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Summons.

THE STATE OF NEW JERSEY, TO:
Delaware, Lackawanna and Western Railroad Company, a corporation,
(L. S.) and Lehigh Valley Railroad Company, a corporation jointly, severally or in the alternative.

YOU are summoned to answer the annexed complaint of RICHARD L. DAVEY, in an action at law in the New Jersey Supreme Court. AND TAKE NOTICE that, unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Esq., Chief Justice of the New Jersey Supreme Court, at Trenton, this 15th day of February, nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys.

Complaint.

(Filed March 8, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

RICHARD L. DAVEY, Plaintiff, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation, and LEHIGH VALLEY RAILROAD COMPANY, a corporation, jointly, severally or in the alternative, Defendants.	Action at Law.

Plaintiff, residing in the City of Bayonne, County of Hudson and State of New Jersey, complaining of the defendants, jointly, severally and in the alternative, says that:

1. At all times herein mentioned, the defendant Delaware, Lackawanna and Western Railroad Company was, and still is, a corporation duly organized and existing under the laws of the State of Pennsylvania, and is licensed to transact business in the State of New Jersey.

2. At all times herein mentioned, the defendant Lehigh Valley Railroad Company was, and still is, a corporation duly organized and existing under the laws of the State of New Jersey.

3. At the times hereinafter mentioned, the defendant Delaware, Lackawanna and Western Railroad Company was engaged in the business of maintaining and operating a certain railway line or system, and was engaged in the business of a common carrier of interstate commerce, and in connection with its said business and operations, owned, managed, operated, maintained, controlled and possessed a certain repair yard and certain docks or wharves at or near West Brighton, on Staten Island, in the State of New York.

4. At the times hereinafter mentioned, the defendant Lehigh Valley Railroad Company was engaged in the business of maintaining and operating a certain railway line or system, and was engaged in the business of a common carrier of interstate commerce, and in connection with its said business and operations, owned, managed, operated, maintained, controlled and possessed a certain repair yard and certain docks or wharves at or near West Brighton, on Staten Island, in the State of New York.

5. On or about August 28th, 1925, the defendants, Delaware, Lackawanna and Western Railroad Company, and Lehigh Valley Railroad Company, or one of them, were or was the owners or owner and in possession and control of a certain tugboat or ship known as the "Auburn," which was standing on the navigable waters at or near the aforesaid repair yard at West Brighton, Staten Island, in the State of New York.

6. At the time set forth in Paragraph 5, plaintiff was in the employ of the defendants, Delaware, Lackawanna and Western Railroad Company, and Lehigh Valley Railroad Company, or one of them, on board of said tugboat or ship, at the place aforesaid, as a pipefitter, and was then and there law-

fully on said tugboat or ship, duly engaged in his employment in and about the repairing and refitting of the said tugboat or ship.

7. At the time set forth in Paragraph 5, while employed as aforesaid, the plaintiff was struck, thrown to the ground and injured by the appliances and instrumentalities furnished by the defendants.

8. Said injury was caused through the negligence and fault of the defendants, their agents, servants or employees. Said negligence consisted in this: defendants failed to use reasonable care to supply the plaintiff with proper instrumentalities to do the work plaintiff was assigned to do, and failed to use reasonable care to inspect said instrumentalities to see that the same were in proper condition for the said work, but, on the contrary, supplied him with improper instrumentalities, and while working therewith, and using due care for his own safety, plaintiff was injured.

9. By reason of the facts aforesaid, the plaintiff was severely and permanently injured about his head, limbs and body, and suffered and sustained a hernia and rupture of the abdominal wall, causing him great pain and anguish both in mind and body, and causing him to be confined for a long period of time, and the said plaintiff was prevented and unable, and is still prevented and unable, to perform his regular daily duties, by reason of said injuries.

10. Plaintiff was forced and obliged to pay, lay out and expend large sums of money for medical appliances, medical care and treatment, in an effort to cure said injuries, and has incurred, and will incur, expenses and debts in the procurement of

medicines, appliances, and medical and surgical care and treatment to effect a cure of said injuries.

Plaintiff demands as damages against the defendants, Delaware, Lackawanna and Western Railroad Company, and Lehigh Valley Railroad Company, jointly severally or in the alternative, the sum of $10,000.00, together with costs of suit.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys for Plaintiff.

Stipulation.

(Filed August 23, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

RICHARD L. DAVEY, Plaintiff, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation, and LEHIGH VALLEY RAILROAD COMPANY, a corporation, jointly, severally or in the alternative, Defendants.	Action at Law.

It is hereby stipulated between the attorneys for plaintiff in the above, and the attorneys for defendant, Delaware, Lackawanna & Western Railroad Company, a corporation, therein, that said

defendant have until the 15th day of March, 1927, in which to file answer to the complaint in this cause without prejudice.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys for Plaintiff.

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendant,
Delaware, Lackawanna & Western Railroad Co.

Notice of Motion to Strike Out Complaint.

(Filed, August 23, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

RICHARD L. DAVEY, Plaintiff, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation, and LEHIGH VALLEY RAILROAD COMPANY, a corporation, jointly, severally or in the alternative, Defendants.	Action at Law.

