

EMMIE FAIR MURPHY, and REXFORD  
E. MURPHY, JR., and MARSHA MURPHY,  
as minors, suing by their next  
friend and mother, EMMIE FAIR  
MURPHY,

Plaintiffs,

vs.

LOUTSVILLE AND NASHVILLE RAIL-  
ROAD COMPANY, a corporation,  
and GARY ROBERTS,

Defendants.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAW

NO. 1434

Come the plaintiffs and appeal to the Supreme Court  
of Alabama from the judgment in the above styled cause on  
the 4<sup>th</sup> day of March, 1952, granting plaintiffs a  
non-suit with the right to review by the Supreme Court of  
Alabama on the record, and dismissing the plaintiffs' said  
suit at the plaintiffs' costs.

J. B. Blackburn  
John L. McCallister  
Attorneys for the Plaintiffs

We acknowledge ourselves as security for all the costs of  
the appeal taken to the Supreme Court by the said Emmie Fair  
Murphy, and Rexford E. Murphy, Jr., and Marsha Murphy, as  
minors, suing by their next friend and mother, Emmie Fair  
Murphy, plaintiffs in the above entitled cause, from the  
judgment rendered in the above styled cause on the 4<sup>th</sup>  
day of March, 1952, granting plaintiffs a non-suit and  
the right to review by the Supreme Court of Alabama on the  
record, and dismissing plaintiffs' said suit at the plain-  
tiffs' costs.

WITNESS our signatures this the 6 day of March  
1952.

Fidelity and Deposit Company of Maryland

Attorney in Fact

Secretary

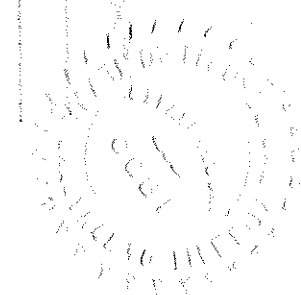
(SEAL)

approved this 6<sup>th</sup> day  
of March 1952 -  
A. J. French, Clerk.

FILED

MAR 6 1952

ALICE J. DUCK, Clerk



EMMIE FAIR MURPHY, and REXFORD E.  
MURPHY, JR., and MARSHA MURPHY, as  
minors, suing by their next friend,  
and mother, EMMIE FAIR MURPHY,

Plaintiffs

versus

LOUISVILLE AND NASHVILLE RAILROAD  
COMPANY, a corporation, and GARY  
ROBERTS,

Defendants

:  
: IN THE CIRCUIT COURT OF  
:  
: BALDWIN COUNTY, ALABAMA  
:  
:  
: NO. \_\_\_\_\_  
:  
:  
:

### DEMURRER

Come the defendants in the above styled cause, separately and severally, and demur to Counts 3, 4, 5, 6, 7, 8, 9, and 10 of the amended complaint, separately and severally, and as separate and several grounds of such demurrer, assign the following:

1. Because the allegation that the defendant Gary Roberts "negligently failed to open said railroad bridge" is a mere conclusion of the pleader.

2. Because the allegation that the defendant Gary Roberts "negligently failed to open said railroad bridge" attempts to aver the quo modo of the alleged negligence, but the facts averred do not show negligence as a matter of law.

3. Because the allegation that the defendant Gary Roberts "negligently failed to open said railroad bridge and allow or permit a motor launch" to pass through said bridge is a mere conclusion of the pleader.

4. Because the allegation that the defendant Gary Roberts "negligently failed to open said railroad bridge and allow or permit a motor launch" to pass through said bridge constitutes an effort to plead the quo modo of the alleged negligence, but the facts set forth do not constitute negligence as a matter of law.

5. Because there is no allegation that proper warning of the approach of said motor launch to said railroad bridge was given by said motor launch.

6. Because said count fails to set forth any facts showing any duty on said Gary Roberts to open said railroad bridge.

7. Because, for aught that appears, said motor launch did not advise said Gary Roberts of its approach in time to permit said railroad bridge to be opened.

8. Because it does not appear that said motor launch was seeking passage through the draw span of said railroad bridge.

9. Because said count fails to aver any facts constituting negligence on the part of the defendants, or either of them.

10. Because said count fails to aver any facts showing that the decedent was killed as a proximate result of negligence on the part of the defendants, or either of them.

