessel lying upon the navigable waters of the state.

In the March case, the court decided that the Workmen's Compensation Act did not cover an employment that came within the purview of the admiralty jurisdiction.

It is evident that this court has not decided the question involved here.

Whatever the dictum may be in these cases, the question of jurisdiction is now up to this court for the first time, and must be decided as a case of first impression.

Even if our courts had decided the question of jurisdiction adversely to us, it is our contention that in view of the ruling of the United States Supreme Court in the recent cases, its decisions are absolutely binding upon the courts of this state and must be followed.

Chancellor Zabriskie aptly stated the law in the case of Stockton v. Dundee Manufacturing Co., 22 N. J. Eq., at page 57:

> "The law as to the effect and constitutionality of acts of Congress, must be received by

the state courts, as it may be from time to time determined and declared by that court. And, although the judges, or the opinions of the judges, of the state courts may not have changed, yet they are bound to give effect to that law, as last declared by the Supreme Court of the United States, however changed by the change of the judges of that court, or the changes in their opinions. What was declared by this court to be the law in Martin's Executors v. Martin, 5 C. E. Green, 421, was then the law. Now it is changed; as much changed as the law of this state would be by statute but not in the same manner. A change by statute is only for the future, a change by decision is retrospective, and makes the law at the time of the first decision as it is declared in the last decision as to all transactions that can be reached by it."

The cases have been collected and the principle clearly enunciated in 7 Ruling Case Law, page 1013, in Section 39, as follows:

> "The constitution of the United States, the laws of Congress made in pursuance thereof, and treaties made under the authority of the United States, are by the Constitution of the Untied States made the 'supreme law of the land' and are binding upon all the courts of all the states, anything to the contrary in the Constitution or laws of a state notwithstanding. It follows necessarily from this constitutional provision, that where a suit in the state court involves a question arising under the Constitution, laws or treaties of the United States, or, in other words, what is commonly called a

> 'federal question', a decision of the United States Supreme Court upon the point at issue is to be regarded as absolutely binding and authoritative, and in such case, if the Supreme Court of a state should entertain a different view, it will follow the federal Supreme Court, reversing and overruling, if necessary, its own previous decisions to the contrary."

15 Corpus Juris, page 930, Section 318.

> "Where a question is federal in its nature, the decisions of the Supreme Court of the United States are absolutely binding upon the various state courts and must be followed, regardless of the views of the latter courts, and even though such decisions are inconsistent with prior decisions of the state court. (Citing cases.)

See also Ahearn case, 247 Mass., 512 (142 N. E. Rep., 73), where the court said:

> "The Supreme Court of the United States is the final arbiter in marking out the boundary between Federal and State jurisdiction in maritime law."

Since this action is based upon a maritime tort, it is the plaintiff's contention that both the employer and employee are out of the scope of our Workmen's Compensation Act. In other words, the plaintiff proceeds as if such an act was not in existence and that it does not in any way apply to him or limit his cause of action.

The broad and sweeping statement of the appellant that the Workmen's Compensation Act wiped out every other cause of action in this state by an

employee for personal injuries and abrogated the common law, is such sheer legal bunk that we shall not dignify it by attempting to answer.

The fallacy of that argument is constantly being shown by the various amendments to our Workmen's Compensation Act, by the number of cases based upon negligence for causing occupational diseases, as illustrated by Smith v. International Highspeed Co., 1 N. J. Adv. Rep., 198, and the cases brought by infant employees for negligence, starting with Fehr v. Weil, 92 N. J. L., 610, down to the most recent one, Dillon v. Heller, 1 N. J. Adv. Rep., 1220, and the actions brought by employees arising out of a casual employment. Occupational diseases and infants' cases now, by amendment to the Workmen's Compensation Act, are compensable under that act; they were not before the amendment was enacted. This court sustained the judgment in each instance.

Possibly through oversight, the appellant does not cite the recent cases of the United States Supreme Court, which are decisive of the question involved.

