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Summons.

(Filed November 15th, 1927.)

THE STATE OF NEW JERSEY.

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(L. S.)

To: UNION DRYDOCK & REPAIR COMPANY, a
Corporation,

YOU ARE SUMMONED to answer the annexed
complaint of GEORGE ROGOSICH, 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.

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WITNESS, WILLIAM S. GUMMERE, Esq., Chief
Justice of the New Jersey Supreme Court, at
Trenton, this 27th day of October, 1927.

EDWARD J. KELLEHER,
Clerk.

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LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys.

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Complaint.

(Filed November 15th, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

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GEORGE ROGOSICH,
Plaintiff,

v.

UNION DRYDOCK & REPAIR COM-
PANY, a Corporation,
Defendant.

Action at Law

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Plaintiff, George Rogosich, residing in the City of Hoboken, County of Hudson and State of New Jersey, complaining of the defendant, says that:

1. The defendant, Union Drydock & Repair Company, is a corporation organized and existing under and pursuant to the laws of the State of New Jersey, having its principal office in the Township of Weehawken, County of Hudson and State of New Jersey, and was at all times herein mentioned such corporation.

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2. At the time herein mentioned, the said defendant owned, operated and controlled a certain drydock and shipbuilding yard or plant in said Township of Weehawken, County and State, aforesaid, and was engaged in the drydock business and in the business of shipbuilders, shiprepairers, shipfitters, shipconverters, and generally engaged in all work and business usually carried on by shipbuilders, owners and operators of drydocks.

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3. On or about the 9th day of December, 1925, and for a long time prior thereto, the plaintiff was

Complaint.

employed as a ship carpenter in and about defendant's business.

4. At the time set forth in Paragraph 3 of this complaint, the plaintiff, while engaged in his employment, as aforesaid, was working in, on and about a certain ship, vessel, lighter, barge or float then standing on, moored or fixed to a certain floating drydock of the defendant in the navigable waters of the Hudson River at the foot of Clifton Road and North River, in the Township of Weehawken, County and State aforesaid, and performing his duties in and about said ship, vessel, lighter, barge or float, on a scaffold or platform erected and maintained on the side thereof, by said defendant. 10

5. At the time set forth in Paragraph 3 of this complaint, the plaintiff, while in the performance of his duties, as aforesaid, was struck by a beam, plank, pole or other appliance used in and about the repairing of said ship, vessel, lighter, barge or float, causing him to be thrown with great force and violence from the place in which he was working to the floor or bottom of said floating drydock, severely and permanently injuring said plaintiff. 20

6. Said striking, fall and injuries were caused without fault and negligence on the part of the plaintiff, and were solely the result of, and due to the fault, carelessness and negligence of the defendant, its servants, agents and employees. 30

7. Said negligence consisted in this: said defendant failed to provide the plaintiff with a reasonably safe place in which to work and failed to exercise due, proper and reasonable care to furnish plaintiff with a safe place in which to work and 40

Complaint.

failed, refused and neglected to provide plaintiff with safe and sufficient equipment, appliances, tools and machinery with which to perform his work and duties; said defendant caused, allowed and permitted the equipment, appliances, tools and machinery, with and about which the plaintiff was employed
10 and working, to become worn, defective, dangerous and unsuited for the work and use to which they were put, and that the equipment, appliances, tools and machinery used and employed by the defendant were to the knowledge of the defendant, worn, defective, unsuited, inadequate and insufficient for the purpose of carrying on and executing the work and uses to which they were put; that the defendant permitted incompetent and inexperienced superintendents and workers to carry on direct and ex-
20 ecute the work of repairing and refitting said ship, vessel, lighter, barge or float, and especially in conducting that part, portion or branch of the defendants work in which the plaintiff was engaged; the defendant failed to use reasonable care to inspect, or in inspecting, the equipment, appliances, tools and machinery with which the work in which plaintiff was engaged was carried on and to see that the same were in proper conditions for said work; that the methods, equipment, appliances, tools and ma-
30 chinery used and employed by the defendant, in and about the execution of the work in which the plaintiff was engaged and directed by the defendant to perform were obsolete and inadequate and not of a kind used and approved by modern and properly equipped drydocks, drydock owners or operators, shipbuilders and those engaged in the work and business of the defendant.

8. By reason of the fault, carelessness or negli-
40 gence of the defendant, aforesaid, plaintiff was

severely and permanently injured about the head, limbs and body, both externally and internally, suffering severe and permanent injuries to his head, back, spine, nerves, nervous system, lungs and impairment of his vision, hearing, and locomotion, causing him great pain and anguish, both of mind and body and causing him to be confined to his bed for a long period of time, and said plaintiff has been, still is, and will permanently be prevented from performing his daily duties or engaging in any work, employment or occupation. 10

9. Plaintiff was forced and obliged to pay, lay out and expend large sums of money for medicines, medical and surgical appliances, medical and surgical care and treatment in an effort to effect a cure of said injuries, and has incurred and will incur expenses and debts in the procurement of medicines, medical and surgical appliances, medical and surgical care and treatment, in an effort to effect a cure of, or obtain relief from said injuries. 20

Plaintiff demands as damages against the defendant the sum of \$50,000.00, together with costs of suit.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys of Plaintiff. 30

Answer.

(Filed November 16th, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

GEORGE ROGOSICH,
Plaintiff,

v.

UNION DRYDOCK & REPAIR COM-
PANY, a Corporation,
Defendant.

Action at Law.

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Defendant, Union Drydock & Repair Company, a corporation of the State of New Jersey having its principal office and place of business in Weehawken, Hudson County, New Jersey, answering the complaint filed herein says that:

1. It admits the allegations of paragraphs 1, 2, 3 and 4.

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2. Answering the allegations of paragraph 5 it admits that the plaintiff, while doing repair work on a barge then in said floating drydock, fell to the deck of said drydock. Except as above stated it denies each and every allegation of paragraph 5.

3. It denies the allegations of paragraphs 6, 7 and 8.

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4. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 9 but denies that any of the expenses alleged to have been incurred or to be incurred were made

necessary because of any negligence on the part of defendant.

FIRST SEPARATE DEFENSE:

5. Plaintiff was guilty of contributory negligence; in that he failed to make proper observation of the conditions existing at the time of the accident and failed to use the care in the performance of his duties which a reasonably prudent person should and ought to have used under the circumstances. 10

SECOND SEPARATE DEFENSE:

6. It alleges that all of the conditions referred to in the complaint were as open, obvious and well known to plaintiff, *as to defendant at all* 20 *times during the period of his employment* by the defendant and were assumed by him.

THIRD SEPARATE DEFENSE:

7. The injuries sustained by plaintiff were due to and caused by the negligence of other servants, agents and employees of the defendant, who were also fellow servants of the plaintiff.

FOURTH SEPARATE DEFENSE:

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8. The contract of hiring between the plaintiff and defendant was made with reference and subject to the provisions of Section II of an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and com- 40

pensation thereunder", being Chapter 95 of the Laws of 1911 together with the amendments thereof and supplements thereto, which were accepted by both the plaintiff and defendant.

10 9. The rights and remedies provided by said Acts are exclusive and by accepting the provisions of said Acts plaintiff surrendered any right which he might otherwise have had to be compensated for said injuries, disease or disability except as herein provided through proceedings instituted before the Workmen's Compensation Bureau of the Department of Labor of the State of New Jersey.

OBJECTION IN POINT OF LAW.

20 This court has no jurisdiction to hear and determine the issues involved in this suit.

PLEASE TAKE NOTICE that before or at the trial of the above stated cause we shall move to dismiss the complaint filed herein on the ground that this court has no jurisdiction to hear and determine the issues involved in said suit.

30 LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

Reply.

(Filed November 22nd, 1927.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

<p style="text-align: center;">GEORGE ROGOSICH, Plaintiff, v. UNION DRYDOCK & REPAIR COM- PANY, a Corporation, Defendant.</p>	}	<p>10</p> <p>Action at Law.</p>
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Plaintiff, George Rogosich, by way of reply to the answer filed by the defendant, Union Drydock & Repair Company, says that: 20

1. He denies the allegations contained in paragraphs 5, 6, 7, 8 and 9 of the answer.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys of Plaintiff.

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Notice of Motion to Strike Out Complaint.

(Filed July 24th, 1929.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

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GEORGE ROGOSICH,
Plaintiff,

v.

UNION DRYDOCK & REPAIR COM-
PANY, a Corporation,
Defendant.

Action at Law.

To: Messrs. Lichtenstein, Schwartz & Friedenber,
Attorneys for Plaintiff.

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Sirs:

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PLEASE TAKE NOTICE that on Friday, the seventh day of June, 1929, at ten o'clock in the forenoon (Daylight Saving Time) or as soon thereafter as counsel can be heard at the Court House in the City of Jersey City, Hudson County, New Jersey, we shall apply to his Honor Henry E. Ackerson, Circuit Court Judge sitting as a Commissioner of the New Jersey Supreme Court, or to such other justice, judge or commissioner as shall sit to hear motions herein for an order to strike out the complaint you filed in the above stated cause against the defendant, Union Dry Dock & Repair Company upon the ground that the above court has no jurisdiction to hear and determine issues involved in said suit.

Respectfully,

LINDABURY, DEPUE & FAULKES,
Attorneys for Defendant.

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Dated, June 1, 1929.

Memorandum.