11. Because said count fails to aver facts showing any liability of the defendants, or either of them.

12. Because said count fails to show that the plaintiffs have any right to prosecute this suit.

13. Because this court has no jurisdiction over this alleged cause of action.

14. Because there is no statute of the State of Alabama authorizing the prosecution of this suit by the plaintiffs.

15. Because the Act of the Legislature of the State of Alabama, approved October 9, 1947 (General Acts of Alabama, 1947, page 484) does not authorize the prosecution of this suit by the plaintiffs.

16. Because the Act of the Legislature of Alabama, approved October 9, 1947 (General Acts of Alabama, 1947, page 484) is unconstitutional and violative of Article IV, Section 45, Constitution of Alabama of 1901.

17. Because the allegation of said count that the defendant Gary Roberts "wantonly killed" the said decedent is a mere conclusion of the pleader.

18. Because the allegation that the said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to open said railroad bridge" is a mere conclusion of the pleader.

19. Because the allegation that said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to open said railroad bridge" constitutes an effort to aver the quo modo of the alleged wanton injury, but the allegations fail to show such wanton injury as a matter of law.

20. Because the allegation that the said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to open said railroad bridge and allow or permit a motor launch" to pass through the same is a mere conclusion of the pleader.

21. Because the allegation that said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to open said railroad bridge and allow or permit a motor launch" to pass through the same constitutes an effort to aver the quo modo of the alleged wanton injury, but the facts averred fail to show such wanton injury as a matter of law.

22. Because said count attempts to aver the quo modo of the alleged wanton injury, but the facts averred do not show a wanton injury as a matter of law.

23. Because, under the allegations of said count, Harrison Brothers Dry Dock and Repair Yard was a joint tort feisor with the defendants in this case, and the award rendered in the Circuit Court of Mobile County, Alabama, in favor of the plaintiffs, releases the defendants in the instant case from any liability to the plaintiffs.

24. Because it affirmatively appears that the plaintiffs have obtained an award against Harrison Brothers Dry Dock and Repair Yard.

25. Because it affirmatively appears that the plaintiffs have made a binding election to proceed solely under the workmen's compensation law of the State of Alabama.

26. Because it affirmatively appears that the plaintiffs have

elected to proceed solely under the workmen's compensation law of the State of Alabama and such law cannot lawfully give the plaintiffs any rights or cause of action against the defendants in the instant case.

27. Because it affirmatively appears that the plaintiffs are estopped or barred from recovering from the defendants, or either of them.

28. Because it affirmatively appears that the plaintiffs are estopped or barred from recovering from the defendants, or either of them, by virtue of the award which they have sought and obtained under the workmen's compensation law of the State of Alabama.

29. Because the award obtained by the plaintiffs under the workmen's compensation law of the State of Alabama constitutes an accord and satisfaction of the plaintiffs' alleged claim or cause of action against the defendants.

30. Because the plaintiffs have no right to recover twice for the same injury.

31. Because it affirmatively appears that the prosecution of this suit is barred by the award rendered under the workmen's compensation law of the State of Alabama.

32. Because it affirmatively appears that the plaintiffs had a choice of remedy and have elected to proceed under the workmen's compensation law of the State of Alabama.

33. Because the award rendered in favor of the plaintiffs under the workmen's compensation law of the State of Alabama operates to release the defendants in the instant case from any liability.

34. Because the award rendered in favor of the plaintiffs under the workmen's compensation law of the State of Alabama constitutes a settlement of all of the plaintiffs' claims.

35. Because any recovery in this cause would be for the benefit of Harrison Brothers Dry Dock and Repair Yard, the other alleged joint tortfeasor.

36. Because any application of the workmen's compensation law of the State of Alabama in the instant case would be violative of Section 2, Article 3 of the Constitution of the United States.

37. Because any application of the Act of the Legislature of Alabama, approved October 9, 1947 (General Acts of Alabama, 1947, page 484) to the instant case would be violative of Section 2, Article 3 of the Constitution of the United States.

38. Because it appears that this suit was filed, and plaintiffs seek to maintain and to recover, under and by virtue of the provisions of the workmen's compensation law of Alabama, when such law does not apply.