This case was brought immediately after the United States Supreme Court handed down its decision in the case of The State of Washington v. Dawson & Co., and Industrial Accident Commission of the State of California v. James Rolph Co., 68 L. Ed., 339, where Mr. Justice McReynolds, writing the opinion for the court, said:

> "That the State Courts have no jurisdiction to award compensation to one killed while actually engaged at maritime work under maritime contract upon a vessel moored at her dock and discharging cargo. That the attempt of Congress in the Act of 1922, saving to others

> than the master of members of the crew, their rights and remedies under the Workmen's Compensation Acts was beyond the power of Congress".

The court followed its earlier decisions in these cases:

> Southern Pacific Co. v. Jensen, 244 U. S., 205;
> Knickerbocker Ice Co. v. Stewart, 253 U. S., 149;
> Grant-Smith-Porter Co. v. Rhode, 257 U. S., 469;
> State Industrial Commission v. Nordenholt, 259 U. S., 567.

The next question that came up was whether a maritime tort can be sued for in the courts of this State. A search of the authorities showed that the State Courts of every State where the question has come up have allowed and permitted recovery for injuries suffered as the result of a maritime tort. The authorities were collected in the case of Crane v. Pacific Steamship Co., 272 Fed. Rep., 204, where the court said as follows:

> "The question presented therefore, is whether one injured by a maritime tort can maintain an action in personam against his employer to recover damages therefor in a common law court. It was decided adversely to the defendant's position by Judge Woolverton in *Williams* v. *Shipping Board, et al.,* on July 23rd, 1920, and his conclusion is supported by the authorities. The statute conferring jurisdiction on the District Court of all civil cases of admiralty and maritime juris-

diction saves 'to suitors in all cases the right of a common law remedy where the common law is competent to give it', and Judge Holmes speaking for the court in *The Hamilton,* 202 U. S., 404, *says the saving clause 'leaves open the common law jurisdiction of the State Courts over torts committed at sea. This, we believe, has always been admitted'."* Citing authorities.

The identical question came up in two very recent cases in the Court of Appeals of the State of New York. In the case of Danielson v. Morse Dry Dock & Repair Co., 235 N. Y., 439, certiorari refused, 262 U. S., 756. Mr. Justice Cardozo speaking for an unanimous court affirmed a judgment which permitted a recovery by the plaintiff, who was a burner repairing bolts and metal plates on board ship, and while so engaged suffered injuries which were due to the defendant's negligence. In the case of Maleeny v. Standard Ship Building Corporation, 237 N. Y., 250, the plaintiff was injured while repairing a ventilating shaft on the ship "Buckeye State", while at the shipyards of the defendant. Mr. Justice Crane speaking for the Court of Appeals, said:

"For an accident such as happened to the plaintiff in this case he could bring his action in admiralty or in the courts of this state.

It is the common law duty of a master to furnish his servant with a proper place to work and reasonably safe appliances; for his neglect of this duty he is liable for the resultant injury. *Crispin* v. *Babbitt,* 81 N. Y., 516, 37 Am. Rep., 521; *Pantzar* v. *Tilly Foster I. M. Co.,* 99 N. Y., 368, 2 N. E., 24. This is

also the law in admiralty, as applicable to those other than seamen. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S., 52, 34 Sup. Ct., 733, 58 L. Ed., 1208, 51 L. R. A. (N. S.), 1157.

Whether there be an admiralty law of master and servant separate and distinct from the common law, as it is known and applied by the states, need not be discussed, as it is neither important nor pertinent.

The fact is that admiralty does apply the common law of master and servant as it has been expounded by the common-law courts.

In *Leathers* v. *Blessing,* 105 U. S., 626, 630 (26 L. Ed., 1192), it was said:

'Nor is the term "tort", when used in reference to admiralty jurisdiction, confined to wrongs or injuries committed by direct force, but it includes wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.'

And Justice Holmes in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S., 149, 167, 40 Sup. Ct., 438, 442 (64 L. Ed., 834, 11 A. L. R., 1145), says:

'But somehow or other the ordinary common-law rules of liability as between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several states, is not accepted, I can only say, I do not know how, unless by the fiat of the judges.'