To LICHTENSTEIN, SCHWARTZ & FRIEDENBERG, Esqs., Attorneys for Plaintiff, 51 Newark Street, Hoboken, N. J.:

Sirs:

PLEASE TAKE NOTICE that on Saturday, the 12th day of March, 1927, a 10 o'clock in the fore-

noon of said day, or as soon thereafter as counsel can be heard, we shall apply to the Honorable James F. Minturn, Justice of the New Jersey Supreme Court, at the Court House in and for the County of Hudson in the City of Jersey City, New Jersey, for an order striking out the complaint herein, and dismissing the above entitled suit on the ground that the complaint herein discloses a cause of action for a marine tort, cognizable exclusively in admiralty and whereof the New Jersey Supreme Court has no jurisdiction;

AND PLEASE TAKE FURTHER NOTICE that our appearance in this regard is made specially only for the purpose of said motion.

Respectfully yours,

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendants.

Order Striking Out Complaint.

(Filed, March 15, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

RICHARD L. DAVEY, Plaintiff, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation, and LEHIGH VALLEY RAILROAD COMPANY, a corporation, jointly, severally or in the alternative, Defendants.	Action at Law.

Application having been made to the court by Autenrieth, Gannon & Wortendyke, Esqs., attorneys for the defendants, appearing specially only for the purposes of said application, in the above entitled cause named, for an order striking out the complaint herein and dismissing this suit for lack of jurisdiction; and

It appearing that due notice of said application has been given to the plaintiff in the manner prescribed by law and the rules of this court; and

It further appearing from the face of the complaint herein that the cause of action therein set forth is one sounding in maritime tort and exclusively within the Admiralty jurisdiction of the United States of America;

It is therefore on this 12th day of March, 1927,

ORDERED that the complaint by plaintiff heretofore filed be and the same is hereby stricken out and the cause of action as above entitled in this court be and the same is hereby dismissed with costs to the defendants.

Let this rule be entered in the minutes.

WM. S. GUMMERE,
Chief Justice of the New Jersey Supreme Court.

Notice and Grounds of Appeal.

(Filed, September 17, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

RICHARD L. DAVEY, Plaintiff, v. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a corporation, and LEHIGH VALLEY RAILROAD COMPANY, a corporation, jointly, severally or in the alternative, Defendants.	Action at Law.

To AUTENRIETH, GANNON & WORTENDYKE, Esqs.,
Attorneys for the above-named Defendants:

PLEASE TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey from an order made by this court on March 12, 1927, striking out the com-

plaint by the plaintiff against the defendants and for judgment therein dismissing the cause of action of the plaintiff, upon the following grounds:

1. Because the court erred in granting the motion of said defendants to strike out the complaint of the plaintiff as setting forth a cause of action sounding in maritime tort and exclusively within the Admiralty jurisdiction of the United States of America, whereas the cause of action therein set forth is one within the jurisdiction of the New Jersey Supreme Court.

2. Because the court erred in striking out the complaint of plaintiff and dismissing his cause of action on the ground that the New Jersey Supreme Court had no jurisdiction, whereas the said court had jurisdiction of the cause of action alleged in said complaint.

3. Because the court erred in striking out the complaint of the plaintiff and dismissing his cause of action as one cognizable exclusively in admiralty, whereas the cause of action alleged in said complaint is cognizable in the New Jersey Supreme Court.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys for Plaintiff.

Indorsement
Service of a copy of the within notice and Grounds of Appeal is hereby acknowledged this 10th day of September 1927
Autenreith Connor and Vortendyke.
attorneys for Defendants

[46392]

New Jersey Court of Errors and Appeals

RICHARD L. DAVEY, Plaintiff-Appellant, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation, and LEHIGH VALLEY RAILROAD COMPANY, a corporation, jointly, severally or in the alternative, Defendants-Respondents.	On Appeal from New Jersey Supreme Court, Hudson County.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This is an appeal from an order made by the New Jersey Supreme Court on March 12th, 1927, striking out the complaint filed by the plaintiff-appellant against the defendants-respondents, and for judgment therein, dismissing the plaintiff's cause of action with costs to the defendants. The motion and order were made on the sole ground that the complaint set forth a cause of action sounding in maritime tort and exclusively within the admiralty jurisdiction of the United States of America.

The complaint sets forth that the plaintiff, while in the employ of the defendants, or one of

them, was injured by reason of the defendants' negligence. The complaint also shows that the alleged tort was committed on navigable waters, at or near Staten Island, in the New York Harbor.

The jurisdiction of the New Jersey Supreme Court to entertain such an action was the only question considered at the argument of the motion, and the court decided that it was without such jurisdiction, for that the cause of action alleged was exclusively within the admiralty jurisdiction of the United States of America (Case, p. 8).

We shall, therefore, only consider the question: Has the New Jersey Supreme Court jurisdiction to entertain the cause of action alleged by plaintiff?

THE LAW.

POINT I.

Being a court of common law, the New Jersey Supreme Court has jurisdiction to entertain and determine the cause of action alleged by plaintiff-appellant.