39. Because it affirmatively appears that no action can be prosecuted against the defendants on account of the alleged wrongful death of said decedent, except an action brought under Section 123 of Title 7 of the Code of Alabama of 1940.

40. Because it affirmatively appears that the cause of action, if any, arising against said Harrison Brothers Dry Dock and Repair Yard by virtue of the death of said decedent should have been brought under the Jones Act (46 U.S.C.A., Sec. 688).

41. Because it affirmatively appears that the cause of action, if any, arising against said Harrison Brothers Dry Dock and Repair Yard by virtue of the death of the said decedent was within the admiralty jurisdiction of the United States and no valid award, decree, or judgment was properly rendered under the workmen's compensation law of the State of Alabama.

42. Because it affirmatively appears that the cause of action, if any, against said Harrison Brothers Dry Dock and Repair Yard arising by virtue of the death of said decedent was within the admiralty jurisdiction of the United States and no valid award, decree, or judgment was rendered against said Harrison Brothers Dry Dock and Repair Yard under the workmen's compensation law of the State of Alabama, so that said workmen's compensation law cannot be applied against the defendants in this case.

43. Because it does not appear that the Circuit Court of Mobile County, Alabama had any jurisdiction to enter said judgment against said Harrison Brothers Dry Dock and Repair Yard.

44. Because the Circuit Court of Mobile County, Alabama was without jurisdiction to enter said judgment against said Harrison Brothers Dry Dock and Repair Yard, as the matter in controversy was within the admiralty jurisdiction of the United States.

45. Because the Circuit Court of Mobile County, Alabama was without jurisdiction to enter said judgment against said Harrison Brothers Dry Dock and Repair Yard, under Section 2, Article 3 of the Constitution of the United States.

46. Because under the maritime laws of the United States, the provisions of the workmen's compensation law of the State of Alabama are not to be enforced.

47. Because it appears from the complaint that plaintiffs have already recovered for the matters and things complained of against their intestate's employer, which settles and discharges their alleged claim against these defendants.

48. Because it appears from the complaint that plaintiffs have already recovered for the matters and things complained of against another alleged joint tort feisor, which, by operation of law, settles and discharges said claim against these defendants.

49. Because, for aught that appears, the compensation awarded plaintiffs in their suit against intestate's employer has been paid or is being paid, and such constitutes payment by one alleged joint tort feisor, which would settle and discharge said alleged claim against these defendants.

50. Because it appears from said complaint that for the identical claim asserted or attempted to be asserted against these defendants plaintiffs have received payment, or are receiving payments, in settle-



ment and discharge thereof from another alleged tort feason, which payment or payments discharged said claim against these defendants.

Smith, Hand, Chandler & Bass  
Attorneys for Defendants

Of Counsel:

Messrs. Steiner, Crum & Baker  
Montgomery, Alabama

Service accepted, this 25<sup>th</sup> day of September, 1951,  
In witness  
Taylor R. H. H.

RECORDED

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**RECORDED**

FILED  
SEP 25 1951  
AUG L. BUCK, Clerk

SMITH, HAND, ARENDALL & BEDSOLE  
LAWYERS

SUITE 622 FIRST NATIONAL BANK BUILDING

MOBILE, ALABAMA

HARRY H. SMITH  
COUNSELOR

CHAS. C. HAND

C. B. ARENDALL, JR.

T. MASSEY BEDSOLE

THOMAS G. GREAVES, JR.

WM. BREVARD HAND

December 10, 1949

Mrs. Alice J. Duck, Clerk  
Circuit Court of Baldwin County  
Bay Minette, Alabama

Dear Mrs. Duck:

I am enclosing the original and one copy of demurrers which we desire to file in the case of Dorothy C. Word, et al., and in the case of Emmie Fair Murphy, et al., respectively, against the Louisville & Nashville Railroad Company and Gary Roberts.

I would appreciate your filing these for us.

Thanking you, I am

Yours very truly,

  
Charles B. Arendall, Jr.

CBA.dmw  
Encl.

