

# Washington Law Review

---

Volume 1 | Number 2

---

10-1-1925

## May an Action for Damages Be Brought in a State Court by a Seaman Injured in the Course of His Duty, or by His Personal Representatives in Case of His Death, under Section Thirty-Three of the Jones Act?

Clifford M. Langhorne

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the Admiralty Commons

---

### Recommended Citation

Clifford M. Langhorne, Notes and Comments, *May an Action for Damages Be Brought in a State Court by a Seaman Injured in the Course of His Duty, or by His Personal Representatives in Case of His Death, under Section Thirty-Three of the Jones Act?*, 1 Wash. L. Rev. 141 (1925).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol1/iss2/8>

This Notes and Comments is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [lawref@uw.edu](mailto:lawref@uw.edu).

him in indeterminate language, is greater than the legal interest devised to the trustee, the trust estate will be enlarged in the trustee to answer all the purposes of the trust. If the carrying out of the purposes of the trust require that the trustee shall take a fee, equity will create a fee simple in him by implication without the use of the word 'heirs.'

It will be seen that the executor or administrator was impliedly a temporary trustee for a specific purpose, who was to hold the property in the interim until the testator's intention could be effected. Could not the estate vest in the executor or even the devisee wife as trustee, until the expiration of the forty-eight hours?

A life estate could be created by necessary words, and, to a restricted degree, effectuate the purpose of the testator. But this would be very unsatisfactory in case the wife survived the testator for any considerable time, for she would be deprived of the privileges of the estate in fee simple.

Stephen Darden Brown.

MAY AN ACTION FOR DAMAGES BE BROUGHT IN A STATE COURT BY A SEAMAN INJURED IN THE COURSE OF HIS DUTY, OR BY HIS PERSONAL REPRESENTATIVES IN CASE OF HIS DEATH, UNDER SECTION THIRTY-THREE OF THE JONES ACT?—Section 33 of the Jones Act,<sup>1</sup> amending Section 20 of the Seamen's Act of 1915,<sup>2</sup> gives to a seaman injured in the course of his duty, or his personal representatives in case of his death, the right to proceed at his election under the provisions of the Employers' Liability Act.<sup>3</sup> The last sentence of the Jones Act, it will be noticed, reads as follows: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The question is, what is the meaning of the words "the court of the district"? Did Congress mean the *federal* court or did it intend

---

<sup>1</sup> Sec. 33 Jones Act (Passed June 5, 1920). "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in the 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 railroad 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." 41 Stats. at Large 1007, U. S. Comp. Stats. Ann., 1923 Supp. §8337a, Fed. Stats. Ann., 2nd ed., 1920 Supp. p. 227.

<sup>2</sup> Fed. Stats. Ann., 1916 Supp. p. 251.

<sup>3</sup> 35 Stats. at Large 66; 36 Stats. at Large 291, U. S. Comp. Stat. 1916, vol. 8, §8662.

to give jurisdiction to the state courts also? This question has been accompanied by another, equally important, which concerns the right of the defendant to remove an action brought under the act in question from the state court to the federal court according to Section 28 of the Judicial Code.<sup>4</sup> This right of removal was expressly refused to those defending an action under the Employers' Liability Act in a state court,<sup>5a</sup> so the difficulty here is to determine whether the language of Section 33 shows an intention on the part of Congress to embrace that provision. While there are a number of decisions touching these questions they are not all in harmony, so it will be the purpose here to set forth the gist of these holdings and to attempt to draw a conclusion as to their probable effect.

The first case to appear was that of *Wenzler v. Robin Line S. S. Co.*, decided December 27, 1921. The question was whether the plaintiff had the right to remand the cause to the state court from whence the defendant had secured its removal. As to this right of removal it was held that Section 33 referred only to the rights and remedies of the plaintiff, and as the removal provision of the Employers' Liability Act applied only to the defendant it could not be available. It was also held that the words of the last sentence of Section 33, above quoted, referred to district courts only and vested exclusive jurisdiction therein.<sup>6</sup>

The authority of the *Wenzler* case was followed exactly by the case of *Malia v. Southern Pacific Co.*

The case of *Petterson v. Hobbs, Wall & Co.*<sup>8</sup> concludes that the state courts and federal courts have concurrent jurisdiction and bases its conclusion upon another section of the Jones Act, not connected with Section 33, which provides concurrent jurisdiction.<sup>9</sup> The reasoning is that the intention of Congress appears in the words of that section and that the same should be applied to Section 33. The final conclusion is, however, that the defendant has the power of removal to the federal courts, so no appreciable divergence from the *Wenzler* case was made.