(Filed July 24th, 1929.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

<p style="text-align: center;">GEORGE ROGOSICH, Plaintiff, v. UNION DRYDOCK & REPAIR COM- PANY, a Corporation, Defendant.</p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">Action at Law.</p>
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ACKERSON, S. C. C. :

The complaint herein alleges that on December 9, 1925, the plaintiff, while employed by the defendant as a ship carpenter in repairing a certain vessel in or moored to the dry-dock of the defendant company in the navigable waters of the Hudson River at the foot of Clifton Road, Township of Weehawken, Hudson County, New Jersey, was injured through the negligence of the defendant company. The defendant moves to strike out this complaint upon the ground that the cause of action as alleged is a maritime tort, arising out of the relation of master and servant, and that, therefore, the courts of admiralty have exclusive jurisdiction, and this court is without jurisdiction to hear and determine the matter. 20 30

It may be considered as settled in this state, that since the enactment of our "Workmen's Compensation Act," an employee injured as the result of a maritime tort arising out of the negligence of his employer, cannot sue in our state courts unless he 40

Memorandum.

brings himself within the selected class designated as "seamen" in the so-called "Jones Act," found in Section 20 of the Merchant Marine Act of March 4, 1915, as amended by Section 33 of the Act of 1920, 46 U. S. C. A., Sec. 688, U. S. Comp. St. Sec. 8337a, which provides inter alia as follows:

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"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, etc."

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

March v. Vulcan Iron Work, 102 N. J. L. 337;

Davey v. D. L. & W. R. Co., 143 Atl. Rep. 313;

International Stevedoring Co. v. Haverty, 272 U. S. 50;

Tuccillo v. John T. Clark & Son, 139 Atl. Rep. 58.

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The plaintiff at the argument of this motion very properly conceded that the cause of action alleged in the complaint is a maritime tort, and, therefore, agreed that the only question to be determined is whether the plaintiff, who, at the time he was injured, was a ship carpenter working for a dry-dock company repairing a vessel on navigable waters, could be classed as a "seaman" so as to come within the provisions of the above quoted act, thereby giving this court jurisdiction of his cause of action.

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In *International Stevedoring Co. v. Haverty*, supra, a stevedore, while working for an independent company unloading a ship, was held to be a "seaman" within the purview of the Seamen's Act, but the decision was put upon the nature and characteristics of his employment. The court in the course of the opinion said:

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"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, * * * we cannot believe that Congress willingly would have allowed 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."

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It was because the plaintiff in that case was doing as a stevedore the work which was formerly done by the seamen on the ship that he was declared within the class protected by the Seamen's Act.

The last mentioned case was followed by our Court of Errors and Appeals in the case of *Tuccillo v. John T. Clark & Son*, supra, where the plaintiff was also a stevedore, and the court draws the clear distinction between a stevedore, who did the class of work formerly performed by members of the ship's crew, and a mechanic, such as the foreman of a boiler shop, as in *March v. Vulcan Iron Works*, supra, a painter as in *Bockhop v. Phoenix Transit Co.*, supra, and a pipe-fitter as in *Davey v. D. L. & W. R. Co.*, supra. In the case of such mechanics they were performing work not ordinarily done by a seaman, and they were not members of the ship's crew, and were not, therefore, classed as seamen.

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Memorandum.

From time immemorial ships have been put out of service either in a ship-yard or a dry-dock to undergo repairs, and invariably this work has been done by a gang of specially trained mechanics and not by members of the ship's crew whose services are usually performed while the ship is in commission and it was to protect this latter class that the so-called "Jones Act" was enacted.

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The plaintiff here relies upon the following cases to support his contention that he was a seaman within the protection of the last mentioned act:

Messel v. Foundation Co.;
Tuccillo v. John T. Clark & Son, supra;
Kuhlman v. A. Fletcher Co., 20 Fed. (2nd)
 465.

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The first two of these cases were dealt with by our Court of Errors and Appeals in *Davey v. D. L. & W. R. Co.*, *supra*, where the plaintiff, a pipe-fitter was negligently injured while working in repairing a vessel in or near a repair yard on navigable waters, and Justice Katzenbach, in the course of an able opinion satisfactorily distinguished the case of *Messel v. Foundation Co.*, *supra*, by showing that under the laws of Louisiana, where the cause of action arose, there could still be a recovery by an employee for a maritime tort as against his master as at common law in the state court, which, of course, could not be done here. Further, in dealing with the case of *Tuccillo v. John T. Clark & Son*, *supra*, the court said the right of the plaintiff to maintain his action in the Supreme Court of New Jersey rested entirely upon his being a stevedore, thereby bringing him within the class designated as "seamen" in the Jones Act.

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The case of *Kuhlman v. W. & A. Fletcher Co.*, *supra*, was decided by the United States Court of

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Appeals for this district. The matter was appealed upon two rulings of the District Court judge, who refused to allow the action to be transferred from the law to the admiralty side of the court in which he was sustained. He also non-suited the plaintiff on the ground that there was no diversity of citizenship in which the Circuit Court of Appeals held there was error under certain provisions of the Seamen's Act. In the course of the opinion rendered in June, 1927, the court did class the plaintiff, who was a ship's carpenter engaged when injured in repairing a steamship at a dock on navigable waters as a seaman, but I cannot consider this court bound by the decision in the face of the clear and explicit pronouncement of our Court of Errors and Appeals in the case of *Davey v. D. L. & W. R. Co.*, supra, decided almost a year and four months later, that a pipe-fitter who was injured while engaged in repairing a vessel for his master, on navigable waters, had no right to maintain a cause of action for such maritime tort in our Supreme Court, but must pursue his remedy in admiralty. In the course of the opinion in this case the court, after referring to the case of *March v. Vulcan Iron Works*, supra, said:

“Later the case of *Tuccillo v. John T. Clark & Son*, 139 A. 58 (not as yet officially reported), was decided in this court. The right of the plaintiff to maintain his action was upheld. The opinion, however, expressly states that it rests upon the plaintiff being a stevedore. A stevedore is under the decision of the federal courts held to be a seaman. To seamen a remedy is given by the Seamen's Act in either the admiralty or state courts. This case, because of these special features, has no bearing upon the case under review.”

Memorandum.

10 This shows clearly that the court did not consider a pipe-fitter a seaman, but regarded him as a mechanic not protected by the Seamen's Act. Surely a carpenter employed by a dry-dock concern to repair a vessel brought by its owner to such a place for repair, is as much a mechanic as a pipe-fitter, and, by the same token comes no nearer to being a seaman than a pipe-fitter.

Furthermore, the plaintiff in the case of Davey v. D. L. & W. R. Co., supra, applied to the Supreme Court of the United States for a certiorari relying particularly on the case of Messel v. Foundation Co., supra, and the application was denied.

20 It may be that the United States Supreme Court will eventually, in the spirit of liberal construction exemplified in the case of International Stevedoring Co. v. Haverty, supra, extend the so-called Seamen's Act to cover mechanics of the class represented by the plaintiff in the case sub judice, but until a pronouncement to that effect, we are bound by the ruling of our Court of Errors and Appeals in the case of Davey v. D. L. & W. R. Co., supra, which is considered to be directly in point and dispositive of the question here raised adversely to the plaintiff's contention.

30 The motion to strike out the plaintiff's complaint is, therefore, granted upon the ground that this court is without jurisdiction to entertain the cause of action therein set forth.

HENRY A. ACKERSON, Jr.,
Supreme Court Commissioner *W*

Order Striking Out Complaint.

(Entered July 26th, 1929.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

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<p style="text-align: center;">GEORGE ROGOSICH, Plaintiff,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">UNION DRYDOCK & REPAIR COM- PANY, a Corporation, Defendant.</p>	}	Action at Law.
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The defendant having served upon the plaintiff notice of a motion in the above entitled cause striking out the complaint upon the ground that the court had no jurisdiction to hear and determine the issues involved in said suit; and a motion for that purpose having been made before the court on the seventh day of June, 1929, pursuant to such notice in the presence of Messrs. Lindabury, Depue & Faulks, attorneys for defendant and Messrs. Lichtenstein, Schwartz & Friedenber

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It is on this 24th day of July, 1929, ORDERED that the complaint filed hereby by plaintiff be and

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Notice and Grounds of Appeal.

the same is hereby stricken out and the cause of action dismissed.

HENRY E. ACKERSON, Jr.,
Commissioner of the New
Jersey Supreme Court.

10 On motion of:

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

Notice and Grounds of Appeal.

(Filed August 19th, 1929.)

20 NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

<p style="text-align: center;">GEORGE ROGOSICH, Plaintiff,</p> <p style="text-align: center;">v.</p> <p style="text-align: center;">UNION DRYDOCK & REPAIR COM- PANY, a Corporation, Defendant.</p>	}	Action at Law
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To: Lindabury, Depue & Faulks, Esqs., Attorneys
of the above named defendant.

PLEASE TAKE NOTICE, that the plaintiff ap-
peals to the Court of Errors and Appeals of the
State of New Jersey from an order made by said
court on July 24th, 1929, striking out the complaint
filed by the plaintiff against the defendant, and for
40 judgment therein, dismissing the cause of action of

Notice and Grounds of Appeal.

plaintiff, and from the final judgment entered therein, in favor of the defendant and against the plaintiff, dismissing the plaintiff's cause of action, which final judgment was entered on July 26th, 1929, upon the following grounds:

1. Because the court erred in granting the motion of the defendant to strike out the complaint of the plaintiff upon the ground that the New Jersey Supreme Court had no jurisdiction to hear and determine the issues involved in said suit; 10

2. Because the court erred in striking out the complaint of the plaintiff and in dismissing his cause of action upon the ground that the New Jersey Supreme Court had no jurisdiction to hear and determine the cause of action alleged in said complaint. 20