1  
EMMIE FAIR MURPHY, and REXFORD  
E. MURPHY, JR. and MARSHA MURPHY,  
as minors, suing by their next  
friend and mother, EMMIE FAIR  
MURPHY,

Plaintiffs,

vs.

LOUISVILLE AND NASHVILLE RAIL-  
ROAD COMPANY, a corporation,  
and GARY ROBERTS,

Defendants.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

MO. 1434

COMMON AVERMENTS

As a part of each Count of the complaint, plaintiffs  
aver that Emmie Fair Murphy, is the widow of Rexford E. Murphy,  
and that Rexford E. Murphy, Jr. and Marsha Murphy are the  
minor son and minor daughter of said Rexford E. Murphy, deceased,  
being three (3) years and two (2) years of age respectively.  
Plaintiffs are the total dependents of the said Rexford E.  
Murphy, who came to his death on the 13th. day of November,  
1948, as the result of an accident arising out of and in the  
course of his employment by William Harrison, Jr., Frank D.  
Harrison, Joseph E. Harrison and Magdalene W. Harrison, and  
Marion C. Hyland, individually and as partners doing business  
under the firm name and style of Harrison Brothers Dry Dock  
and Repair Yard; that compensation under the Workmen's Com-  
pensation Law of the State of Alabama, not having been paid  
plaintiff for herself and minor children, but having been re-  
fused to them by said employers, the plaintiff, subsequent to  
the death of the said Rexford E. Murphy, and before the expira-  
tion of twelve (12) months therefrom, filed in the Circuit Court  
of Mobile County, Alabama, an action against the employers of  
the said Rexford E. Murphy hereinabove named, as defendants there-  
in, said action being cause Number 6588 on the docket of the  
Circuit Court of Mobile County, Alabama, At Law,) for the recovery  
of compensation for herself and minor children under the Work-

men's Compensation Law of the State of Alabama; that said employers, as the defendants in said action, answered said complaint, and denied that plaintiff and her minor children were entitled to recover compensation under the Workmen's Compensation Law of the State of Alabama; that upon the trial of said cause, the Court did, on the 17th. day of October, 1949, enter a final judgment, awarding the plaintiffs compensation against the defendants under the Workmen's Compensation Law of the State of Alabama, for the death of said Rexford E. Murphy, and the time has not expired for the defendants to apply for a writ of certiorari to the Supreme Court of the State of Alabama.

#### COUNT ONE

Plaintiffs claim of the defendants, the sum of FIFTY THOUSAND and no/100 (\$50,000.00) DOLLARS, as damages, for that on, to-wit, the 13th. day of November, 1948, the defendant, Gary Roberts, while acting within the line and scope of his employment as a servant or agent of the Louisville and Nashville Railroad Company, as a bridge tender of its railroad bridge spanning Mobile River in Mobile County, Alabama, negligently failed to maneuver or open said railroad bridge, so as to allow or permit a motor launch in Mobile River upon which said Rexford E. Murphy was then and there employed, and which had in tow a barge, to pass through the draw span of said railroad bridge, as a proximate result of which negligence, said Rexford E. Murphy was drowned and killed; WHEREFORE, plaintiffs bring this suit and ask for damages in the above amount.

#### COUNT TWO

Plaintiffs claim of the defendants the sum of FIFTY THOUSAND and no/100 (\$50,000.00) DOLLARS, as damages, for that on, to-wit, the 13th. day of November, 1948, the defendant, Gary Roberts, while acting within the line and scope of his employment as a servant or agent of the Louisville and Nashville

Railroad Company, as a bridge tender of its railroad bridge spanning Mobile River in Mobile County, Alabama, wantonly killed the said Rexford E. Murphy through wantonly failing to maneuver or open said railroad bridge so as to allow or permit a motor launch in Mobile River, upon which said Rexford E. Murphy was then and there employed, and while had in tow a barge, to pass through the draw span of said railroad bridge as a proximate result of which wantonness, said Rexford E. Murphy was drowned and killed; WHEREFORE, plaintiffs bring this suit and ask for damages in the above amount.

Johnston, McCall & Johnston  
J.B. Blackburn  
Attorneys for the Plaintiffs

Plaintiffs demand a trial by jury in the above entitled cause.