As I read the cases I find no disagreement with this statement of Justice Holmes, that

the common law of the states has become the law of admiralty as it relates to master and servant. The only disagreement which I find is in determining what that common law is, or else in its application to situations strictly maritime. *Workman* v. *New York,* 179 U. S., 552, 21 Sup. Ct., 212, 45 L. Ed., 314; *Baltimore & O. R. Co.* v. *Baugh,* 149 U. S., 368, 13 Sup. Ct., 914, 37 L. Ed., 772; *City of Detroit* v. *Osborne,* 135 U. S., 492, 10 Sup. Ct., 1012, 34 L. Ed., 260.

We start, therefore, in our discussion with the concession that for the failure of the master to provide the servant with a reasonably safe place to work and with proper appliances, an action may be brought either in the state courts, or in the United States District Courts. The law to be applied in either tribunal will be the common law; in admiralty it may be called the maritime law. * * *

That the right of a common law remedy which has been saved to suitors is not limited to either the substantive or remedial law, as it was in 1789, has heretofore been decided. Referring to the case of *American S. B. Co.* v. *Chase,* 16 Wall., 522, 21 L. Ed., 369, Mr. Justice Brown in *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S., 638, 646, 20 Sup. Ct., 824, 828 44 L. Ed., 921), said:

> 'Defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act, and as the common law gave no remedy for negligence resulting in death, an action subsequently given by the statute was not a common-law remedy. The contention was held to be unsound.'

In *The Hamilton,* 207 U. S., 398, 404, 28 Sup. Ct., 133, 134 (52 L. Ed., 264), we find this stated as the opinion of the Supreme Court:

> 'The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, "Saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," Rev. Stats. Sec. 563, cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. * * * And as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the Legislature.'"

See also:

> Patrone v. Howlett, 237 N. Y., 397;
> Tammis v. Panama Railroad Co., 202 App. Div., 226;
> Larsen v. Alaska Steamship Co., 96 Wash., 665;
> Rosenberg v. Frank, 58 Calif., 403.

The leading case in the United States Supreme Court on the question of State and Federal concurrent jurisdiction, is The Hamilton, 207 U. S., 398, where Mr. Justice Holmes said as follows:

> "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, 'Saving to suitors in all cases the right of a common law remedy where the common

law is competent to give it,' Rev. Stats. Sec. 563, cl. 8, leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted."

Whatever doubt there may have been on the question has been dispelled by the following cases in the United States Supreme Court:

Panama Railroad Co. v. Johnson, 264 U. S., 375;
Engel v. Davenport, 271 U. S., 34;
Panama Railroad Co. v. Vasquez, 271 U. S., 557;
International Stevedoring Co. v. Haverty (decided October 18th, 1926).

In the case of Panama Railroad Co. v. Johnson (supra), Mr. Justice Van Devanter delivered the opinion of the court.

This was an action of a seaman against the employer for injuries. It was brought on the common law side of the District Court, and was predicated on Section 20 of the Act of March 4th, 1915, as amended by Section 33 of the Act of 1920, which reads as follows:

"Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The defendant demurred to the complaint and then answered. The issues were tried before the court and a jury. There was a verdict for the plaintiff. The court held as follows:

"The case arose under a law of the United States and involved the requisite amount, if any was requisite; so there can be no doubt that the case was within the general jurisdiction conferred on the district courts by Sec. 24 of the Judicial Code, unless, as the defendant contends, it was excluded by the concluding provision of the act, which says: 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.' Although not happily worded, the provision, taken alone, gives color to the contention. But, as a general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus de-

liberately settled is not lightly to be assumed. See United States v. Barnes, 222 U. S., 513, 520, 56 L. Ed., 291, 293, 32 Sup. Ct. Rep., 177; United States v. Sweet, 245 U. S., 563, 572, 62 L. ed., 473, 480, 38 Sup. Ct. Rep., 193. The rule is specially pertinent here. Beginning with the Judiciary Act of September 24, 1789 (1 Stat. at L. 73, chap. 20, Comp. Stat., Sec. 1051), Congress has pursued the policy of investing the Federal courts—at first the circuit courts, and later the district courts—with a general jurisdiction expressed in terms applicable alike to all of them, and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant, or in which he has a place of business,—the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will. This policy was carried into the Judicial Code, and is shown in Sections 24 and 51, one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provision now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the district courts as defined in Sec. 24, but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word 'jurisdiction' seems inapt,

and therefore not of special significance. The words 'shall be' are stressed by the defendant, but as they are found also in the earlier provisions which uniformly have been held to relate to venue only, they afford no ground for a distinction."