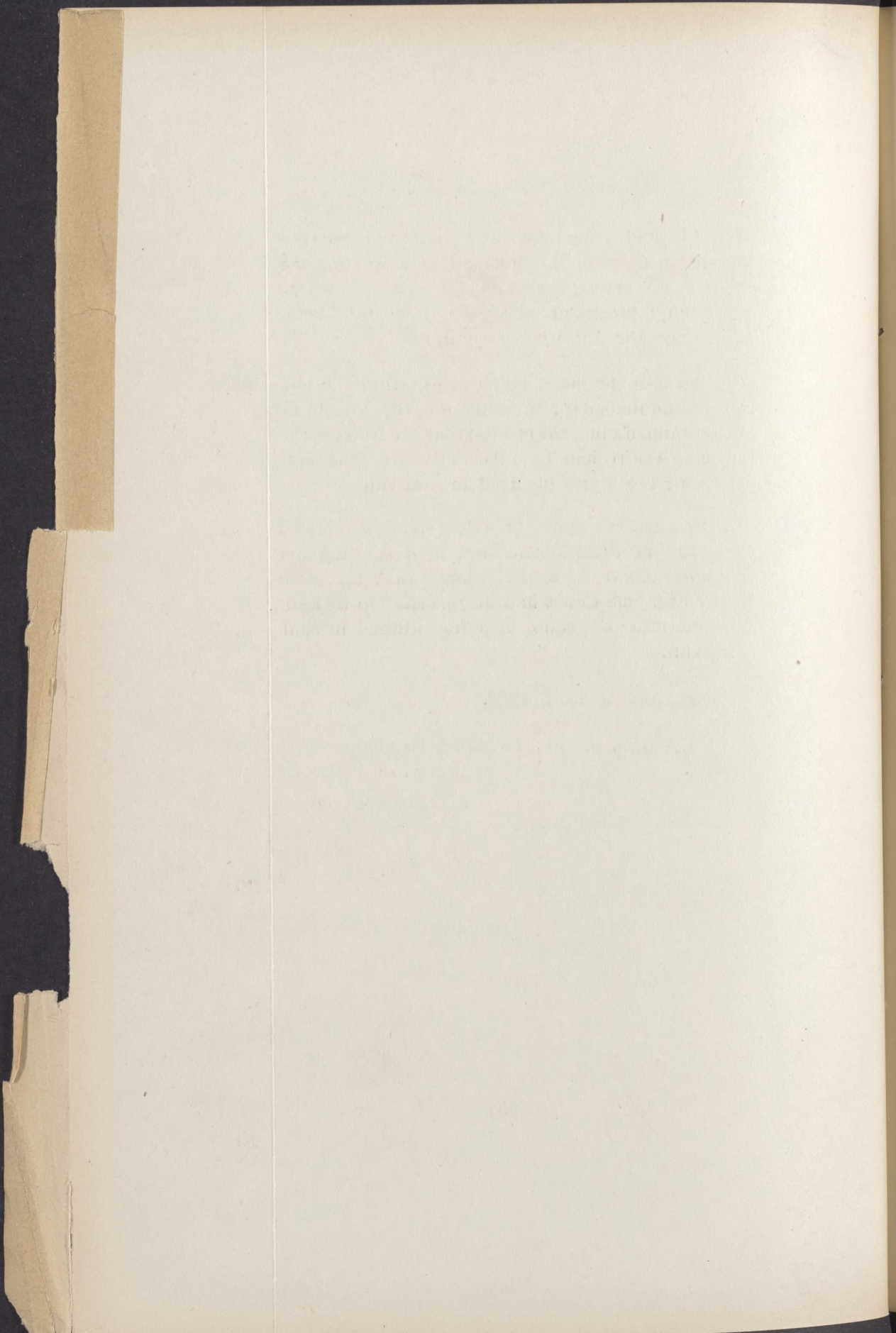
Dated, August 15th, 1929.

LICHTENSTEIN, SCHWARTZ & FRIEDENBERG,
Attorneys of Plaintiff.

Service of a copy of the within
Notice and Grounds of Appeal
is hereby acknowledged this
16th day of August, 1929.

Lindabury, DePue & Faulks,
Attorneys of Defendant

[49509]



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New Jersey Court of Errors and Appeals

GEORGE ROGOSICH, Plaintiff-Appellant, v. UNION DRYDOCK AND REPAIR COMPANY, a corporation, Defendant-Respondent.	} On Appeal from New Jersey Supreme Court, Hudson County.
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BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

This is an appeal from an order made in the New Jersey Supreme Court on July 24th, 1929, and filed July 26th, 1929, striking out the Complaint filed by the plaintiff-appellant against the defendant-respondent and for judgment dismissing plaintiff's cause of action. The motion and order were made on the sole ground that the New Jersey Supreme Court has no jurisdiction to entertain the cause of action set forth in plaintiff's complaint.

The Complaint sets forth that the plaintiff-appellant, while in the employ of the defendant-respondent, was injured by reason of the defendant's negligence. The Complaint also shows that the alleged tort was committed on the navigable waters of the Hudson River near the shore of the Township of Weehawken, Hudson County, New Jersey. Plaintiff alleges that he was, at the time of his injury,

working as a ship carpenter in, on and about a certain vessel then standing on a floating drydock of the defendant. Plaintiff-appellant claimed his rights to maintain this cause of action in the New Jersey Supreme Court under the Jones Act, which is fully set forth and discussed hereafter.

The jurisdiction of the New Jersey Supreme Court to entertain this cause of action was the sole basis of the motion addressed to the Complaint and the only question considered on the argument thereof. The court decided that it was without such jurisdiction (Case, p. 11, et. seq.).

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

THE LAW.

POINT I.

The New Jersey Supreme Court has jurisdiction to hear and determine the cause of action alleged by plaintiff-appellant, under and by virtue of the provisions of an Act of Congress, dated March 4th, 1915, as amended June 5th, 1920, C. 250, § 33 (U. S. C. A. Title 46, § 688).

By an Act of June 5th, 1920 (41 Stat. 1007; Fed. Stat. Anno. Sup. 1920, page 227; U. S. C. A., Title 46, § 688, page 149) the United States Congress passed the following law:

“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 any 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."

This statute is commonly referred to as the "Jones Act," and incorporates, by reference, the provisions of the Federal Employers' Liability Act into our Merchant Marine Act, and extends to seamen (and by this we mean that large class of maritime workers who have been adjudicated to be seamen within the terms of the Jones Act) all the benefits and privileges enjoyed by railway employees engaged in interstate commerce under the Federal Employers' Liability Act. With respect to jurisdiction, the Act itself provides:

"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."

Where a seaman sues under this Act, there is no difficulty in determining that a State court of common law, such as our New Jersey Supreme Court,

has jurisdiction. For some time after the passage of this so-called Jones Act, the term "seaman" was not given the broad meaning that it has had in recent years. For instance, for a long time, it was ruled by various circuit courts of appeal that a longshoreman did not come within its beneficial provisions. This rule was changed in the case of *International Stevedoring Co. v. Haverty*, 47 Sup. Ct. Rep. 19; 272 U. S. 50, where the United States Supreme Court decided, through Mr. Justice Holmes, that a stevedore or longshoreman was a seaman within the meaning of the Jones Act. This same proposition was again reaffirmed, with respect to stevedores or longshoremen, in the case of *Northern Coal & Dock Co. v. Strand*, Case 41, October Term, 1928, United States Supreme Court. The *Haverty* case was followed by the New Jersey Court of Errors and Appeals in the case of *Tuccillo v. John T. Clark & Son*, 104 N. J. L. 122; 139 Atl. Rep. 58, wherein this court affirmed the judgment obtained by the plaintiff, a stevedore, against his employer for injuries sustained upon a ship docked in the navigable waters.

Our present contention is that the plaintiff, Rogosich, is as much a seaman within the Jones Act as would be a stevedore. In the case of *Messel v. Foundation Company*, 274 U. S. 427; 71 L. Ed. 1135, the United States Supreme Court said, through Chief Justice Taft:

"The principles applicable to Messel's recovery must be limited to those which the admiralty law of the United States prescribes, including the applicable section of the Employers' Liability Act (June 5th, 1920) incorporated in the maritime law by Section 33, Chapter 250, 41 Stat. at L. 1007; U. S. C. A., Title 46, Section 688."

This is the Jones Act, above referred to, and which is declared by the United States Supreme Court, in the above-mentioned case, to be applicable to Messel, the plaintiff therein. The facts of the Messel case show that the plaintiff was a boiler-maker's helper, sent to assist a boilermaker on board a steamship being repaired while floating in the Mississippi River, at New Orleans. Messel worked for the Foundation Company as a boiler-maker's helper in the same manner that Rogosich worked for the defendant-respondent in the instant case as a carpenter. If the Jones Act applies to one, it surely applies to the other. The *Messel case* also held that the plaintiff had a right to sue his case in the state courts of Louisiana, if he so elected. The court says, at page 434:

"As Messel has resorted to the state court, and there is nothing to prevent his recovery in the state court except the Workmen's Compensation Act, which is inapplicable to his case in view of our decisions, the judgment of the Supreme Court of Louisiana must be reversed and the case remanded for further proceedings not inconsistent with this opinion."

This unequivocal pronouncement of the United States Supreme Court, that a boilermaker's helper who goes from shore on board a ship to assist in the repair of the same, is a seaman within the terms of the Jones Act, should be dispositive of this case, the only distinction being that the plaintiff herein was a ship's carpenter, rather than a boilermaker's helper. The learned court below, in passing upon the *Messel case*, disposes of it without discussion, by citing the case of *Davey v. D. L. & W. R. Co., et*

al., 143 Atl. Rep. 313 (*not yet officially reported*), and merely states that therein:

“Mr. Justice Katzenbach, in the course of an able opinion, satisfactorily distinguishes the case of *Messel v. Foundation Co.*, *supra*, by showing that under the laws of Louisiana, where the cause of action arose, there could still be a recovery by an employee for a maritime tort against his master at common law in the state court, which, of course, cannot be done here” (Case, p. 14, l. 25).

An examination of the opinion filed in the *Davey case* will show that the New Jersey Court of Errors and Appeals accepted the case of *Messel v. Foundation Company*, *supra*, as binding, but sought to distinguish it from the case then under consideration. The basis of this distinction, according to the opinion in the *Davey case*, was the existence of a provision in the Louisiana Revised Civil Code, Article 2315:

“Every act whatever of man that causes damage to another obliges him by whose fault it happens to repair it.”

It was the absence of such a statutory declaration that prompted the Court of Errors and Appeals in the *Davey case* to state that the *Messel case* had no application. We contend that this distinction, sought to be drawn in the *Davey case*, is unsound, since the section of the Louisiana Code cited is nothing more or less than a statutory declaration of the common-law remedy which has existed in the State of New Jersey from its birth, and which common law is, indeed, the foundation stone upon

which the jurisprudence of this State is built. In a common-law state, such a statutory declaration would be superfluous.