While it is true that the Constitution of the United States provides that the judicial power of the United States "shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, * * * to all cases of admiralty and maritime jurisdiction; * * *" (Art. 3, Sec. 2, U. S. Const.), this grant of judicial power is not *exclusive* in the sense contended for by the defendants below, when considered in connection with Section 9 of the Judiciary Act of 1789 (1 Stat. at L. 76, Chap. 20), which has been continued by the Judicial Code, Sections 24 and 256

(U. S. C. A. Title 28, Secs. 41 and 371), by which the federal courts are given exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, *"saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."*

The contention of the plaintiff-appellant may briefly be stated thus: The 'saving clause' in the Judiciary Act, above quoted, leaves open the common law jurisdiction of the New Jersey Supreme Court to entertain and determine the case at bar, notwithstanding that the wrong complained of took place on navigable waters, and is, in short, a maritime tort.

The question to be decided is: Is the remedy here sought one which is saved to the plaintiff? It is a common law remedy which the plaintiff seeks. There is nothing special or unusual in its nature. It is an action *in personam,* started by summons and complaint, duly served on the defendants, asking for a money judgment for damages sustained by the plaintiff by reason of the negligence of his masters. Surely this is such a remedy *which the common law is competent to give.* Indeed, it is the same remedy enforced in our various courts of common law from earliest times—that of a servant against his master for negligence. The case at bar is one which the court below is entirely competent to hear and determine, one which it always has, and still does, hear and determine where the New Jersey Workmen's Compensation Act does not, or cannot, apply such as those cases arising out of the Federal Employers' Liability Act, or involving the employment of certain infants. The fact that the transaction out of which the case arose took place on navigable waters has no bearing, because the Federal Judiciary Act,

above quoted, saves to the plaintiff his right to the common law remedy here sought, it being such a remedy which the common law *is competent to give.*

The defendants do not contend that the plaintiff should seek his relief under the Workmen's Compensation Act of this State. In fact, it is conceded that he has no rights under that law.

March v. *Vulcan Iron Works,* 132 Atl. 89 (*not yet officially reported*); *Tuccillo* v. *John T. Clark & Son,* 5 N. J. Adv. Rep. 1437; 139 Atl. 58 (*not yet officially reported*); *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; 61 L. ed. 1086.

The defendants do contend, however, that the plaintiff has no right to sue his cause in the New Jersey Supreme Court, and say that the plaintiff, though a resident of New Jersey, must seek redress in the federal courts. Indeed, defendants contend that he will be entertained only in admiralty. Color is given to their stand by the fact that no case is found in this State where jurisdiction of a maritime tort was exercised by our courts, solely on the strength of this 'saving clause' in the Federal Judiciary Act. At least, the courts do not assert this as the basis of their jurisdiction. But when they contend that the plaintiff must proceed in admiralty, they are clearly in error, which is very forcibly brought out in federal cases holding that servants may sue their masters on the law side of the federal courts, and there obtain a common-law remedy, and that a motion to transfer such an action from the law to the admiralty side will be denied.

Crane v. *Pacific Steamship Co.,* 272 Fed. Rep. 204.

Federal courts have consistently held that the said 'saving clause' leaves open the common-law

jurisdiction of the state courts for torts committed at sea.

American Steamboat Co. v. *Chace,* 83 U. S. 522, 21 L. ed. 369; *The Hamilton,* 207 U. S. 398, 52 L. ed. 264; *Messel* v. *Foundation Co.,* 274 U. S. 427; 71 L. ed. 1135.

While it is true that the States may not change the machinery of the common law so as to interfere with the proper harmony or uniformity of the maritime law without violating the restrictions placed upon the States by the Federal Constitution, as expounded in such cases as *The Ad. Hine* v. *Trevor,* 4 Wall. 555; 18 L. ed. 451, and *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; 61 L. ed. 1086, it has never been doubted that the States were saved ample jurisdiction over torts committed at sea to enforce a common law remedy, or even a modified common law remedy.

The Hamilton, supra, where the United States Supreme Court says, through Mr. Justice Holmes, at page 404:

> "The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789 (1 Stat. at L. 77, chap. 20, sec. 9), 'saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it' (Rev. Stat. Sec. 563, cl. 8, U. S. Comp. Stat. 1901, p. 457), leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. Martin v. Hunter, 1 Wheat. 304, 337; 4 L. ed. 97, 105; The Hine v. Trevor (The Ad. Hine v. Trevor), 4 Wall. 555, 571; 18 L. ed. 451, 456; Leon v. Galceran, 11 Wall. 185; 20 L. ed. 74; Manchester v. Massachusetts, 139 U. S. 240, 262; 35 L. ed. 159, 166; 11 Sup. Ct. Rep. 559."