<sup>4</sup> (Amended Jan. 20, 1914) U. S. Comp. Stats. 1916 vol. 1, §1010.

<sup>5a</sup> U. S. Comp. Stat. 1916, vol. 8, §8662.

<sup>6</sup> 277 Fed. 812 (Decided by Judge Cushman, Western District of Washington, Dec., 1921).

<sup>8</sup> Judge Cushman there said: "If the removal statute be in any sense a remedy, as distinguished from a right, it is then the remedy of the defendant. But section 20 (Section 33 of Jones Act), in speaking of rights and remedies, is not referring to those of the defendant, but to the rights and remedies of the plaintiff at common law."

The court went even further in its statement and held that: "That portion of section 8662 and section 28 denying removal does not modify the common law in cases of personal injuries. It modifies the statute law of removal."

<sup>7</sup> 293 Fed. 902 (N. Y., July, 1923).

<sup>9</sup> 300 Fed. 811 (Cal., Nov. 10, 1923).

<sup>9</sup> U. S. Comp. Stats. Ann. Supp. 1923, §8146¼ M. M. M.

The next case in point of the date of the decision was that of *Reyes v. U S. Shipping Board Emergency Fleet Corp.*,<sup>10</sup> an action for the death of a seaman. Judge Garvin makes a distinction in the wording of Section 33, where, in providing a remedy for personal injury and for death, reference is made to the Employers' Liability Act. The statute reads in regard to personal injury: "and in such actions all statutes of the United States *modifying or extending the common law right or remedy* in cases of personal injury to railway employes shall apply."

In regard to actions for death, the statute reads: "All statutes of the United States *conferring or regulating the right of actions* for death in the case of railway employes shall apply"

In short, it is held that the intention of the framers of the act was to include the removal provision of the Employers' Liability Act only in cases where the action was one for the death of a seaman.

In regard to the *Wenzler* and the *Malia* cases, *supra*, the court says: "Whether or not (they) were correctly decided, each is a case involving personal injury, not death."

District Judge Neterer, in our own Ninth District, decided the case of *Lorang v. Alaska S. S. Co.*<sup>11</sup> The holding in this case supported that of the *Reyes* case, *supra*. It was said, in substance, that inasmuch as the statute extended to seamen "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employes", and as the removal provision "is not of a remedy" and "is not a vested right", that such removal provision could not be available. This case cited as authority *Panama R. Co. v. Johnson*, which will be discussed later.

There are three cases holding contrary to those previously touched upon, all of which were decided by District Judge Hand of New York. The first of these is *Beer v. Clyde S. S. Co.*<sup>12</sup> It was there held that no distinction existed between the wording in regard to actions for death and actions for personal injuries, and that the statute fairly included by reference the removal provision of the Employers' Liability Act. The next two cases, *Herrera v. Pan-American Petroleum & Transport Co.*,<sup>13</sup> and *Martin v. U S. Shipping Board Emergency Fleet Corp.*,<sup>14</sup> reiterate the doctrine previously declared in the *Beer v. Clyde* case. The decision in the *Martin* case goes to a greater length, Judge Hand basing his conclusion upon the historical development of Admiralty law respecting actions for death and personal injury.<sup>15</sup>

In the decisions above set forth, while they deal with the jurisdiction of the state courts over actions brought under Section 33, the con-

<sup>10</sup> 299 Fed. 957 (N. Y., Feb. 13, 1924).

<sup>11</sup> 298 Fed. 547 (Wash., May 14, 1924).

<sup>12</sup> 300 Fed. 561 (N. Y., Dec. 3, 1923).

<sup>13</sup> 300 Fed. 563 (N. Y., May 22, 1924).

<sup>14</sup> 1 Fed. (2nd) 603 (N. Y., June 6, 1924).

<sup>15</sup> Judge Hand says: "No civil right of action existed at common law in the case of death from wrongful act. Such a cause of action was first granted by Lord Campbell's Act, and has subsequently been carried forward by various

clusions are based upon the opinions of the various judges as to whether or not the removal provision of the Employers' Liability Act was intended to be included therein. This question is also determined in a number of other cases, the conclusions of which are based upon the construction of the last sentence of Section 33, above set out. The *Wenzler* case, *supra*, touched upon this question.