The *Messel case* ruled, in brief, that the Workmen's Compensation Act of Louisiana could not take away the equivalent of a common-law remedy, as provided for by the article of the Civil Code, above quoted, and if this is the law, it surely follows that the Workmen's Compensation Act of New Jersey could not deprive Davey of a real common-law remedy in a common-law state. This was the contention of the plaintiff in the *Davey case*.

Further, an examination of the opinion in the *Davey case* will reveal that the learned court stated, in next to the last paragraph thereof:

"There is nothing, so far as we can find, in this Act (New Jersey Workmen's Compensation Act) which contains a similar provision to the Louisiana Code hereinbefore cited (Louisiana Revised Civil Code of 1870, Article 2315). For these reasons, we are of the opinion that the case of *Messel v. Foundation Company*, supra, has no application to the present case."

It clearly appears from this language, that the Court of Errors and Appeals, in the *Davey case*, was under the impression that the provision in the Louisiana Code, above quoted, was a part and parcel of the Louisiana Workmen's Compensation Act, whereas, as a matter of fact, the provision of the Louisiana Code is a part of the Revised Code of Louisiana, Section 2315, which was passed in 1870, whereas the Workmen's Compensation Act of Louisiana was not passed until 1914 (Louisiana Laws 1914, Act 20). The Louisiana Workmen's

Compensation Act is almost identical to our own, and makes no reference whatever to the Code provision relied upon by the Court of Errors and Appeals in the *Davey case*.

However, without attempting to criticize the opinion in the *Davey case*, and for the purpose of argument, conceding it to be sound law, and binding, it must be borne in mind that in the instant case, the plaintiff, Rogosich, claims to have a right to pursue his action under the Jones Act. This claim was not made by the plaintiff in the *Davey case*, because at the time the complaint therein was filed, the opinion in the case of *Messel v. Foundation Co.*, *supra*, had not been rendered, and the United States Supreme Court had not adjudicated that a boilermaker's helper was a seaman, within the terms of the Jones Act. But now this adjudication in the *Messel case* is clearly before the court, as it was before the court below. Our United States Supreme Court has said that Messel, a boilermaker's helper, was a seaman within the terms of the Jones Act, and it is the appellant's present contention that he, as a ship's carpenter, was as much a seaman, and, therefore, as much within the Jones Act, as was Messel. To quote again from the opinion of Chief Justice Taft in the *Messel case*:

"The principles applicable to Messel's recovery must be limited to those which the admiralty law of the United States prescribes, including the applicable section of the *Employers' Liability Act* (June 5th, 1920) incorporated in the maritime law by Section 33, Chapter 250, 41 Stat. at L. 1007; U. S. C. A., Title 46, Section 688."

It must be borne in mind that the United States Supreme Court, in the *Messel case*, made a twofold

ruling: first, that Messel had a right to proceed in the state court, and that the Workmen's Compensation Act of Louisiana did not, and could not, take away this right; and secondly, that *he, as a boilermaker's helper, making repairs on a ship in navigable waters, was to be accorded the privileges of, and that his rights were to be controlled by, the Jones Act, and that he was, in short, a seaman within that Act.* It is the second of these rulings that is now urged upon the court. The case of *Messel v. Foundation Company, supra*, definitely ruled that Messel, a boilermaker's helper, who went from the shore on board a ship in navigable waters to make repairs thereon, was a seaman within the Jones Act, and that ruling is binding upon our courts, and leads us inevitably to the fact that the present appellant, a ship's carpenter, who goes aboard a ship on navigable waters to make repairs thereon, is also a seaman within that Act. Although the respondent, in the court below, and the court below seek to distinguish the *Messel* case from the instant one, and rely on the case of *Davey v. D. L. & W. R. R. Co., supra*, for that distinction, they cannot escape the ruling of the United States Supreme Court that the Jones Act applied to a boilermaker's helper, injured while working on a ship in navigable waters. In short, the United States Supreme Court ruled that Messel was a seaman, and this court is now bound by that ruling, and it must follow that the appellant is also a seaman within the Jones Act, and that the jurisdiction in this case is well laid. It must be ever borne in mind, when the case of *Davey v. D. L. & W. R. R. Co., supra*, is urged against the appellant, that the plaintiff therein, *Davey, did not contend that he was a seaman, did not contend that he came within the Jones Act, and that nowhere in the briefs, arguments or*

opinion in that case was the Jones Act discussed with respect to the plaintiff therein, Davey. Indeed, the Court of Errors and Appeals, in that very opinion, recognizes the right of a seaman to proceed in the state courts, and in 143 Atl. Rep., at page 314, we find the following language:

“Later, the case of *Tuccillo v. John T. Clark & Son*, 139 Atl. Rep. 58, was decided in this court. The right of the plaintiff to maintain his action was upheld. The opinion, however, expressly states that it rests upon the plaintiff being a stevedore. A stevedore is, under the decision of the federal courts, held to be a seaman. To seamen a remedy is given by the Seamen’s Act, in either admiralty or the state courts. This case, because of its special features, has no bearing on the case under review.”

Here our Court of Errors and Appeals binds itself to the proposition that one within the Seamen’s Act, such as a stevedore, may prosecute his case in the state courts. That much is surely conceded. Now we have, in the present case, the plaintiff, Rogosich, a ship’s carpenter, who contends that he is a seaman within the terms of the Jones Act, and who prosecutes this action and this appeal as such. The pronouncement of the United States Supreme Court in the *Messel case*, *supra*, certainly makes the way clear for the present appellant in the state court, and the case of *Davey v. D. L. & W. R. R. Co.*, *supra*, which is relied upon almost exclusively by the respondent, cannot be considered in point because Davey, the plaintiff therein, did not contend that he was a seaman and did not invoke the provisions of the Jones Act.

POINT II.

A carpenter, working in the repair of a ship on navigable waters, is a seaman within the meaning of the Jones Act (Act of March 4th, 1915) as amended June 5th, 1920, C. 250, § 33, U. S. C. A. Title 46, § 688.

After seeing that the United States Supreme Court has ruled that a boilermaker's helper, who goes from the land to a ship on the navigable waters to make repairs thereon, is a seaman within the Jones Act, it would hardly seem necessary to argue that a ship's carpenter, engaged in repair work on navigable waters, is also a seaman within said Act. Surely there can be no distinction, in fact or in law, between a boilermaker's helper and a carpenter, within the purview of the Jones Act. Both were working and received their injuries, while on the navigable waters. Both were engaged in the repair of a vessel. Neither was a member of the crew. Messel worked for the Foundation Company as a boilermaker's helper in the same manner that the plaintiff-appellant herein worked for the defendant-respondent as a carpenter, and if the Jones Act applies to one, it surely applies to the other.

The United States Circuit Court of Appeals for our own circuit has ruled that a carpenter making repairs on a vessel in navigable waters was a seaman within the Jones Act. *Kuhlman v. W. & A. Fletcher Co.*, 20 Fed. (2nd) 465.

The facts in that case were as follows. The plaintiff, Kuhlman, was employed by the defendant as a ship's carpenter. The defendant had in its charge, and was repairing, at a dock in the Hudson River,

a certain steamer known as the "Western Front," and the plaintiff, while employed as a carpenter, and working upon said steamship, was injured. The complaint was based upon the negligence of the master. When the case came on for trial, the trial court denied a motion to amend the complaint and to transfer the case to the admiralty docket, and then proceeded to enter a judgment of non-suit against the plaintiff, on the ground that it was without jurisdiction, as a court of law, to entertain the cause of action alleged. On appeal, the Circuit Court of Appeals sustained the trial court in denying the transfer of the case to the admiralty docket, but overruled the judgment of non-suit entered in the law action and held that the District Court had jurisdiction, on its law side, to entertain the plaintiff's suit.

The court filed a well-considered opinion and ruled, first, that the cause of action alleged was in tort, and that the tort was of a maritime nature, citing *Robins Dry Dock & Repair Co. v. Dahl*, 266 U. S. 449; 69 L. Ed. 372. The court further said that since a maritime tort was alleged, that "the rights and liabilities of the parties to said tort arise out of, and depend on, the general maritime law. *Robins Dry Dock & Repair Co., supra.*"

The Court of Appeals proceeds to review, briefly, the rights of seamen as they existed a long time prior to the bringing of this action, pointing out: first, that courts of admiralty had exclusive jurisdiction of maritime torts which might be invoked by a seaman against a ship and its own in an action in rem, wherein a seaman could recover indemnity for injuries he had sustained in consequence of the unseaworthiness of the ship, citing *The Osceola*, 189 U. S. 158; 47 L. Ed. 760; and secondly, that a seaman, when injured in the service of

his ship, whether through negligence or by accident, could recover his wages and expenses of maintenance and cure, citing *Chelentis v. Luckenbach*, 247 U. S. 372; 62 L. Ed. 1171; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; 66 L. Ed. 927. The court does not discuss these cases at length, because it bases its opinion on a statute passed June 5th, 1920, Chapter 250, Section 33; 41 Stat. 988, 1007; U. S. C. A., Title 46, Section 688. This is the Jones Act, quoted in the First Point of this brief, and has the effect of incorporating into the general maritime law the provisions of the Federal Employers' Liability Act (Comp. Stat., Sections 8657 to 8665). For this proposition, the court, in the *Kuhlman case*, cites the case of *International Stevedoring Co. v. Haverty, supra*, which case was followed by our Court of Appeals in the *Tuccillo case, supra*. After making these observations, the court says, at page 467:

"This section broadened the maritime law by giving a seaman a new right—a right at law—through proceedings in personam, according to the course of the common law, on the common-law side of federal district courts. State courts also have like jurisdiction,"

citing *Engel v. Davenport*, 271 U. S. 33, 70 L. ed. 813. The court also states, at page 467, that where the plaintiff elects to proceed under the Jones Act, he places himself in the same position to his employer as a railway employee engaged in interstate commerce bears to his employer. The court then proceeds to review various cases involving injuries to maritime workers, who were not members of the crew of a ship, and at page 468, says:

"On these authorities we hold that the plaintiff's right to redress of his personal injuries grew out of general maritime law, which includes the Merchant Marine Act, and, though not a sailor, he was, within the meaning of the statute in respect to the work he was doing, a seaman."