Johnston, McCall & Johnston  
J.B. Blackburn  
Attorneys for the Plaintiffs

701434

FILED

NOV 12 1949

ALICE J. DUCK, Clerk

SUMMONS AND COMPLAINT

Moore Printing Co.

THE STATE OF ALABAMA, }  
BALDWIN COUNTY

CIRCUIT COURT, BALDWIN COUNTY

No. 1434:-

-----TERM, 19-----

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

a corporation, and GARY ROBERTS

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in

the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against \_\_\_\_\_

LOUISEVILLE AND NASHVILLE RAILROAD COMPANY, AND GARY ROBERTS, Defendant----

by EMMIE FAIR MURPHY et als.

\_\_\_\_\_, Plaintiff----

Witness my hand this 12th day of Nov. 19--49..

Heisel Hirsch, Clerk



RECORDED

No. 1434 Page \_\_\_\_\_

THE STATE OF ALABAMA

BALDWIN COUNTY

CIRCUIT COURT

EMMIE FAIR MURPHY ~~et als.~~

Plaintiffs

vs.

LOUSVILLE AND NASHVILLE R.R.

AND GARY ROBERTS

Defendants

SUMMONS and COMPLAINT

Filed Nov. 12, 19 49

Alice J. Duck, Clerk

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

RECEIVED IN OFFICE

Nov. 14, 1949

Taylor Wilkins, Sheriff

I have executed this summons

this \_\_\_\_\_, 19 \_\_\_\_\_  
by leaving a copy with

Gary Roberts 11-14-49  
Bonneforte agent for  
L. N. Railroad Co. 11-15-49

Taylor Wilkins Sheriff

H. F. Hall Deputy Sheriff

RECORDED

No. 1434 Page \_\_\_\_\_

THE STATE OF ALABAMA  
BALDWIN COUNTY

CIRCUIT COURT

EMMIE FAIR MURPHY et al.

Plaintiffs

vs.

LOUSVILLE AND NASHVILLE R.R.

AND GARY ROBERTS

Defendants

SUMMONS and COMPLAINT

Filed Nov. 12, 19 49

Alice J. Duck, Clerk

Plaintiff's Attorney

Defendant's Attorney

Defendant lives at

RECEIVED IN OFFICE

Nov. 14, 19 49

Taylor Wilkins, Sheriff  
I have executed this summons

this \_\_\_\_\_, 19 \_\_\_\_\_  
by leaving a copy with

Gary Roberts 11-14-49  
Gennie Forte agent for  
L. & N. Railroad Co. 11-15-49

Taylor Wilkins Sheriff  
H. F. Hall Deputy Sheriff

SUMMONS AND COMPLAINT

Moore Printing Co.

THE STATE OF ALABAMA,  
BALDWIN COUNTY

CIRCUIT COURT, BALDWIN COUNTY

No. 1134

TERM, 19

TO ANY SHERIFF OF THE STATE OF ALABAMA:

You Are Hereby Commanded to Summon LOUISVILLE AND NASHVILLE RAILROAD COMPANY,  
a corporation, and GARY ROBERTS

to appear and plead, answer or demur, within thirty days from the service hereof, to the complaint filed in  
the Circuit Court of Baldwin County, State of Alabama, at Bay Minette, against

LOUISEVILLE AND NASHVILLE RAILROAD COMPANY, AND GARY ROBERTS, Defendant  
by EMMIE FAIR MURPHY et als.

\_\_\_\_\_, Plaintiff  
Witness my hand this 12th day of Nov. 1919.

Alice J. Luck, Clerk

(4)  
EMMIE FAIR MURPHY, and REXFORD  
E. MURPHY, JR., and MARSHA MURPHY,  
as minors, suing by their next  
friend and mother, EMMIE FAIR  
MURPHY,

Plaintiffs,

vs.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

LOUISVILLE AND NASHVILLE RAIL-  
ROAD COMPANY, a corporation,  
and GARY ROBERTS,

Defendants.