The conclusion reached in the *Wenzler* case was concurred in by the later case of *Nox v. U. S. Shipping Board Emergency Fleet Corp.*<sup>16</sup> Judge Hotchkiss says: "But the act says nothing at all about state courts. Its words are as above quoted, and the maxim '*Expressio unius est exclusio alterius*' would approve of an interpretation excluding the state courts from jurisdiction. This interpretation accords with such decisions as have already been made in federal courts."

The case of *Prieto v. U. S. Shipping Board Emergency Fleet Corp.*<sup>17</sup> occurred at the same time as the *Nox* case and concurs in its holding. Judge Dike states that while the wording of the statute is sufficient to indicate or designate a District Court of the United States, it is insufficient as an adequate description of a state court. It is stated that Congress provided, in the Employers' Liability Act, for concurrent jurisdiction under that act, and if the same was intended in the Jones Act, the same provision would have been made.

A very decided dissent to this view occurred in *Tammis v. Panama R. Co.*,<sup>18</sup> where Judge Heely states, in effect, that there is nothing which should prevent the exercise of state authority over this subject, for the reason that seamen are given the same rights as have been delegated to interstate railway employes, and that the rights of the latter are constantly before the state courts for adjudication. An express dissent to the *Wenzler*, *Nox* and *Prieto* cases appears in the case of *Lynott v. Great Lakes Transit Corp.*<sup>19</sup> While the use of the words "court of the district", Judge Sears remarks, must necessarily be construed to mean the District Court of the United States, it does not impliedly exclude the long recognized and established jurisdiction of the state courts in such matters. It was held that the words in question provide the jurisdiction of the United States courts when the aid thereof is sought, but that the jurisdiction of the state courts remains as heretofore to apply the common law remedy

A new light is thrown upon this question by the decisions of District

---

statutes in all common law jurisdictions. Section thirty-three of the Jones Act, in dealing with death cases, therefore, appropriately, if not necessarily, describes the Federal Employers' Liability Act as a statute 'conferring or regulating the right of action for death in the case of railway employes. In the case of personal injuries to railway employes, the remedy already existed at common law. There can, however, be no reasonable ground urged for forbidding removal in death cases which does not apply to personal injury cases.'

<sup>16</sup> 193 N. Y. S. 340 (Jan. 2, 1922).

<sup>17</sup> 117 Misc. Rep. 703 193 N. Y. S. 342 (Jan., 1922).

<sup>18</sup> 202 App. Div. 226, 195 N. Y. S. 587 (June 29, 1922).

<sup>19</sup> 202 App. Div. 613, 195 N. Y. S. 13.

Judge Campbell, Eastern District of New York, in three cases, *Caceres v. U. S. Shipping Board Emergency Fleet Corp.*,<sup>20</sup> *Wienbroer v. U. S. Shipping Board Emergency Fleet Corp.*,<sup>21</sup> and *Villard v. U. S. Shipping Board Emergency Fleet Corp.*,<sup>22</sup> all being handed down upon May 29, 1924. It was held that the provision of Section 33 under consideration related not to the general jurisdiction of the court, but only to venue. In the opinion of Judge Campbell the jurisdiction of the state courts under the act was not thereby divested but remains concurrent with that of the federal courts.<sup>23</sup>

*Johnson v. Panama R. Co.*<sup>24</sup> is the most important case dealing with this subject. There were two questions involved in this action, namely, first, did the federal court have jurisdiction even though the parties were residents of the same state, and second, did the defendant waive his right to object to the venue because of his failure to appear specially for that purpose. The court held that Section 33 of the Jones Act gave federal courts jurisdiction even though the parties were residents of the same state. As to the second point it was held that the wording of the last sentence of the act merely prescribed the venue should the action be brought in the federal court, and did not provide the jurisdiction of actions brought under the act. The court said. "It follows that, as defendant failed to appear specially and move to dismiss, it has waived its right to object to the venue." This case was affirmed in the Circuit Court of Appeals,<sup>25</sup> and also by the Supreme Court of the United States.<sup>26</sup>

<sup>20</sup> 299 Fed. 968.

<sup>21</sup> 299 Fed. 972.

<sup>22</sup> 1 Fed. (2nd) 570.