This case is mainly important because of the fact that it expressly defines a *carpenter*, engaged in work identical to that in which the plaintiff-appellant was engaged, to be a *seaman* within the meaning of the Jones Act. With this question adjudicated, there can be no doubt that our New Jersey Courts of common law have jurisdiction to entertain the instant case. It would be impossible to find two cases more similar. The court below concedes the applicability of this case, but states that it cannot consider itself bound thereby. It may be quite true that an opinion of the Circuit Court of Appeals is not binding upon our courts, but the fact should not be lost sight of that the said opinion was based upon a line of cases in the United States Supreme Court, and that those cases deal with the interpretation of a federal statute, and we respectfully urge that, under those circumstances, the said courts are bound, in the interpretation of said federal statute, if not by the said opinion of the Circuit Court of Appeals, then surely by the opinions of the United States Supreme Court, upon which it is based.

In *Engel v. Davenport*, 271 U. S. 33, 70 L. ed. 813, the United States Supreme Court says, at page 817:

"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 (Jones Act) as part of the maritime law."

Our own state courts are committed to this proposition, but it would appear from the memorandum filed in the court below that they will extend the benefits of the Jones Act only to persons who are *sailors, and to stevedores*. This is the pronouncement of the court presently appealed from, although that court recognizes that the United States Supreme Court's ruling on the Jones Act would be binding on the state courts. At the end of the memorandum appealed from (Case, p. 16), we find the following language:

"It may be that the United States Supreme Court will eventually, in the spirit of liberal construction, exemplified in the case of *International Stevedoring Co. v. Haverty, supra*, extend the so-called Seaman's Act to govern mechanics of the class represented by the plaintiff in the case sub judice, but until a pronouncement to that effect, we are bound by the ruling of the Court of Errors and Appeals in the case of *Davey v. D. L. & W. R. R. Co., supra*, which is considered to be directly in point and dispositive of the case here raised adversely to the plaintiff's contention."

In other words, the court there says that should the United States Supreme Court rule that carpenters, mechanics and repairmen who go aboard a ship on navigable waters to make repairs thereon are seamen within the Jones Act, its decision in the instant case would be different.

This pronouncement opens the door to the two-fold error committed by the court below. Firstly,

the United States Supreme Court has ruled that the so-called Seaman's Act governs mechanics of the class represented by plaintiff. In *Messel v. Foundation Co.*, *supra*, the United States Supreme Court ruled that a boilermaker's helper was a seaman within said Act, and in *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479, 67 L. ed. 756, the United States Supreme Court, on writ of error, affirmed the District Court of the United States, for the Western District of New York (280 Fed. 125), which ruled that an administratrix for the estate of a master boilermaker, who was drowned through the negligence of his employer, while working in the repair of a scow moored in navigable waters, might maintain her action under the provisions of the Seaman's Act, as amended by the Act of June 5th, 1920, Section 33 (Jones Act). There are a number of cases ruling that a stevedore or longshoreman, injured while working on a vessel, comes within the terms of said Act, among which the best known are *International Stevedoring Co. v. Haverty*, *supra*; *Northern Coal and Dock Co. v. Strand*, *supra*.

The opinion appealed from seems to draw the line at stevedores, while an examination of the cases above quoted will show that such a line was not drawn by the United States Supreme Court. The court below bases its distinction mainly on three cases in the New Jersey Court of Errors and Appeals, to wit: *Bockhop v. Phoenix Transit Company*, 97 N. J. L. 514; *March v. Vulcan Iron Works*, 132 Atl. Rep. 89; 102 N. J. L. 337; *Davey v. D. L. & W. R. R. Co.*, 143 Atl. Rep. 313 (not yet officially reported).

This leads us to the second error of the court, to wit: that the said cases passed upon the proposition now raised, whereas, none of them made any

mention of the Jones Act, and none of the parties therein contended that the Jones Act applied to them.

In the *Bockhop case*, the plaintiff started his action at law for injuries received while working in the repair of a boat, and the court refused to entertain his cause of action, being inclined to the view that the exclusive features of the New Jersey Workmen's Compensation Act barred the same, and that Bockhop's sole remedy was in the Compensation courts. We point out here that Bockhop did not urge that he came within the Jones Act, and the Jones Act is nowhere cited or discussed in the opinion.

In *March v. Vulcan Iron Works, supra*, a petition was filed in the New Jersey Workmen's Compensation Bureau, to recover compensation for the death of March, who was injured while repairing a boat in a floating drydock on navigable waters. It clearly appears that the petitioner in this case was guided by the *Buckhop case* in filing this petition. The Court of Errors and Appeals, however, dismissed this petition and ruled that the Workmen's Compensation Bureau had no jurisdiction of the case, since it was based upon a maritime tort. Here again, it must be borne in mind that the petitioner did not urge the Jones Act, nor contend that she was given any rights thereby. The court did not discuss the Jones Act in any part of its opinion, but confined itself to the proposition that a remedy for a maritime tort cannot be obtained under the peculiar legal machinery which is built up by the New Jersey Workmen's Compensation Law, which proposition was firmly established by the United States Supreme Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086.

In *Davey v. D. L. & W. R. R. Co*, *supra*, we again point out that Davey, the plaintiff, did not contend to come within the Jones Act, nor did he seek any of the benefits thereof on his appeal. The proposition of the *Davey case* was that a State Workmen's Compensation Act could not affect the common-law jurisdiction of a state court with respect to a maritime tort. Davey relied exclusively on a provision of the Federal Judiciary Act of 1889, which has been continued by the Judicial Code, Sections 24 and 256 (U. S. C. A., Title 28, Sections 41 and 371), by which the federal courts are given exclusive original cognizance of all civil cases in 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." This "saving clause" was the sole basis of Davey's contention, and this appears from a reading of the opinion, 143 Atl. Rep. 313 (not yet officially reported), at page 314, where the court says:

"The appellant contends that in the Judicial Code of the United States, as contained in Subdivision 3, Section 991, etc., by which the federal courts are given exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, appear the words 'saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it', and that these words leave open the common-law jurisdiction of the Supreme Court to entertain the case at bar. The difficulty we have with this argument is that the Federal Employer's Liability Act (45 U. S. C. A., Sections 51 to 59), under which the case at bar was instituted, is not a common-law remedy, but a pure statutory remedy created to meet

the exigencies of modern industrial life. This is in derogation of the common law, and supercedes state law in respect to circumstances and relations within its scope."

There was no basis for this ruling in the *Davey case*, that Davey came within the Federal Employer's Liability Act, because of the fact that he was not engaged in interstate commerce at the time he received his injuries, but if it be conceded that the *Davey case* was governed by the Federal Employers' Liability Act, as the opinion of the court indicates, then jurisdiction in the New Jersey Supreme Court would have been assured to Davey, by virtue of the terms of the Federal Employers' Act itself. Further, in the opinion in the *Davey case*, the court says:

"Is the common law now competent in New Jersey to give a remedy in the case under consideration?"

and rules that it was not, in view of the provisions of the Workmen's Compensation Act of New Jersey.

In *Resigno v. F. Jarka Co.*, 248 N. Y. 225, the New York Court of Appeals considered the New Jersey Workmen's Compensation Act, and, at page 234, said, per Cardozo, C. J.:

"The Appellate Division held that the remedy under that act had been supplanted by the adoption in New Jersey of a Workmen's Compensation Act, awarding the usual system of insurance to workmen subject to its provisions. We think the holding is erroneous. Resigno was injured while engaged in maritime work upon navigable waters. There was no power in

the Legislature of New Jersey to substitute a system of workmen's compensation for the right of action for damages that was his under maritime law. There was a like defect of power to substitute such a system for the then existing right of action for the use of his survivors. The point was expressly ruled in *Warren v. Morse Dry Dock & Repair Co.*, 234 N. Y. 445; 262 U. S. 756; 67 L. ed. 1217. * * * A different question would be here if the Legislature had attempted to repeal the death statute altogether. What is attempted was 'not to abolish every remedy, but to substitute one remedy for another.' *Warren v. Morse Dry Dock & Repair Co.*, supra. 'To the extent that the substitution of a new remedy is ineffective, the old one survives.' "

This clearly sets forth the contention Davey made, and though we are forced to concede that the New Jersey Court of Errors and Appeals ruled against this contention, we now urge that there is nothing in that opinion, or any of the opinions cited by the learned court below, that indicates that the *Davey case* would have, or could have, been the same if he had urged, and the court had considered, the Jones Act. Davey relied solely on the "saving clause" in the Federal Judiciary Act, whereas the present plaintiff-appellant relies on the Jones Act, and this is the first case brought before the New Jersey Court of Errors and Appeals where a maritime worker, other than a stevedore, bases his rights on that Jones Act.

The defendant below relied on the case of *Lawson v. N. Y. and P. R. S. S. Co.*, 148 La. 290-294, 86, So. 815, and while this opinion sustains the de-

defendant's present contention, and while a similar ruling was made by the Louisiana court, when the case of *Messel v. Foundation Company, supra*, was before it, it must be remembered that when the subsequent case, that of *Messel v. Foundation Company*, was reviewed by the United States Supreme Court, the Louisiana court was there overruled. The Foundation Company, in the certiorari proceedings before the United States Supreme Court, relied on, and cited, the case of *Lawson v. N. Y. and P. R. S. S. Co., supra*, in the same manner that the present defendant cites it, and in view of the decision of the United States Supreme Court, *the Lawson case* can no longer be quoted as authority. We quote again the significant language of Chief Justice Taft, in the case of *Messel v. Foundation Company*, 71 L. ed. 1135, at page 1139, 274 U. S., at page 434:

"The principles applicable to Messel's recovery, should he have one, must be limited to those which the admiralty law of the United States prescribes, including the applicable section of the Federal Employers' Liability Act (June 5th, 1920) incorporated in the maritime law by Section 33, Chap. 250, 51 Stat. at L. 988, U. S. C. Title 46, Sec. 688" (Jones Act).