NO. 1234

The Court having sustained a demurrer to Counts One and Two  
of the complaint, come the plaintiffs and amend said complaint  
by adding Counts Three, Four, Five, Six, Seven, Eight, Nine and  
Ten as follows:

As a part of each Count of the complaint, plaintiffs aver  
that Emmie Fair Murphy, is the widow of Rexford E. Murphy, and  
that Rexford E. Murphy, Jr. and Marsha Murphy are the minor son  
and minor daughter of said Rexford E. Murphy, deceased, being  
three (3) years and two (2) years of age respectively. Plaintiffs  
are the total dependents of the said Rexford E. Murphy, who  
came to his death on the 13th. day of November, 1948, as the  
result of an accident arising out of and in the course of his  
employment by William Harrison, Jr., Frank D. Harrison, Joseph  
E. Harrison and Magdalene W. Harrison, and Marion C. Hyland, in-  
dividually and as partners doing business under the firm name  
and style of Harrison Brothers Dry Dock and Repair Yard; that  
compensation under the Workmen's Compensation Law of the State  
of Alabama, not having been paid said widow for herself and  
minor children, but having been refused to them by said em-  
ployers, said widow, subsequent to the death of the said  
Rexford E. Murphy, and before the expiration of twelve (12)  
months therefrom, filed in the Circuit Court of Mobile County,  
Alabama, an action against the employers of the said Rexford E.  
Murphy hereinabove named, as defendants therein, said action  
being cause Number 6588 on the docket of the Circuit Court of

Mobile County, Alabama, at Law, for the recovery of compensation for herself and minor children under the Workmen's Compensation Law of the State of Alabama; that said employers as defendants in said action answered said complaint, and denied that plaintiff and her minor children were entitled to recover compensation under the Workmen's Compensation Law of the State of Alabama, and denied that the court had jurisdiction to award compensation in said action, and charged that the death of the said Rexford E. Murphy fell within the jurisdiction of the Court of Admiralty of the United States; that upon the trial of said cause, the court did, on the 17th. day of October, 1949, determine that it had jurisdiction therein, and entered a final judgment awarding said widow compensation for herself and said minor children against the defendants therein under the Workmen's Compensation Law of the State of Alabama, for the death of the said Rexford E. Murphy, a copy of which judgment is hereto attached, marked Exhibit "A" and made a part hereof.

#### COUNT THREE

Plaintiffs claim of the defendants the sum of FIFTY THOUSAND and no/100 (\$50,000.00) DOLLARS, as damages, for that on, to-wit, the 13th. day of November, 1948, the defendant, Gary Roberts, while acting within the line and scope of his employment as a servant or agent of the Louisville and Nashville Railroad Company, as a bridge tender of its railroad bridge spanning Mobile River in Mobile County, Alabama, negligently failed to open said railroad bridge and allow or permit a motor launch in Mobile River upon which said Rexford E. Murphy was then and there employed, and which had in tow a barge, to pass through the draw span of said railroad bridge, as a proximate result of which negligence, said Rexford E. Murphy was drowned and killed; WHEREFORE, plaintiffs bring this suit and ask for damages in the above amount.

#### COUNT FOUR

Plaintiffs claim of the defendants the sum of FIFTY THOUSAND and no/100 (\$50,000.00) DOLLARS, as damages, for that on,

to-wit, the 13th. day of November, 1948, the defendant, Gary Roberts, while acting within the line and scope of his employment as a servant or agent of the Louisville and Nashville Railroad Company, as a bridge tender of its railroad bridge spanning Mobile River in Mobile County, Alabama, wantonly killed the said [Rexford E. Murphy through wantonly failing to open said railroad bridge and allow or permit a motor launch in Mobile River, upon which said Rexford E. Murphy was then and there employed, and which had in tow a barge, to pass through the draw span of said railroad bridge, as a proximate result of which wantonness, said Rexford E. Murphy was drowned and killed; WHEREFORE, plaintiffs bring this suit and ask for damages in the above amount.

#### COUNT FIVE

As a part of this count, plaintiffs add the following allegation to its Common Averments, viz; The final judgment of the Circuit Court of Mobile County, Alabama, has never been reversed, set aside, or modified by the Circuit Court of Mobile County, Alabama, or by the Supreme Court of the State of Alabama, or the Court of Appeals of Alabama, or by any other court having appellate or supervisory jurisdiction over the Circuit Court of Mobile County, Alabama.