For further authority for the proposition that the right of a common law remedy which has been saved to suitors is not limited to the law as it stood at the time of the passage of the Federal Judiciary Act, see *American Steamboat Co.* v. *Chace,* 16 Wall. 522; 21 L. ed. 369; *Knapp Stout Co.* v. *McCafferey,* 177 U. S. 638, at 646; 44 L. ed. 921, at 925; *Lottawanna,* 21 Wall. 558, at 579, 580; 22 L. ed. 654, at 663; *La Bourgegne,* 210 U. S. 95, at 138; 52 L. ed. 973, at 993; *Johnson* v. *Westfield's Adm'r,* 143 Ky. 10; 135 S. W. 425.

Courts of sister States, in which the question now before the court has been presented, have uniformly exercised this jurisdiction saved to them, and permitted recoveries for injuries suffered as the result of maritime torts.

Bohannan v. *Hammond,* 42 Cal. 227; *Walter* v. *Kierstead,* 74 Ga. 18; *Duffy* v. *Gleason,* 26 Ind. A. 180, 58 N. E. 729; *Warren* v. *Kelley,* 80 Me. 512, 15 Atl. Rep. 49; *Berry* v. *M. F. Donovan Sons,* 120 Me. 457, 115 Atl. Rep. 250; *Kennedy* v. *Cunard S. S. Co.,* 197 App. Div. 459, 189 N. Y. S. 402, aff. 235 N. Y. 604, 139 N. E. 752; *La Coco* v. *Massey S. S. Co.,* 174 Wis. 545, 183 N. W. 677; *The Erie Lighter* 108 (D. C. N. Y. J., 1918), 250 Fed. 490; *Ross* v. *Pacific S. S. Co.* (D. C. Or. 1921), 272 Fed. 538.

Indeed, to have done otherwise would be startling, for under the essential theory of our government, the States have jealously guarded those rights which they did not surrender to the central authority, and the courts of such States cannot consistently surrender, nor refuse to accept, jurisdiction in cases saved to them.

In treating this subject, Corpus Juris says:

> "Sec. 22. The admiralty jurisdiction of the state courts was taken away by the establish-

ment of the district courts as courts of admiralty, and, with the qualification after-mentioned, exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction was vested in the district courts. But the grant of admiralty jurisdiction was not intended to deprive suitors of any remedies afforded by the common law, either in state or federal courts, and, to make this clear, congress inserted in the Judiciary Act of 1789 a clause 'saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.'

Sec. 23. The clause saving to suitors a common-law remedy where the common law is competent to give it is intended to save the remedy or right of action in those courts which proceed according to the course of the common law as distinguished from admiralty proceedings, and the words 'common-law remedy' do not necessarily imply an action or remedy obtainable in a common-law court, but are equivalent to the 'means employed to enforce a right or redress an injury'. Nor are they limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act.

Sec. 24. Where no process is served upon, nor any remedy is sought against, the vessel, but only a personal judgment against the owners is prayed, the case is not within the exclusive jurisdiction of the federal courts, but, whether the action be one of contract or of tort, the state courts will be held to have jurisdiction thereof."

1 C. J. 1253, 1254.

Finding the law, as expressed in the federal courts and in the courts of the various States, overwhelmingly in favor of the plaintiff's contention, we shall take up the consideration of the cases found in our own reports.

Before the passage of the New Jersey Workmen's Compensation Act, it appears that no difficulty existed, and any number of cases were entertained by our state courts where the cause of action arose on navigable waters.

Baumann v. *Hamburg-American Packet Co.,* 67 N. J. L. 250; *Horn* v. *Hamburg-American Packet Co.,* 81 N. J. L. 729; *Furstenberg* v. *North German Lloyd Steamship Co.,* 80 N. J. L. 519; *Daug* v. *North German Lloyd Steamship Co.,* 73 N. J. L. 770; *O'Brien* v. *American Dredging Co.,* 53 N. J. L. 291; *Steamship Co.* v. *Ingebregsten,* 57 N. J. L. 400.

Following the passage of the New Jersey Workmen's Compensation Act, our courts seemed inclined to the view that its exclusive features barred an action at law as the one alleged in the case at bar.

Bockhop v. *Phoenix Transit Co.,* 97 N. J. L. 514.

In the case of *March* v. *Vulcan Iron Works,* 132 Atl. Rep. 89, (not yet officially reported), our Court of Errors and Appeals decided that a remedy for injuries or death arising out of a maritime tort could not be obtained under the Workmen's Compensation Act. The March case did not decide that our courts must surrender jurisdiction, in cases in personam, in cases arising out of a maritime tort. True, the March case speaks of the exclusive admiralty jurisdiction, but the term "exclusive" was not intended in its dictionary meaning, but was meant to express the judicial attitude found

in cases such as *Hine* v. *Trever,* 4 Wall. 555, 18 L. ed. 451, and *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 61 L. ed. 1086. It must not be forgotten that the March case was confined by its facts to the proposition that a remedy for a maritime tort cannot be obtained under the peculiar legal machinery, foreign to the common law, which is built up under the New Jersey Workmen's Compensation Act. This latter proposition is true and conceded by the plaintiff, but it does not follow that our courts of common law cannot exercise the jurisdiction over maritime torts saved to them by the Federal Judiciary Act.