However, it is unnecessary to contend, on this appeal, that the case of *Davey v. D. L. & W. R. R. Co., supra*, is unsound in any respect. We can, for the purposes of this appeal, accept it as absolutely binding upon this plaintiff-appellant. It is still sound law that the plaintiff-appellant has a right to proceed with this action in our New Jersey Supreme Court, under the Jones Act. As a ship's carpenter, he was a seaman within the purview of the Jones

Act, in the same manner that Messel, a boiler-maker's helper, was a seaman within that Act, and in the same manner that the plaintiff in the case of *Kuhlman v. W. & A. Fletcher Co.*, *supra*, who was a carpenter, was a seaman within that Act.

See *Kuhlman v. W. & A. Fletcher Co.*, 20 Fed. (2nd) 465, at 468, and cases there cited.

It is respectfully submitted that the New Jersey Supreme Court has jurisdiction to entertain the case at bar, and that the plaintiff-appellant is entitled to proceed in said court and receive the remedy afforded by the Jones Act, and that the learned court below was in error in denying him this right.

The plaintiff-appellant respectfully prays that the decision of the court below be reversed.

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

JOHN H. KELLEY,
of Counsel.

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New Jersey Court of Errors and Appeals

GEORGE ROGOSICH, Plaintiff-Appellant, <i>vs.</i> UNION DRY DOCK & REPAIR COM- PANY, Defendant-Appellee.	}	On Appeal from New Jersey Supreme Court, Hudson County.
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BRIEF OF DEFENDANT-APPELLEE.

Facts.

The statement of facts in the plaintiff-appellant's brief, while accurate, it seems to us, is not sufficiently complete and we, therefore, submit a brief statement thereof.

The defendant, Union Dry Dock & Repair Company is a corporation of the State of New Jersey and has for a great number of years been engaged in the business of shipbuilding and ship-repairing at the foot of Clifton Road and North River in the Township of Weehawken, Hudson County, New Jersey.

For a long time prior to December 9, 1925 the plaintiff was engaged by the defendant as a carpenter to perform services in the building of ships and in the repair of those which were dry-docked for that purpose.

On December 9, 1925, while plaintiff was performing his regular duties as a carpenter for the defendant in the repair of a certain ship then in dry-dock in navigable waters of the North River

he claims to have been injured through the negligence of defendant, its agents, servants or employees and for which injuries he has instituted this suit.

The defendant filed its answer in which it denied the negligence alleged, set up a number of separate defenses and also set up as an objection in point of law that the Court in which the action had been instituted had no jurisdiction to hear and determine the issues involved in said suit as they were of a maritime character arising out of the relation of master and servant of which the Federal Courts have exclusive jurisdiction.

* The matter was presented before the Honorable Henry E. Ackerson, a Circuit Court Judge sitting as a Supreme Court Commissioner, at the Court House, Jersey City, New Jersey, on June 7, 1929 on oral argument and briefs. On July 24, 1929 the Court made an order striking out plaintiff's complaint on the grounds alleged by the defendant (Case, p. 17). The sole question presented on this appeal is as to the propriety of the Court's action in striking the complaint.

Argument.

The plaintiff has argued the matter under two points but as the only question involved is as to the jurisdiction of the state court, we feel that the case can better be discussed by treating both points under one general argument.

Plaintiff concedes that the cause of action alleged in the complaint is based on a maritime tort.

The contention of defendant that the state court has no jurisdiction is based squarely upon the authority of *Davey v. D. L. & W. R. R. Co., et al.*, 143 Atl. 313 (Ct. of E. & A., Oct. 1928) (not yet officially reported) certiorari denied—*U. S. Sup. Ct. Adv. Op.*, 73 L. Ed. No. 8, p. 302; *March v.*

Vulcan Iron Works, 102 N. J. L. 337 (Ct. of E. & A., Feb. 1926); *Bockhop v. Phoenix Transit Co.*, 97 N. J. L. 514 (Ct. of E. & A., June 1922), to which cases more specific reference is hereinafter made. The plaintiff's attorneys in their brief generally admit the soundness of defendant's contention as to the holding in these cases but attempt to minimize their authority on the sole ground that the case at bar is distinguishable from them in theory.

It will be observed that plaintiff primarily relies in this case upon the decisions rendered in the case of *Messel v. Foundation Co.*, 274 U. S. 427, in the case of *Tuccillo v. John T. Clark & Son*, 104 N. J. L. 122 (Ct. of E. & A. 1927), in the case of *Kuhlman v. W. & A. Fletcher Co.*, 20 Fed. (2d) 465 and the case of *Resigno v. F. Jarka Co.*, 248 N. Y. 225 (N. Y. Ct. of App., May 1928) in order to sustain his contention that the state court has jurisdiction.

Counsel for the plaintiff states that the complaint in the *Davey* case was filed prior to the decision rendered in the *Messel* case and speaks as if that case had not been properly considered by this court when the opinion in the *Davey* case was rendered. The *Davey* case was decided by the Court of Errors and Appeals of this State in October, 1928. The decision in the *Messel* case was rendered in May, 1927 or almost a year and a half before the *Davey* case was decided and at which time the decision in that case was certainly available before the *Davey* case was taken to the Court of Errors. It must be observed, too, that the Jones Act was passed in 1920 and although plaintiff argues throughout his brief that the Jones Act was not considered by this court in the *Davey* case, we submit that since the facts as pleaded by plaintiff in that case brought the case within the statute, such statute is invoked without

referring specifically to it. We quote from the *Kuhlman* case as follows:

“Did he elect the action at law afforded him by the Merchant Marine Act of 1920 and institute it on the law side of the District Court? Although he made no formal or verbal election, we think he made one nevertheless; and for these reasons: First, he entitled his suit in that court; and second, consciously or not, he pleaded the statute in pleading his case. Distinguishing between counting on a statute and reciting a statute (as these words are familiarly known to pleaders), he, nevertheless, pleaded the statute by stating his case within its terms, though without mentioning it. *Gould's Pl.*, Ch. 3, Sec. 16, note 3. When the facts as pleaded brought the case within the statute, the statute is invoked without referring to it. *Luckenbach S. S. Co. v. Campbell* (C. C. A. 9th) 8 F. (2d) 223, 224.”

That the *Messel* case and the Jones Act were considered in the *Davey* case is proven conclusively by the fact that Mr. Justice Katzenbach in the course of the opinion distinguished the *Tucillo* case which applied and enforced the provisions of the Jones Act and also discussed the *Messel* case at length. It will also be noted that the complaint in the case now under consideration makes no mention of the Jones Act nor any other act. It merely states a cause of action for negligence arising out of a maritime tort. Plaintiff pleads no special statute and is following the same procedure as was followed in the *Davey* case. Plaintiff's attorneys, who also represented the plaintiff in the *Davey* case, relied upon the *Messel* case as authority for their contention in the *Davey* case that the court should entertain jurisdiction in that case. The plaintiff is again relying on the *Messel* case and is making the same argument

which was put forward in the *Davey* case with reference thereto. On this point it may not be out of place to state, using the opinion of the Court of Errors and Appeals as our authority, that the *Messel* case is not in point because of the peculiar features of the Louisiana Code which reserves to a plaintiff in addition to his compensation rights, the right to sue in the state courts. In this connection Chief Justice Taft, in his opinion written in that case, said at page 432:

“Sec. 2315 offers a remedy in the state court for any act whatever of man that causes damage to another and obliges him by whose fault it happened to repair it. That includes everything except what the Workmen’s Compensation Act bars from recovery under this general section. * * * Clearly, therefore, suit for such a tort is not excluded from the jurisdiction of the state court under sec. 2315 unless the federal law forbids.”

This section, it is true, is not a part of the Compensation Law of Louisiana but is still a subsisting part of the law of that State. The distinction between the law of Louisiana and that of the State of New Jersey, both with respect to the comprehensiveness of the Workmen’s Compensation Act and also reserved rights in so far as suits at common law are concerned, it seems to us, is sufficiently pointed out in the discussion of the *Messel* case as set forth in the *Davey* case, *supra*, at page 314:

“Prior to the enactment of the Workmen’s Compensation Act the law was that a maritime tort of the nature of the one sued on in the present case could be sued on at common law or in an admiralty court at the option of the injured party. *The Hamilton*, 207 U. S. 398, 28 S. Ct. 133, 52 L. Ed. 264. When, however, the Workmen’s Compensation Act was enacted an employee was deprived of his

common-law remedy in a state court, except where notice of refusal had been given by the employee according to the provision of the statute. *March v. Vulcan Iron Works, supra.*”

* * * * *

“Our attention has been called to the case of *Messel v. Foundation Co.*, 274 U. S. 427, 47 S. Ct. 695, 71 L. Ed. 1135. The conditions of the accident were similar to the case at bar. The plaintiff was neither a seaman nor a stevedore. He sued as at common law in the state court of Louisiana and was refused compensation or common-law relief on the ground that the tort was purely maritime. The case was taken to the United States Supreme Court. That court seized upon a provision in the Louisiana Code (Civ. Code La. art. 2315) reading, ‘Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it,’ and followed the Supreme Court of Louisiana (*Gray v. Dry Dock Co.*, 146 La. 826, 84 So. 109) in holding that this provision is tantamount to the common law and as the Louisiana Workmen’s Compensation Act (Act No. 20 of 1914) does not bar a suit for damages against another for a maritime tort there can be recovery for a maritime tort as at common law in a state court.