The plaintiffs further adopt all the remaining allegations of Count Three of the Complaint as a part of the allegations of this count.

#### COUNT SIX

As a part of this count, plaintiffs add the following allegation to its Common Averments, viz; The final judgment of the Circuit Court of Mobile County, Alabama, has never been reversed, set aside or modified by the Circuit Court of Mobile County, Alabama, or by the Supreme Court of the State of Alabama or the Court of Appeals of Alabama, or by any other court having appellate or supervisory jurisdiction over the Circuit Court of Mobile County, Alabama.

The plaintiffs further adopt all the remaining allegations

of Count Four of the Complaint as a part of the allegations of this count.

#### COUNT SEVEN

As a part of this count, plaintiffs add the following allegations to its Common Averments, viz; The judgment of the Circuit Court of Mobile County, Alabama, made on the 17th. day of October, 1949, has been paid pro tanto as the amounts thereunder respectively became due, by the defendants' insurance carrier under the Workmen's Compensation Law of Alabama

The plaintiffs further adopt all the remaining allegations of Count Three of the complaint as a part of the allegations of this count.

#### COUNT EIGHT

As a part of this count, plaintiffs add the following allegations to its Common Averments, viz; The judgment of the Circuit Court of Mobile County, Alabama, made on the 17th. day of October, 1949, has been paid pro tanto as the amounts thereunder respectively became due, by the Defendants' insurance Carrier under the Workmen's Compensation Law of Alabama.

The plaintiffs further adopt all the remaining allegations of Count Three of the complaint as a part of the allegations of this count.

#### COUNT NINE

As a part of this count, plaintiffs add the following allegations to its Common Averments, viz; After the rendition of said judgment, the defendants filed no petition for certiorari to the Supreme Court of Alabama, nor undertook through any proceeding to reverse, revise or otherwise modify said judgment; but on the contrary, their Insurance Carrier under the Workmen's Compensation Law of the State of Alabama, on their behalf, has satisfied the same pro tanto ~~as~~ the amounts ordered to be paid thereunder respectively became due.

The plaintiffs further adopt all the remaining allegations

of Count Three of the complaint as a part of the allegations of this count.

COUNT TEN

As a part of this count, plaintiffs add the following allegations to its Common Averments, viz; After the rendition of said judgment, the defendants filed no petition for certiorari to the Supreme Court of Alabama, nor undertook through any proceeding to reverse, revise or otherwise modify said judgment; but on the contrary, their Insurance Carrier under the Workmen's Compensation Law of the State of Alabama, on their behalf, has satisfied the same pro tanto ~~in~~ the amounts ordered to be paid thereunder respectively became due.

The plaintiffs further adopt all the remaining allegations of Count Four of the complaint as a part of the allegations of this count.

J. B. Blanton, Johnston, McCall & Johnston  
Attorneys for plaintiffs



COPY

EMMIE FAIR MURPHY,

Plaintiff,

vs.

WILLIAM HARRISON, JR., FRANK  
HARRISON and JACK HARRISON,  
Individually and as partners  
doing business under the firm  
name and style of HARRISON  
BROTHERS,

Defendants.

IN THE CIRCUIT COURT OF

MOBILE COUNTY, ALABAMA

AT LAW NO. 6588.

FINDING OF FACTS

This case was submitted for final judgment upon the complaint as amended, the answer of the defendants and the evidence offered at the trial. On the 13th. day of November, 1948, Rexford E. Murphy, an employee of the defendants, came to his death as the proximate result of an accident arising out of and in the course of his employment by the defendants; leaving as his total dependents his widow, the plaintiff, Emmie Fair Murphy, and their two (2) minor children, Rexford E. Murphy, Jr., a son now three (3) years of age, and Marsha Murphy, a daughter now two (2) years of age, his average weekly earnings with the defendants, being \$70.00 a week.