In a more recent case of our highest court, *Tuccillo* v. *John T. Clark & Son,* 139 Atl. 58, 5 Adv. Rep. 1437 (not yet officially reported), it was held that the plaintiff might maintain a suit growing out of a maritime tort against his master in our Supreme Court. The court there distinguished the case decided from the March case on the ground that the petitioner in the March case was a mechanic, whereas the plaintiff Tuccillo, in the case decided, was a stevedore, and, as such, stood in the position of a seaman, under Section 20 of the Merchant Marine Act of 1915, as amended 1920. But this distinction was not essential on the question of jurisdiction of the state court, and the jurisdiction of the state court is saved the same to a mechanic, or other person suing for a common-law remedy, as a stevedore or seaman suing under the Merchant Marine Act, for it must be remembered that under the Merchant Marine Act, the remedy obtained is also a common-law remedy, although the same may be a "modified common-law remedy". In the Tuccillo case, our Court of Errors and Appeals relied for its distinction between a mechanic and a stevedore on a re-

cent opinion of the United States Supreme Court, in *International Stevedoring Co.* v. *Haverty,* 47 Sup. Ct. Rep. 19, wherein the United States Supreme Court decided that a stevedore was a seaman within the Federal Merchant Marine Act. Mr. Justice Holmes, for that court, based his conclusion on the fact that a stevedore, while he does not go with the ship, performs work formerly done by members of the crew. While this is sound law, we call the court's attention to the fact that the Tuccillo case was tried in our New Jersey Supreme Court before the Haverty case was decided, and that the complaint in the Tuccillo case expressly alleged that the plaintiff "was not a member of the crew." It is, therefore, clear that the case was not presented to the trial court on the theory of the Haverty case, and that the plaintiff sought a common-law remedy as distinguished from a modified common-law remedy, to which he was entitled under the Merchant Marine Act, as enterpreted by the Haverty case.

But this is beside the point when the "saving clause" in the Federal Judiciary Act is considered. That Act *"saved to suitors in all cases the right of a common-law remedy where the common law is competent to give it,"* and is sufficient in itself to sustain the contention that our Supreme Court has ample jurisdiction to hear and determine the cause of action alleged in the case at bar.

In the case of *Tuccillo* v. *John T. Clark & Son, supra,* our Court of Errors and Appeals says, at page 1441:

> "By a provision of the (Federal) Judiciary Act of (September 24th,) 1789, (1 Stat. at L. 73), now embodied in Section 24, Subdivision 3, and Section 256, Subdivision 3, of the Judicial Code, giving district courts original jurisdiction of civil cases of admiralty and maritime jurisdiction, there is saved to suitors in all cases the right of a common-law remedy where the common law is competent to give it.
>
> That suits for common-law torts arising from the master's negligence in admiralty cases were cognizable in state courts has been held for a long time past, as reference to the cases of American Steamship Co. v. Chace, 16 Wall. 522, 21 L. ed. 369, and The Hamilton, 207 U. S. 398, 52 L. ed. 264, will show."

It is clear, therefore, that our New Jersey Supreme Court has ample jurisdiction in the case at bar, as, indeed, have all our courts of common law. It is equally clear from the excerpt of the opinion in the Tuccillo case, above quoted, that our courts mean to exercise this jurisdiction. While it is true that the Tuccillo case is distinguished because of the fact that the Seaman's Act applied to that situation, our courts cannot refuse to accept the case at bar without being in the anomalous position of exercising their jurisdiction to give a modified common-law remedy and refusing to exercise it to give the common-law remedy which the plaintiff-appellant seeks.

To strike out this complaint is to close the door on a resident and citizen of this State, who, by *personal service, in an action in personam,* brings the defendants into court, seeking a remedy expressly saved to him by the Federal Judiciary Act. His rights in any other forum are now barred by the Statute of Limitations, or laches, and if our courts should refuse to exercise the jurisdiction which is, and always has been, theirs, the plaintiff-appellant must go without a trial on his complaint. This re-

sult the court will not allow; first, because of the injustice to the plaintiff-appellant, and secondly, to do so would be to voluntarily curtail and abandon the powers and jurisdiction of our own courts, while the courts of all our sister States exercise such jurisdiction, and while the federal courts recognize and repeatedly affirm our rights.

It is respectfully submitted that the order and judgment striking out the plaintiff's complaint and dismissing his cause of action be set aside and reversed.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys for Plaintiff-Appellant.

JOHN H. KELLEY,
of Counsel.

PRESS OF FREMONT PAYNE, 80 Washington Street, New York City.
[47339]

New Jersey Court of Errors and Appeals

RICHARD L. DAVEY, Plaintiff-Appellant, v. DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a corporation, and LEHIGH VALLEY RAILROAD COMPANY, a corporation, jointly, severally or in the alternative, Defendants-Respondents.	On Appeal from New Jersey Supreme Court, Hudson County.

BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This is an appeal from an order made by the New Jersey Supreme Court on March 12th, 1927, striking out the complaint filed by the plaintiff-appellant against the defendants-respondents, and for judgment therein, dismissing the plaintiff's cause of action with costs to the defendants. The motion and order were made on the sole ground that the complaint set forth a cause of action sounding in maritime tort and exclusively within the admiralty jurisdiction of the United States of America.