(2) Accepting this decision as binding upon this court if there be statutes of this state similar to those in Louisiana, we have examined the Workmen’s Compensation Act to see whether it is exclusive of other forms of remedy. Is the common law now competent in New Jersey to give a remedy in the case under consideration? An examination of the Workmen’s Compensation Act of this state discloses that Section 1 of the act has no application. Section 2, par. 7 of the act provides that, when employers and employees shall by agreement, either express or implied, or as hereinafter provided, accept the provisions of section 2 of this act, com-

compensation for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment shall be made by his employer without regard to the negligence of the employer according to the schedule contained in paragraph 11, etc. Paragraph 8 provides that such agreement shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation, or determination thereof, than as provided in section 2 of this act, and an acceptance of all the provisions of section 2 of this act, and shall bind the employee himself as well as the employer. Paragraph in effect provides that every contract of hiring shall be presumed to have been made with reference to the provisions of section 2. There is nothing so far as we can find in this act which contains a similar provision to the Louisiana Code hereinbefore recited. For these reasons we are of the opinion that the case of *Messel v. Foundation Co.*, *supra*, has no application to the present case."

Counsel for plaintiff on pages 6 and 7 of their brief have apparently misconceived the distinction between the law of Louisiana and the law of New Jersey as drawn by Justice Katzenbach in the *Davey* case. Counsel also states that the *Messel* case ruled that the Workmen's Compensation Act of Louisiana could not take away the equivalent of a common law remedy and argues from that, that the Compensation Act of New Jersey cannot deprive an employee of his common law remedy. This argument is wholly unsound, it seems to us, as it is clearly pointed out in the opinion in the *Davey* case and it also appears in the *Messel* case that the Workmen's Compensation Act does not destroy or invalidate Art. 2315 of the Civil Code of Louisiana. It should be noted that Louisiana is a code state operating under a civil code derived from the Napoleonic code, whereas New

Jersey has no such code and is a common law state. No better expression of the fact that Louisiana does not recognize and adopt the principles of the common law, can be found than appears in the opinion of Chief Justice Monroe in the case of *La Blanc v. City of New Orleans*, 138 La. 243; (Sup. Ct. La. 1915) 70 So. 212 in which he said:

“The state of Louisiana has never been governed by unwritten law, save in so far as that the common-law definitions of certain enumerated crimes, and its rules of procedure in the prosecution of crimes, offenses, and misdemeanors were adopted prior to the adoption of the first Constitution, and no system has even been here established which has, or could have, overlapped, prevailed against, or acquired an authority superior to that of, our written law, as contained in Constitutions, Codes, and statutes.”

* * * * *

“Since 1812 there have been seven Constitutions adopted in Louisiana, exclusive of that with which she became a state, and inclusive of one which is not yet two years old, and each has contained the same original prohibition against the adoption of ‘any system of laws’ especially directed, as is well known historically, against the ‘common-law’ and ‘equity’ systems established in the other states.”

The authority of the civil code is supreme in that state and where other statutes conflict therewith the code prevails. *Fuselier v. Police Jury of Parish of Iberia* (Sup. Ct. 1903) 109 La. 551; 33 So. 597. It is by virtue of Article 2315 of the Civil Code that the right of redress for personal injuries for wrongful acts is given. The Employer’s Liability Act of Louisiana, passed subsequent to the Civil Code, is in reality therefore supplemental to the Code in that it merely pro-

vides the manner in which redress as between master and servant is obtained. It must be further understood that where a statute and the Civil Code are not in conflict or irreconcilable, effect must be given to both Revised Statutes and Civil Code, as was said in *Fuselier v. Police Jury of Parish of Iberia, supra*:

“Undoubtedly, if such conflict exist, the authority of the Code prevails and Rev. St. §3369, would be without force of law to warrant what defendant jury did.

But we do not find an irreconcilable conflict. Section 3369 and the articles of the Code referred to are laws in *pari materia*.

Such laws are to be construed together, and so construed as to give, if possible, effect to each.”

It, therefore, clearly appears that from the system of jurisprudence which prevails in Louisiana that the right for personal injuries is derived from the Civil Code. The Employer's Liability Act of Louisiana, being supplemental to the Code, if that act is inapplicable, an employee, nevertheless, still retains his substantive rights under the Code in the same manner as any other individual in that State.

The case at bar has every element of a compensation case. The accident and injury to the servant arose out of and in the course of his employment. The New Jersey Compensation Act provides the servant with certain statutory remedies, and by its provisions is an exclusive remedy where a servant is injured by accident while in the service of his employer and bars any right in such case where the servant, without the existence of such statute, would have had a right of action at common law in the State courts. This is, of course, the feature in which the New Jersey law differs from the Louisiana law and is the

point so clearly analyzed in the part of the opinion in the *Davey* case above quoted. There is no question but that the present case would be one of which our compensation courts would take jurisdiction were it not for the Federal cases which prohibit such action on the ground that it would disturb the uniformity of the maritime law. Now the Jones Act does not and cannot compel State courts to entertain jurisdiction in all maritime matters. It merely permits the State courts to entertain jurisdiction of such cases, and if they do assume it, they must apply the maritime law. The principle involved is very analogous to that stated in *Rushworth v. Judges of Hudson Pleas*, 58 N. J. L. 97 (Supreme Court 1895). The question before the Court in that case was whether a New Jersey statute which provided for the regulation or conditions under which the State courts should act upon application for ^{naturalization} navigation was constitutional. The Supreme Court held that inasmuch as the State courts could entirely refuse jurisdiction they could impose any limitations or conditions in entertaining such jurisdiction. On this point Van Syckel, J., said:

“The conclusion to be drawn from these declarations of the Federal courts, I think, must be that Congress is without power to interfere with or control State courts, except in so far as the Federal courts have appellate jurisdiction. It is immaterial to consider whether the granting of naturalization is strictly a judicial function. If Congress has, without the consent of the State, the power to impose such a duty upon the State courts, there is no legal limit to the authority of the national legislature to burden the State courts with such a volume of business as to essentially impair their capacity to exercise the judicial functions for which they were created by the State.”

* * * * *

“Chancellor Kent, in his *Commentaries*, says that in *Houston v. Moore*, 5 Wheat. 1, the Supreme Court disclaimed the idea that Congress could authoritatively bestow judicial powers on State courts. In that case it is said that it is perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States, although the State courts may exercise jurisdiction in cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal courts.

The learned author declares that in the case last cited, the judges of the Supreme Court very clearly intimated that the State courts were not bound in consequence of any act of Congress to assume and exercise jurisdiction in such cases, and he regards the doctrine as well founded that Congress cannot compel a State court to entertain jurisdiction in any case. 1 *Kent Com.*, 399, 400, 402.”

* * * * *

“There has been no surrender by the states of the right to establish their own courts, to define and limit their jurisdiction and functions, and to regulate and control them in all respects, except as to appellate jurisdiction, and as to subjects within the exclusive jurisdiction of the United States.”

This case was cited and followed with approval in *Freeholders of Passaic v. Slater*, 85 N. J. L. 621 (Ct. of E. & A. 1914).

The courts of the state of New Jersey have a right to say what class of cases they will hear where Federal law is to be applied and they have consistently held by the *Bockhop* case, the *March* case and the *Davey* case that they would not entertain jurisdiction where employees who were *mechanics* were injured through accident sustained on navigable waters. This, of course, does not mean that such an employee is deprived of a

right of action to recover damages. It merely means that he must seek the Federal Courts for his remedy, as in fact has already been done by this plaintiff by the institution of an action of libel. In the *Davey* case the Court of Errors and Appeals specifically distinguished the *Tuccillo* case on the ground that the plaintiff in that case, as a stevedore, was a seaman and determined that Davey, being a *mechanic* was not a seaman. The Court, therefore, decided that the Seaman's Act, popularly known as the Jones Act, was not applicable. It has in order held that a painter, boilermaker and a pipefitter, as in the *Davey* case had no right of action in the state courts where their cause of action was based on a maritime tort. The only exception, therefore, is in the case of a stevedore and members of a ship's crew. We further contend that the only reason that a stevedore is considered by the courts of New Jersey to be a seaman as stated by the Court below is because they do the work which was formerly done by members of a ship's crew. Yet it is interesting to note that the same stevedore, were he injured on the dock would be relegated to his rights under the State compensation law. *State Industrial Commission v. Nordenholt Company*, 259 U. S. 263.

In so far as the *Kuhlman* case is concerned the Court will, of course, notice that the suit was instituted in the Federal Court so that there is no question involved in that case as to the jurisdiction of the State Court. The two questions involved were:

First: Did the plaintiff have a right after suit was instituted on the law side of the Court to transfer it to the admiralty side thereof?

Secondly: Did the Court have jurisdiction because of the lack of diversity of citizenship?

The United States District Court Judge before whom the case was tried refused to allow the action to be transferred to the admiralty side of the Court and on that point he was sustained by the Circuit Court of Appeals. He, however, nonsuited the plaintiff on the ground that there was no diversity of citizenship, which the Circuit Court of Appeals held to be error. It is true that Judge Wooley in his opinion discussed the question of the jurisdiction of State courts in such matters, but we contend this is merely dicta and we further contend that even if it were a direct holding, that this Court not only would not be obliged to follow it in view of its own direct contrary expression, but on the other hand would be obliged to render its decision in accordance with the law established by this court.

Plaintiff also, in his memorandum cites the cases of *Haverty v. International Stevedoring Co.*, 272 U. S. 50; *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479, and *Engel v. Davenport*, 271 U. S. 33. We wish to call the attention of the Court to the fact that the *Haverty* case was an action by a stevedore. The plaintiff in that case performed services which were ordinarily performed by a member of the ship's crew and for that reason the court held that plaintiff was a seaman under the Jones Act, saying in part:

“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. 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.”

It will be noted, however, that there was no question raised in that case as to the jurisdiction of the State courts.

The case of *Great Lakes Dredge & Dock Company v. Kierejewski, supra*, was an action instituted in the Federal Court and on writ of error to the United States Supreme Court the "sole question" determined by that Court was whether the District Court had jurisdiction to entertain a libel. The Court held that the District Court had jurisdiction inasmuch as the cause of action arose out of a maritime tort. The plaintiff in the case of *Engel v. Davenport, supra*, was a member of the ship's crew so that in that case there was no doubt but that he was a seaman. The United States Supreme Court held that the State court had concurrent jurisdiction with the Federal courts in that case but did not hold that the State court was required to take jurisdiction.