In the case of Engel v. Davenport (supra), Justice Sanford delivered the opinion of the court.

In this case Engel, the plaintiff, brought his action at law in a Superior Court of California, to recover damages for personal injuries while he was engaged in placing a chain lashing around part of a cargo of lumber. The defendant demurred to the complaint on the ground that the cause of action was barred by the California Code of Civil Procedure. The demurrer was sustained, and the plaintiff appealed to the United States Supreme Court. The court said:

"It is settled by the decision in Panama Railroad Co. v. Johnson, 264 U. S., 375, 68 L. Ed., 748, 44 Sup. Ct. Rep., 391, that S. 33 of the Merchant Marine Act is an exercise of the power of Congress to alter or supplement the maritime law by changes that are country-wide and uniform in operation; that it brings into the maritime law new rules drawn from the Employers' Liability Act and its amendments,—adopted by the generic reference to 'all statutes of the United States modifying or extending the common law right or remedy in cases of personal injuries to railway employees,'—and 'extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules'; that is, that it grants them, as

an alternative, the common-law remedy of an action 'to recover compensatory damages under the new rules as distinguished from the allowances covered by the old rules,' which, as a modification of the maritime law, may be enforced through appropriate proceedings in personam on the common-law side of the courts.

"It is clear that the state courts have jurisdiction, concurrently with the Federal courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law. This was assumed in Re East River Towing Co., 266 U. S., 355, 368, 69 L. Ed., 324, 327, 45 Sup. Ct. Rep., 114; and expressly held in Lynott v. Great Lakes Transit Corp., supra, affirmed, without opinion, in 234 N. Y., 626, 138 N. E., 473. And it has been implied in various decisions in the district courts, involving the question of the right to remove to a Federal court a suit that had been commenced in a state court.

"By a provision of the Judiciary Act of (September 24), 1789 (1 Stat. at L., 73), now embodied in S. 24, subd. 3, and S. 256, subd. 3 of the Judicial Code, giving district courts original jurisdiction of civil causes of admiralty and maritime jurisdiction, there is saved to suitors in all cases the right of common-law remedy where the common-law is competent to give it."

In the case of Panama Railroad Co. v. Vasquez (supra), Mr. Justice Van Devanter delivered the opinion of the court.

This was an action by the representative of the deceased seaman against the owner of the ship, to

recover damages for the death of the plaintiff's intestate, caused by the owner's negligence. This action had been tried in the courts of New York State, and had been affirmed by the Court of Appeals (see 239 N. Y., 590). The court said as follows:

> *"The sole question presented is whether state courts may entertain such actions, the defendant's contention being that they are cognizable only in the Federal District Courts.*
>
> Amended S. 20, as heretofore construed, changes the prior maritime law of the United States by giving to seamen injured through the negligence of their employers, and to their personal representatives where the injuries result in death, the rights given to railway employees and their personal representatives by the Employers' Liability Act of 1908 and its amendments. Panama R. Co. v. Johnson, 264 U. S., 375, 68 L. ed., 748, 44 Sup. Ct. Rep., 391. And the procedural provisions therein have been construed—when read in connection with Ss 24 (third) and 256 (third) of the Judicial Code, and in the light of constitutional rules respecting admiralty and maritime jurisdiction—to mean that the new substantive rights may be asserted and enforced either in actions in personam against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury; but always taking the changed maritime law as the basis and measure of the rights asserted. Panama R. Co. v. Johnson, supra.
>
> The sections of the Judicial Code just cited, while investing the Federal District Courts