The complaint sets forth that the plaintiff, while in the employ of the defendants, or one of

them, was injured by reason of the defendants' negligence. The complaint also shows that the alleged tort was committed on navigable waters, at or near Staten Island, in the New York Harbor.

The jurisdiction of the New Jersey Supreme Court to entertain such an action was the only question considered at the argument of the motion, and the court decided that it was without such jurisdiction, for that the cause of action alleged was exclusively within the admiralty jurisdiction of the United States of America (Case, p. 8).

We shall, therefore, only consider the question: Has the New Jersey Supreme Court jurisdiction to entertain the cause of action alleged by plaintiff?

THE LAW.

POINT I.

Being a court of common law, the New Jersey Supreme Court has jurisdiction to entertain and determine the cause of action alleged by plaintiff-appellant.

While it is true that the Constitution of the United States provides that the judicial power of the United States "shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, * * * to all cases of admiralty and maritime jurisdiction; * * *" (Art. 3, Sec. 2, U. S. Const.), this grant of judicial power is not *exclusive* in the sense contended for by the defendants below, when considered in connection with Section 9 of the Judiciary Act of 1789 (1 Stat. at L. 76, Chap. 20), which has been continued by the Judicial Code, Sections 24 and 256

(U. S. C. A. Title 28, Secs. 41 and 371), by which the federal courts are given exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, *"saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."*

The contention of the plaintiff-appellant may briefly be stated thus: The 'saving clause' in the Judiciary Act, above quoted, leaves open the common law jurisdiction of the New Jersey Supreme Court to entertain and determine the case at bar, notwithstanding that the wrong complained of took place on navigable waters, and is, in short, a maritime tort.

The question to be decided is: Is the remedy here sought one which is saved to the plaintiff? It is a common law remedy which the plaintiff seeks. There is nothing special or unusual in its nature. It is an action *in personam,* started by summons and complaint, duly served on the defendants, asking for a money judgment for damages sustained by the plaintiff by reason of the negligence of his masters. Surely this is such a remedy *which the common law is competent to give.* Indeed, it is the same remedy enforced in our various courts of common law from earliest times—that of a servant against his master for negligence. The case at bar is one which the court below is entirely competent to hear and determine, one which it always has, and still does, hear and determine where the New Jersey Workmen's Compensation Act does not, or cannot, apply such as those cases arising out of the Federal Employers' Liability Act, or involving the employment of certain infants. The fact that the transaction out of which the case arose took place on navigable waters has no bearing, because the Federal Judiciary Act,

above quoted, saves to the plaintiff his right to the common law remedy here sought, it being such a remedy which the common law *is competent to give.*

The defendants do not contend that the plaintiff should seek his relief under the Workmen's Compensation Act of this State. In fact, it is conceded that he has no rights under that law.

March v. *Vulcan Iron Works,* 132 Atl. 89 (*not yet officially reported*); *Tuccillo* v. *John T. Clark & Son,* 5 N. J. Adv. Rep. 1437; 139 Atl. 58 (*not yet officially reported*); *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; 61 L. ed. 1086.

The defendants do contend, however, that the plaintiff has no right to sue his cause in the New Jersey Supreme Court, and say that the plaintiff, though a resident of New Jersey, must seek redress in the federal courts. Indeed, defendants contend that he will be entertained only in admiralty. Color is given to their stand by the fact that no case is found in this State where jurisdiction of a maritime tort was exercised by our courts, solely on the strength of this 'saving clause' in the Federal Judiciary Act. At least, the courts do not assert this as the basis of their jurisdiction. But when they contend that the plaintiff must proceed in admiralty, they are clearly in error, which is very forcibly brought out in federal cases holding that servants may sue their masters on the law side of the federal courts, and there obtain a common-law remedy, and that a motion to transfer such an action from the law to the admiralty side will be denied.

Crane v. *Pacific Steamship Co.,* 272 Fed. Rep. 204.

Federal courts have consistently held that the said 'saving clause' leaves open the common-law

jurisdiction of the state courts for torts committed at sea.

American Steamboat Co. v. *Chace,* 83 U. S. 522, 21 L. ed. 369; *The Hamilton,* 207 U. S. 398, 52 L. ed. 264; *Messel* v. *Foundation Co.,* 274 U. S. 427; 71 L. ed. 1135.

While it is true that the States may not change the machinery of the common law so as to interfere with the proper harmony or uniformity of the maritime law without violating the restrictions placed upon the States by the Federal Constitution, as expounded in such cases as *The Ad. Hine* v. *Trevor,* 4 Wall. 555; 18 L. ed. 451, and *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; 61 L. ed. 1086, it has never been doubted that the States were saved ample jurisdiction over torts committed at sea to enforce a common law remedy, or even a modified common law remedy.