The opinion in the *Tuccillo* case was also written by Justice Katzenbach so that he was thoroughly familiar with the phase of the law involved in maritime torts when he wrote the opinion in the *Davey* case. This latter case, together with the *March* and *Bockhop* cases also indicates clearly that this Court is unwilling to extend the definition of seaman so as to include *mechanics* who perform no service which is customarily performed by members of a ship's crew.

In attempting to further distinguish the *Davey* case the plaintiff says that the latter case was instituted under the Federal Employer's Liability Act and, therefore, is not in point. The plaintiff in the *Davey* case was attempting to recover damages. It was not merely a suit for wages, maintenance and cure and there would have been no point in attempting to bring a suit under the Federal Employer's Liability Act to recover damages for a maritime tort except that the Jones

Act in aid of redress for seamen made such act a part of it and without which no recovery for damages could have been had thereunder. Furthermore, it cannot be denied, that the only remedy which would allow a recovery for damages, was a suit brought under the Jones Act which, by its terms made a part thereof the Federal Employer's Liability Act. Without this Act and up to the time it was passed a seaman could only recover his wages and his expenses for maintenance and cure except in cases where he was subjected to risks incidental to an unseaworthy ship. *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; *Kuhlman v. W. & A. Fletcher Co.*, *supra*. In the case at bar an attempt is made to recover damages and not merely wages, maintenance and cure which is the contention made by plaintiff in the *Davey* case, so that in both cases the plaintiff is pursuing the same statutory remedy.

The last case cited by plaintiff is that of *Resigno v. F. Jarka & Co.*, 248 N. Y. 225. An examination of this case will disclose that it is one involving a stevedore and was decided before the decision of this court was rendered in the *Davey* case. The suit was instituted on two theories, *first* that plaintiff could recover under the so-called Jones Act; and *secondly*, if no recovery could be had under that Act then he was entitled to recover under the authority of a New Jersey Statute P. L. 1848 p. 151 which gave a right of action for damages where negligence results in death. The appellate court decided that plaintiff could not recover against defendant under the Jones Act as that act was limited to seamen at work upon domestic vessels and afforded no relief to a stevedore performing duties on a foreign vessel. The court did hold that the stevedore could recover under the New Jersey law. This holding of the New York Court that a stevedore was a seaman is, of

course, nothing more than the holding in the *Tuccillo* case in New Jersey. Counsel for plaintiff would seem to imply that the death act of New Jersey could be availed of even though the circumstances of the death were such as to bring the action within the Compensation Act. This is obviously not so. Furthermore, the case at bar is not a death action and it seems to us for that reason that the case has no application. Even if we were to assume, however, that the decision differed from the New Jersey law, we cannot see how it could disturb the law so explicitly laid down on the subject by Justice Katzenbach in this Court in the *Davey* case. In the *Resigno* case it is also interesting to note the language of Crane, J., in a concurring opinion in reference to stevedores as seamen, which is as follows:

“* * * In fact he is not a seaman, but merely classed as such to come within the benefits of the Jones Act. *Resigno* was a resident of New Jersey, worked in New Jersey, and was employed by a domestic corporation doing stevedoring work. He never formed or became part of the crew of any ship, nor was he at the time in question employed by the ship or its owners. That he was classed as a seaman was due entirely to the intention of Congress as read into this provision of section 33, passed for the purpose of advancing the interests of the Merchant Marine, and to benefit American seamen. His work was so closely connected with shipping, and became so necessary to the loading and unloading of vessels, that an act passed in the interests of American seamen could hardly have been intended to exclude him. This is the ruling in the *Haverty* case. *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157. When Mr. Justice Holmes writes: ‘It is true that for most purposes, as the word is commonly used, stevedores are not “seamen”’. But

words are flexible', this is merely the justice's stylistic way of saying that the Act of June 5, 1920, was intended to include longshoremen among the class to be benefited by the act. The work of longshoremen was described in *Atlantic Transport Co. of West Virginia v. Imbrovek*, 234 U. S. 52, 62, 34 S. Ct. 733, 735, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, as follows:

'Formerly the work was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners".'

Excerpts from the New Jersey cases herein referred to, it seems to us, adequately support the view that the plaintiff does not come within the provisions of the Jones Act nor is he saved any remedy under the saving clause of the Judicial Code but that his right of action is under the exclusive jurisdiction of the Federal courts. As was said in the *Davey v. D. L. & W. R. R. Co.*, 143 Atl. 313, 314:

"Later the case of *Tuccillo v. John T. Clark & Son*, 139 A. 58 (not as yet officially reported), was decided in this Court. The right of the plaintiff to maintain his action was upheld. The opinion, however, expressly states that it rests upon the plaintiff being a stevedore. A stevedore is under the decision of the Federal courts held to be a seaman. To seamen a remedy is given by the Seaman's Act in either the admiralty or State courts. This case, because of these special features, has no bearing upon the case under review."

* * * * *

"* * * The appellant contends that in the Judicial Code of the United States, as contained in subdivision 3 of section 991 (U. S. C. S. 1916, Annotated, vol. 1, p. 764 (28 U. S. C. A., §41 (3))), by which Federal

courts are given exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, appear the words, 'Saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it,' and that these words leave open the common-law jurisdiction of the Supreme Court to entertain the case at bar. The difficulty we have with this argument is that the Federal Employer's Liability Act (45 U. S. C. A., §§51-59) under which the case at bar was instituted, is not a common-law remedy, but a pure statutory remedy created to meet the exigencies of modern industrial life. It is in derogation of the common law and supercedes State law in respect of the circumstances and relationships within its scope. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C 451, Ann. Cas. 1917E, 900."

The plaintiff in the above case, relying on the *Messel* case applied for a writ of certiorari to the United States Supreme Court which was denied. *U. S. Sup. Ct. Adv. Op.*, 73 L. Ed., No. 8, p. 302.

March v. Vulcan Iron Works, 102 N. J. L. 337, 340. This was a compensation case in which a workman employed on a boat on navigable waters was awarded compensation by the Workmen's Compensation Bureau. The judgment was affirmed by the Supreme Court but was reversed by the Court of Errors and Appeals in an opinion by Justice Parker, in which he said:

"To the suggestion that, if there be no state jurisdiction of the matter under the Workmen's Compensation Act, the petitioner may be remediless, unless she can show negligence, the answer is that, until the Compensation Acts were put on the statute book, the mere occurrence of an accident to a servant gave no right of action at common law against the master, nor did even the negligent act of a fellow servant, except in certain special

cases; but that fact cannot avail to enable a state court, under a workmen's compensation statute, *or any other statute, to intrude upon a field of exclusive federal jurisdiction.*"

Also in *Bockhop v. Phoenix Transit Company*, (Ct. of E. & A., N. J., 1922) 97 N. J. L. 514.

This case, it seems to us, is directly in point. The plaintiff was employed by the defendant as a painter. While painting a ferry boat, used for transportation of passengers and vehicles across the Hudson River, which at that time was moored to a dock in the Township of Weehawken, the boat was struck by a lighter operated by the Erie Railroad Company, causing injuries to the plaintiff for which he brought suit in the New Jersey Supreme Court to recover damages. A motion was made by the plaintiff to strike out the answer filed by defendants and the defendant moved before Mr. Justice Swayze at the Circuit to strike out the complaint on the ground that the accident was of a maritime character of which the Federal Courts had exclusive jurisdiction. Mr. Justice Swayze struck out the complaint on the ground that the State court had no jurisdiction. This action was affirmed by the Court of Errors and Appeals.

See also *Lawson v. N. Y. and P. R. S. S. Co.*, 86 So. 815 (La. Sup. Ct.).

At this point it may not be amiss to state, as this court is no doubt aware, that the question involved in this suit as to jurisdiction, is, outside of this case and outside of such cases, if any, which may now be pending in the State courts, now purely academic. Congress in its endeavor to obtain some uniform procedure in such cases, in 1927 passed the *Longshoremen's and Harbor Worker's Compensation Act*, U. S. C. A. Title 33 Sec. 901 (March 4, 1927, c. 509) under which all disputes between master and servant involving

mechanics and general harbor workers performing work on navigable waters, such as in the case at bar, are tried before a special tribunal known as the United States Employees Compensation Commission which handles such matters in the same manner as cases are disposed of under our Workmen's Compensation Act.

Conclusion.

Under the Federal Constitution the judicial power is extended to cases of admiralty and maritime jurisdiction. By virtue of this power, the United States Supreme Court has prohibited the application of State compensation acts. The State compensation law excludes all common law remedies for accidents arising out of and in the course of the employment.

The question then presented is, shall the State courts take jurisdiction.

The case at bar is directly controlled by the case of *Davey v. D. L. & W. R. R. Co. et al.*, *supra*. The facts are identical in that in both cases the plaintiff is a mechanic and the cause of action in each case arises out of a maritime tort. Furthermore, the pleadings in both cases present the same question for determination by the Court. By its decision, this Court has repeatedly and unequivocally laid down the principle that State courts will not entertain jurisdiction of a cause of action arising out of a maritime tort involving the relation of master and servant. The only exception to this rule is in the case of a stevedore, as in the *Tuccillo* case. In that case this Court approved the action of the Supreme Court in entertaining jurisdiction only because of the fact that the plaintiff was performing services which were formerly performed by a member of a ship's crew.

Our courts have consistently held that a *mechanic* is not a seaman and had no right to maintain an action in the State courts for a maritime tort, but has left him to his remedy in the Federal courts. A State court has the indisputable right to determine for itself as to what causes of action not exclusively of Federal jurisdiction arising under the Federal Constitution it may take cognizance. *Rushworth v. Judges of Hudson Pleas, supra.*

The cases cited by plaintiff are distinguishable and are not binding on this Court.

The decisions in the cases above quoted in so far as the courts of this State are concerned are uniform and clear. We can see no legitimate reason why this Court should, at this time, depart from authority so definitely established.

We respectfully submit that under the undoubted authorities the action of the Court below in striking out plaintiff's complaint in the case at bar should be affirmed.

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