with jurisdiction, 'exclusive of the courts of the several states,' of all 'civil causes of admiralty and maritime jurisdiction,' contain an excepting clause expressly 'saving to suitors in all cases the right to common-law remedy where the common law is competent to give it.' *This clause is a continuation of a like clause in the Judiciary Act of* (*September* 24), 1789 (1 *Stat. at L.* 73, *chap.* 20), *and always has been construed as permitting substantive rights under the maritime law to recover money for service rendered, or as damages for tortious injuries, to be asserted and enforced in actions in personam according to the course of the common law.* Chelentis v. Luckenbach S. S. Co., 247 U. S., 372, 384, 62 L. ed., 1171, 1176, 38 Sup Ct. Rep., 501, 19 N. C. C. A., 309; Panama R. Co. v. Johnson, supra, pages 388, 390 (68 L. ed., 753, 754, 44 Sup. Ct. Rep., 391). *And it uniformly has been regarded as permitting such actions to be brought in either the Federal courts or the state courts, as the possessor of the right may elect.* Leon v. Calceran, 11 Wall., 185, 188, 20 L. ed., 74, 75; Schoonmaker v. Gilmore, 102 U. S., 118, 26 L. ed., 95; Chappell v. Bradshaw, 128 U. S., 132, 134, 32 L. ed., 369, 370, 9 Sup. Ct. Rep., 40; Carlisle Packing Co. v. Sandanger, 259 U. S., 255, 66 L. ed., 927, 42 Sup. Ct. Rep., 475; Red Cross Line v. Atlantic Fruit Co., 264 U. S., 109, 123, 68 L. ed., 582, 586, 44 Sup. Ct. Rep., 274.

In so saying, we must be understood as fully recognizing what often has been held in other cases—that the saving clause does not include suits in rem or other forms of proceeding unknown to the common law. The Moses

Taylor, 4 Wall., 411, 431, 18 L. ed., 397, 402; The Hine v. Trevor, 4 Wall., 555, 571, 18 L. ed., 451, 456; Southern P. Co. v. Jensen, 244 U. S., 205, 218, 61 L. ed., 1086, 1099, L. R. A., 1918-C, 451, 37 Sup. Ct. Rep., 524, Ann. Cas., 1917-E, 900, 14 N. C. C. A., 597. But an action in personam to recover damages for tort is one of the most familiar of the common-law remedies; and it is such a remedy at law that is contemplated by amended S. 20 of the Seamen's Act and invoked in this case.

The defendant insists that the saving clause refers only to rights recognized by the maritime law as existing in 1789, when the clause first was adopted, and therefore does not include rights brought into the maritime law by subsequent legislative changes. We think the clause has a broader meaning, looks to the future as well as the past and includes new as well as old rights, if only they are such as readily admit of assertion and enforcement in actions in personam, according to the course of the common law. This is the view that was taken in American S. B. Co. v. Chase, 16 Wall., 522, 533, 21 L. ed., 369, 372.

The defendant also points to the provision in amended S. 20 *saying, 'Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located,' and argues therefrom that Congress has manifested a purpose to restrict the enforcement of the newly given rights to the Federal district courts. The provision is not aptly worded to express that purpose, and taken alone is confusing. We think it falls short of that certainty which naturally would be manifested in*

making an intended departure from the long-prevailing policy evidenced by the saving clause in the Judiciary Act of 1789 *and in the two sections of the Judicial Code, and that the more reasonable view is that it is intended to regulate venue and not to deal with jurisdiction as between Federal and state courts.* Panama R. Co. v. Johnson, supra, pages 384, 391 (68 L. ed., 751, 754, 44 Sup. Ct. Rep., 391); Re East River Towing Co., 266 U. S., 355, 368, 69 L. ed., 324, 327, 45 Sup. Ct. Rep., 114; Engel v. Davenport (decided April 12, 1926) (271 U. S., 33, ante, 813, 46 Sup. Ct. Rep., 410).

We well might have rested our decision here on the conclusion reached in Engel v. Davenport, where we said: 'It is clear that the state courts have jurisdiction, concurrently with the Federal Courts, to enforce the right of action established by the Merchant Marine Act as a part of the maritime law.' "

In the case of International Stevedoring Co. v. Haverty (supra), Mr. Justice Holmes delivered the opinion of the court.