The Hamilton, supra, where the United States Supreme Court says, through Mr. Justice Holmes, at page 404:

> "The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789 (1 Stat. at L. 77, chap. 20, sec. 9), 'saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it' (Rev. Stat. Sec. 563, cl. 8, U. S. Comp. Stat. 1901, p. 457), leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. Martin v. Hunter, 1 Wheat. 304, 337; 4 L. ed. 97, 105; The Hine v. Trevor (The Ad. Hine v. Trevor), 4 Wall. 555, 571; 18 L. ed. 451, 456; Leon v. Galceran, 11 Wall. 185; 20 L. ed. 74; Manchester v. Massachusetts, 139 U. S. 240, 262; 35 L. ed. 159, 166; 11 Sup. Ct. Rep. 559."

For further authority for the proposition that the right of a common law remedy which has been saved to suitors is not limited to the law as it stood at the time of the passage of the Federal Judiciary Act, see *American Steamboat Co.* v. *Chace,* 16 Wall. 522; 21 L. ed. 369; *Knapp Stout Co.* v. *McCafferey,* 177 U. S. 638, at 646; 44 L. ed. 921, at 925; *Lottawanna,* 21 Wall. 558, at 579, 580; 22 L. ed. 654, at 663; *La Bourgegne,* 210 U. S. 95, at 138; 52 L. ed. 973, at 993; *Johnson* v. *Westfield's Adm'r,* 143 Ky. 10; 135 S. W. 425.

Courts of sister States, in which the question now before the court has been presented, have uniformly exercised this jurisdiction saved to them, and permitted recoveries for injuries suffered as the result of maritime torts.

Bohannan v. *Hammond,* 42 Cal. 227; *Walter* v. *Kierstead,* 74 Ga. 18; *Duffy* v. *Gleason,* 26 Ind. A. 180, 58 N. E. 729; *Warren* v. *Kelley,* 80 Me. 512, 15 Atl. Rep. 49; *Berry* v. *M. F. Donovan Sons,* 120 Me. 457, 115 Atl. Rep. 250; *Kennedy* v. *Cunard S. S. Co.,* 197 App. Div. 459, 189 N. Y. S. 402, aff. 235 N. Y. 604, 139 N. E. 752; *La Coco* v. *Massey S. S. Co.,* 174 Wis. 545, 183 N. W. 677; *The Erie Lighter* 108 (D. C. N. J., 1918), 250 Fed. 490; *Ross* v. *Pacific S. S. Co.* (D. C. Or. 1921), 272 Fed. 538.

Indeed, to have done otherwise would be startling, for under the essential theory of our government, the States have jealously guarded those rights which they did not surrender to the central authority, and the courts of such States cannot consistently surrender, nor refuse to accept, jurisdiction in cases saved to them.

In treating this subject, Corpus Juris says:

> "Sec. 22. The admiralty jurisdiction of the state courts was taken away by the establishment of the district courts as courts of admiralty, and, with the qualification after-mentioned, exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction was vested in the district courts. But the grant of admiralty jurisdiction was not intended to deprive suitors of any remedies afforded by the common law, either in state or federal courts, and, to make this clear, congress inserted in the Judiciary Act of 1789 a clause 'saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.'

> Sec. 23. The clause saving to suitors a common-law remedy where the common law is competent to give it is intended to save the remedy or right of action in those courts which proceed according to the course of the common law as distinguished from admiralty proceedings, and the words 'common-law remedy' do not necessarily imply an action or remedy obtainable in a common-law court, but are equivalent to the 'means employed to enforce a right or redress an injury'. Nor are they limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act.
>
> Sec. 24. Where no process is served upon, nor any remedy is sought against, the vessel, but only a personal judgment against the owners is prayed, the case is not within the exclusive jurisdiction of the federal courts, but, whether the action be one of contract or of tort, the state courts will be held to have jurisdiction thereof."

1 C. J. 1253, 1254.

Finding the law, as expressed in the federal courts and in the courts of the various States, overwhelmingly in favor of the plaintiff's contention, we shall take up the consideration of the cases found in our own reports.

Before the passage of the New Jersey Workmen's Compensation Act, it appears that no difficulty existed, and any number of cases were entertained by our state courts where the cause of action arose on navigable waters.

Baumann v. *Hamburg-American Packet Co.,* 67 N. J. L. 250; *Horn* v. *Hamburg-American Packet Co.,* 81 N. J. L. 729; *Furstenberg* v. *North German Lloyd Steamship Co.,* 80 N. J. L. 519; *Daug* v. *North German Lloyd Steamship Co.,* 73 N. J. L. 770; *O'Brien* v. *American Dredging Co.,* 53 N. J. L. 291; *Steamship Co.* v. *Ingebregsten,* 57 N. J. L. 400.

Following the passage of the New Jersey Workmen's Compensation Act, our courts seemed inclined to the view that its exclusive features barred an action at law as the one alleged in the case at bar.

> *Bockhop* v. *Phoenix Transit Co.,* 97 N. J. L. 514.