<sup>23</sup> Judge Campbell, in the *Wienbroer* case, stated: "In my opinion Congress did not, by the words 'the court of the district in which the employer defendant resides or in which his principal office is located', mean the federal court district when the action is brought in the state courts, nor the state judicial district when the action is brought in the New York state courts, but did mean, when the action is brought in the New York state courts, the county in which the defendant resides or has his principal office as the county is in reality the district for the purpose of determining where the actions are to be brought."

<sup>24</sup> 277 Fed. 859 · affirmed on appeal and on rehearing, 289 Fed. 964 (N. Y., Oct. 27, 1921), affirmed 264 U. S. 375, 44 S. C. Rep. 391, 68 Law Ed. 748 (Apr. 7, 1924).

<sup>25</sup> 289 Fed. 964 (Feb. 15, 1923, May 14, 1923).

<sup>26</sup> The court there said, in a short resume of the historical basis of such statutes as the one in question: "Beginning with the Judiciary Act of 1789 Congress has pursued the policy of investing the federal courts with a general jurisdiction expressed in terms applicable alike to all of them and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued, such as the district of which he is an inhabitant or in which he has a place of business—the purpose of the venue provisions being to prevent defendants from being compelled to answer and defend in remote districts against their will. This policy was carried into the Judicial Code, and is shown in sections 24 and 58 (Comp. Stats. §§ 991 and 1033), one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provisions now before us with those sections, and in the light of the policy carried into them, makes it rea-

*Engle v. Davenport*<sup>27</sup> illustrates the effect of the *Johnson* case. The action was first brought in a state court and on appeal<sup>28</sup> the Supreme Court of California held that the lower court had no jurisdiction. The decision in the *Johnson* case was handed down the next month, and this action was again brought in the state court and judgment recovered for the plaintiff. This was affirmed by the Supreme Court of the state.<sup>29</sup> The result of this latest development is clear, and the interpretation of the act now seems to be definitely settled. It may be said, therefore, that Section 33 of the Jones Act provides that the plaintiff may bring his action thereunder in a state court, if he so elects, regardless of the fact that there is a diversity of citizenship, and the defendant may not remove the cause to the federal court.<sup>30</sup> The same is true if the plaintiff elects to bring his action in the federal court, both he and the defendant being residents of the same state.<sup>31</sup>

Clifford M. Langhorne.

## RECENT CASES

CARRIERS—STREET RAILWAYS—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—VIOLATION OF ORDINANCE.—A, who was familiar with the location of the tracks and loading platform at the point where the accident occurred, stood waiting for a street car in such a position that she was struck and killed by the overhanging side of defendant's passing interurban car. *Held*. (1) The pedestrian is charged with notice of the extent of the vehicle's overhang; failure to warn the pedestrian of the overhang does not constitute negligence; and the train crew may presume that the person will exercise ordinary prudence and avoid the vehicle; (2) the fact that the car was operated at a rate of speed in excess of that permitted by a city ordinance does not charge the defendant with negligence unless the speed was the proximate cause of the injury *Beach v. Pacific Northwest Traction Co.*, 35 Wash. Dec. 184, 237 Pac. 737 (July, 1925).

(1) Undisputed evidence showed that the illuminated car was visible for three hundred yards down a straight track, and that a warning gong was

---

sonably certain that the provision is not intended to affect the general jurisdiction of the District Courts as defined in section 24, but only to prescribe the venue for actions brought under the new act of which it is a part."

<sup>27</sup> 288 Pac. 710 (Aug. 25, 1924).

<sup>28</sup> 1924 A. M. C. 758 (Mar. 25, 1924).

<sup>29</sup> The court said, after discussing the *Johnson v. Panama R.* case: "It follows that if this provision merely defines the 'venue' of an action, the theory that such provision conferred 'jurisdiction' upon a particular court is no longer tenable; and, in the absence of any other provision purporting to divest of jurisdiction, those courts, both state and federal, which prior to the enactment of the Merchant Marine Act had jurisdiction of such actions, such jurisdiction may be presumed to continue."

<sup>30</sup> See: *Ullrich v. N. Y., N. H. & H. R. R. Co.*, 193 Fed. 768 (1912) *De Atley v. Chesapeake & O. Ry. Co.*, 201 Fed. 591 (1912) *Jones v. Kansas City Southern Ry. Co.*, 137 La. 178, 68 So. 401 (1915) *Pankey v. Atchison, T. & S. F. Ry. Co.*, 180 Mo. App. 185, 168 S. W. 274 (1914).

<sup>31</sup> See: *Panama R. Case*, *supra*.