This case is almost identical with the case at bar. The facts as stated in the opinion, are: The action was brought in a State Court seeking a common law remedy for personal injuries sustained by the plaintiff upon a vessel at dock in the harbor of Seattle. The plaintiff was a longshoreman engaged in stowing freight in the hold. Through the negligence of the hatch tender, no warning was given that a load of freight was about to be lowered, and when the load came down the plaintiff was badly hurt. The plaintiff and the hatch tender both were employed by the defendant stevedore.

The defendant asked for a ruling that the plaintiff and the hatch tender were fellow servants and that therefore the plaintiff could not recover. The court ruled that if the failure of the hatch tender to give a signal was the proximate cause of the injury the verdict must be for the plaintiff. A verdict was found for him, and it was affirmed by the Supreme Court of the State (134 Wash., 235). The court held:

> "The petitioner argues that the case is governed by the admiralty law; that the admiralty law has taken up the common law doctrine as to fellow servants, and that by the common law the plaintiff would have no case. Whether this last proposition is true we do not decide. The plaintiff cites a number of decisions of which it is enough to mention The Hoquiam, 253 F. 627, 165 C. C. A., 253, and Cassil v. United States Emergency Fleet Corporation (C. C. A.), 289 F., 774. It also refers to an intimation of this court that whether the established doctrine be good or bad it is not open to courts to do away with it upon their personal notions of what is expedient. It is open to Congress, however, to change the rule and in our opinion it has done so. By the Act of June 5, 1920, c. 250, S. 20, 41 Stat., 988, 1007 (Comp. St. S. 8337a):
>
> 'Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.'

"It is not disputed that the statutes do away with the fellow servant rule in the case of personal injuries to railway employees. Second Employers' Liability Cases, 223 U. S., 1, 49, 32 S. Ct., 169, 56 L. Ed., 327, 38 L. R. A. (N. S.), 44. The question therefore is how far the Act of 1920 should be taken to extend.

It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. Atlantic Transport Co. v. Imbrovek, 234 U. S., 52, 62, 34 S. Ct., 733, 58 L. Ed., 1208, 51 L. R. A. (N. S.), 1157. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field which Congress has disapproved and changed the rule introduced into the common law within less than a century. We are of opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores engaged as the plaintiff was, whatever it might mean in laws of a different kind."

This is the first case in the United States Supreme Court squarely holding that a stevedore comes within the Jones Act, and that therefore the

State Courts have concurrent jurisdiction with the Federal Courts, and squarely decides the question involved on this appeal.

POINT II.

The charge of the trial judge was correct.

(a) As to the alleged error claimed in Point II of appellant's brief, the charge was not only fair but especially favorable to the defendant, as is evident from this excerpt:

> "What was the duty devolving upon the defendant, John T. Clark & Son? It was the duty of John T. Clark & Son to exercise reasonable care and skill in furnishing suitable machinery and appliances for carrying on its business of stevedoring, including the duty of making inspection and repairs of such machinery and appliances at proper intervals. It was also the duty of the defendant to use reasonable care to provide a safe place to work as well as to supply sufficient machinery and appliances.
>
> The defendant, John T. Clark & Son, Incorporated, was not an insurer of the plaintiff against accidents. It was only required to use reasonable care and skill to furnish suitable and safe machinery and appliances for the work for which the plaintiff was employed, and to use reasonable care to see that the place where the plaintiff was at work was safe for such work to be carried on. The defendant was also required to make, from time to time, reasonable inspection of the machinery and appliances so used and of the place where the plain-

tiff was working, to see they were reasonably safe for the use for which they were intended, and, if not, to use reasonable care to have any defect that was discovered remedied within a reasonable time. The defendant could not escape liability by delegating the duty of using reasonable care in the performance of its duties to someone else."

As to the objection concerning plaintiff's fourth request, it may be pertinent to state that said request is practically in the language of a case in this court—Wilczynski v. Pennsylvania Railroad Co., 90 N. J. L., at page 181, where the court said, in part, as follows:

"This duty of the master, like the duty to use reasonable care to provide a safe place of work, with which it is closely assimilated in legal principle, is one that the master owes to his servants, and hence is one for the breach of which the master cannot escape liability by entrusting the performance of such duty to others, be they managers, agents, strangers, volunteers or fellow servants."