In the case of *March* v. *Vulcan Iron Works,* 132 Atl. Rep. 89, (not yet officially reported), our Court of Errors and Appeals decided that a remedy for injuries or death arising out of a maritime tort could not be obtained under the Workmen's Compensation Act. The March case did not decide that our courts must surrender jurisdiction, in cases in personam, in cases arising out of a maritime tort. True, the March case speaks of the exclusive admiralty jurisdiction, but the term "exclusive" was not intended in its dictionary meaning, but was meant to express the judicial attitude found

in cases such as *Hine* v. *Trever,* 4 Wall. 555, 18 L. ed. 451, and *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 61 L. ed. 1086. It must not be forgotten that the March case was confined by its facts to the proposition that a remedy for a maritime tort cannot be obtained under the peculiar legal machinery, foreign to the common law, which is built up under the New Jersey Workmen's Compensation Act. This latter proposition is true and conceded by the plaintiff, but it does not follow that our courts of common law cannot exercise the jurisdiction over maritime torts saved to them by the Federal Judiciary Act.

In a more recent case of our highest court, *Tuccillo* v. *John T. Clark & Son,* 139 Atl. 58, 5 Adv. Rep. 1437 (not yet officially reported), it was held that the plaintiff might maintain a suit growing out of a maritime tort against his master in our Supreme Court. The court there distinguished the case decided from the March case on the ground that the petitioner in the March case was a mechanic, whereas the plaintiff Tuccillo, in the case decided, was a stevedore, and, as such, stood in the position of a seaman, under Section 20 of the Merchant Marine Act of 1915, as amended 1920. But this distinction was not essential on the question of jurisdiction of the state court, and the jurisdiction of the state court is saved the same to a mechanic, or other person suing for a common-law remedy, as a stevedore or seaman suing under the Merchant Marine Act, for it must be remembered that under the Merchant Marine Act, the remedy obtained is also a common-law remedy, although the same may be a "modified common-law remedy". In the Tuccillo case, our Court of Errors and Appeals relied for its distinction between a mechanic and a stevedore on a re-

cent opinion of the United States Supreme Court, in *International Stevedoring Co.* v. *Haverty,* 47 Sup. Ct. Rep. 19, wherein the United States Supreme Court decided that a stevedore was a seaman within the Federal Merchant Marine Act. Mr. Justice Holmes, for that court, based his conclusion on the fact that a stevedore, while he does not go with the ship, performs work formerly done by members of the crew. While this is sound law, we call the court's attention to the fact that the Tuccillo case was tried in our New Jersey Supreme Court before the Haverty case was decided, and that the complaint in the Tuccillo case expressly alleged that the plaintiff "was not a member of the crew." It is, therefore, clear that the case was not presented to the trial court on the theory of the Haverty case, and that the plaintiff sought a common-law remedy as distinguished from a modified common-law remedy, to which he was entitled under the Merchant Marine Act, as enterpreted by the Haverty case.

But this is beside the point when the "saving clause" in the Federal Judiciary Act is considered. That Act "*saved to suitors in all cases the right of a common-law remedy where the common law is competent to give it,*" and is sufficient in itself to sustain the contention that our Supreme Court has ample jurisdiction to hear and determine the cause of action alleged in the case at bar.

In the case of *Tuccillo* v. *John T. Clark & Son, supra,* our Court of Errors and Appeals says, at page 1441:

> "By a provision of the (Federal) Judiciary Act of (September 24th,) 1789, (1 Stat. at L. 73), now embodied in Section 24, Subdivision 3, and Section 256, Subdivision 3, of the Judicial Code, giving district courts original jurisdiction of civil cases of admiralty and maritime jurisdiction, there is saved to suitors in all cases the right of a common-law remedy where the common law is competent to give it.
>
> That suits for common-law torts arising from the master's negligence in admiralty cases were cognizable in state courts has been held for a long time past, as reference to the cases of American Steamship Co. v. Chace, 16 Wall. 522, 21 L. ed. 369, and The Hamilton, 207 U. S. 398, 52 L. ed. 264, will show."

It is clear, therefore, that our New Jersey Supreme Court has ample jurisdiction in the case at bar, as, indeed, have all our courts of common law. It is equally clear from the excerpt of the opinion in the Tuccillo case, above quoted, that our courts mean to exercise this jurisdiction. While it is true that the Tuccillo case is distinguished because of the fact that the Seaman's Act applied to that situation, our courts cannot refuse to accept the case at bar without being in the anomalous position of exercising their jurisdiction to give a modified common-law remedy and refusing to exercise it to give the common-law remedy which the plaintiff-appellant seeks.

To strike out this complaint is to close the door on a resident and citizen of this State, who, by *personal service, in an action in personam,* brings the defendants into court, seeking a remedy expressly saved to him by the Federal Judiciary Act. His rights in any other forum are now barred by the Statute of Limitations, or laches, and if our courts should refuse to exercise the jurisdiction which is, and always has been, theirs, the plaintiff-appellant must go without a trial on his complaint. This re-

sult the court will not allow; first, because of the injustice to the plaintiff-appellant, and secondly, to do so would be to voluntarily curtail and abandon the powers and jurisdiction of our own courts, while the courts of all our sister States exercise such jurisdiction, and while the federal courts recognize and repeatedly affirm our rights.

It is respectfully submitted that the order and judgment striking out the plaintiff's complaint and dismissing his cause of action be set aside and reversed.

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