It is respectfully submitted that the charge, as a whole, laid down the law with clearness and especially did not make the defendant an insurer of the condition of the machinery, as claimed.

The value of appellant's citations may be indicated by the two cases cited in support of its contention:

State v. Erie Railroad Co., 84 N. J. L., 661;
State v. Sand, 95 N. J. L., 49.

The first case came up on an indictment for

nuisance, and the second case came up on an indictment for a disorderly house.

Even assuming, for the sake of argument, that error had been committed in the charge, the trial Judge is entitled to have his attention called to it by a properly taken objection, in order that he may correct it, if he is satisfied of the error.

Shotwell v. Public Service, 3 N. J. Misc. Rep., 435.

The only objection made by the attorney for the defendant was in this language:

"I would also like to note an exception to that part of your Honor's charge which instructed the jury that the defendant was bound, in this case, to make reasonable inspection of its appliances and machinery on the steamship, and to have same safe—to have the appliances safe and the machinery safe."

That objection misstates the charge, as is evident from a reading of the same, and is so ambiguous and pointless as to be meaningless; and does not point out in what manner the court should have properly charged or the specific error in the charge. Counsel, however, tried to clarify the situation in a latter objection set forth at page 118, lines 33-40, where he used this language:

"I except to your Honor's charge where your Honor said that the defendant was bound to furnish machinery and appliances in reasonably good condition and repair and was bound to make an inspection and report at proper intervals, and it was for the jury to determine in this case whether or not they had done that,

and whether or not the machinery and appliances were inspected at intervals and were in reasonably good condition."

That objection, however, is not pressed on this appeal and is not argued in the brief.

(b) The trial Judge did not err in reading to the jury the allegations of negligence, as set out in the complaint.

The appellant's brief entirely ignores the facts, and misquotes the evidence, because the proof showed that prior to the happening of the accident one of the ropes attached to the boom had broken and that the men were trying to repair it (splicing the frayed end) when the plaintiff stopped them; that a new rope or chain was sent for; that the defendant's general superintendent picked out the chain that was to be used, which, on inspection, was evident that it was not adequate for the purpose unless it was put on double; that while the plaintiff was so doing, the general superintendent came along, ordered him away and fixed it so, that on the first attempt made to hoist freight, that chain snapped; that he was not given any warning that it was to be used, and no warning was given him of the fact that the chain had snapped so that he could get out of the way; that no notice was given him of any of these facts.

There is no question, from the evidence, that the general foreman was utterly incompetent and showed a reckless disregard of the lives and safety of the men under him.

A careful reading of the testimony will show that all of the allegations set forth in the complaint were proven. However, it is respectfully submitted that even if only one element of negligence had been proven, it would have been sufficient.

These facts effectually dispose of defendant's Requests to Charge marked 12, 13, 14, 16 and 18.

All of the cases cited by appellant have absolutely no bearing upon the questions involved. In each case cited, the court permitted proof that was illegal and had no application in any way to the negligence as alleged.

In the instant case, the evidence tended to prove each and every claim of negligence set forth in the complaint.

(c) The trial Judge did not err in his instructions to the jury concerning his medical expenditures.

The proof showed that the plaintiff did have his own doctor, who came into court too late to testify. However, the court expressly charged the jury that there was no evidence of any medical bill; the only evidence being that paid for an addominal belt. The defendant's request to charge, "you can allow the plaintiff nothing for medical expenses or medicines, because he has proven none", is incorrect and entirely ignores the facts, because he had proven the amount he paid for the medical accessories he had to use.

(d) The trial Judge did not err in submitting to the jury the questions as to his injuries.

The question of the plaintiff's injuries and the amount he is to receive therefor, was solely a jury question.

The appellant, seemingly, is again trying to argue the weight of the evidence.

All of the questions raised in appellant's points

II, III, IV, V and VI, were involved in the argument of defendant's rule to show cause in the Supreme Court, and it is respectfully submitted that the defendant is precluded from rearguing the facts again on this appeal.

POINT III.

It is respectfully submitted that the judgment herein be affirmed.

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