The defendants operate a local repair yard on the eastern banks of Mobile River in the City of Mobile, for the repair and construction of small water craft, and in connection therewith, maintain machine shops, in which a large part of its repair or construction work is performed. The said Rexford E. Murphy was employed by the defendants as a machinist about seven (7) months prior to his death, and the larger part of his work was performed in the machine shops on land, his superintendent being one W. B. Word. From time to time, as directed, the said Rexford E. Murphy tested out water craft repaired or constructed by the defendants in their plant. On one occasion, he was directed to assist in operating a small motor launch, about thirty feet (30') in length to Selma, Alabama, while on another occasion he assisted in operating it to another point

EXHIBIT "A"

ON the Tombigbee River. The said Rexford E. Murphy was taken out of the defendants' yard as several other men were from time to time and sent on these casual trips. On November 12, 1948, the said W. B. Word, his superintendent, and said Rexford E. Murphy, were directed by one of the defendants, to proceed to Mount Vernon, Mobile County, Alabama, with said thirty foot (30') launch and return with a barge under tow to the defendants' plant in Mobile. The two employees repaired with said launch to Mount Vernon, took the barge in tow and during their return and while approaching the Louisville and Nashville Bridge on Mobile River, approximately sixteen (16) miles above Mobile, the launch overturned and sank through the negligence of the railroad bridge tender in not opening the bridge and permitting the motor boat and barge to pass through it; and both Mr. Word and Mr. Murphy were drowned. The barge was owned by the defendants, and at the time was being towed to their plant in Mobile for some repairs. The defendants' business was localized in Mobile. Paragraph Two of the complaint alleged;

"2. On and prior to the 13th day of November, 1948, the defendants operated a local repair yard for the repair or construction of small water craft."

and the allegation was admitted by the defendants' answer. Defendants did no business outside of the State of Alabama, it being local to this neighborhood, the City of Mobile; and their employees resided in the City of Mobile. The work in which the said Rexford E. Murphy was engaged at the time of his death was an incident to his chief employment as a machinist on the repair yard of the defendants, while the trips he made with said motor launch were only casual. The defendants' answer and the proof show that they were insured both under the Workmen's Compensation Law of the State of Alabama, and the Federal Longshoremen's and Harbor Workers' Compensation Act. Defendants' premiums paid for Workmen's Compensation Insurance under the Alabama law were calculated upon the amount of their monthly payroll; and notices were

posted around the repair yard of the defendants that they were subject to the Workmen's Compensation Law of Alabama and of the Longshoremen and Harbor Workers' Act. The defendants deny that the death of the said Rexford E. Murphy was within the protection of either the Alabama Workmen's Compensation Law or the Longshoremen and Harbor Workers' Act, but insist that the death of said Rexford E. Murphy was maritime, and any liability therefor is within the exclusive jurisdiction of admiralty.

#### FINDINGS OF LAW

Since the decision of the Supreme Court of the United States of Southern Pacific Company vs. Jensen, 244 U. S. 205, 214; 61 L. Ed. 1086, the obligation of an employer to the employee in matters of a similar maritime nature, cognizable in admiralty, has been modified from time to time, so as to permit the application of local workmen's compensation laws, where the subject matter thereof is one of local concern. Whether it be or not a matter of local concern, is factual, and depends largely upon the circumstances of the particular case.

The case of Grant, Smith-Porter Ship Co. vs. Rohde, 257 U. S. 467, 476; 66 L. Ed. 321, 324, arose out of injuries suffered by a carpenter while at work on an uncompleted vessel lying in navigable waters within the State of Oregon. There were submitted to the Supreme Court, two questions.

1. Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?
  2. Is libellant entitled, because of his injury, to proceed in admiralty against respondent for the damages suffered?
- In response to the two questions, "the Court" said:

"Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, we answer yes.

Assuming that the second question presents the inquiry whether, in the circumstances stated, the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

It will be observed that the Supreme Court held that under the circumstances of that case, the regulation of the rights, obligations and subsequent liabilities of the parties, as between themselves, by local rule, (the Workmen's Compensation Law of Oregon), would not necessarily work material prejudice to any characteristic feature of the general maritime law or interfere with the proper harmony or uniformity of that law in its international or interstate relations.

Shortly afterwards, the case of Millers Indemnity Underwriters vs. Braud, 270 U. S. 59; 70 L.Ed. 470, was decided. There a diver submerged himself from a floating barge anchored in the navigable Sabine River to remove obstructions to its navigation. While there submerged, the air supply failed and he died of suffocation. Obviously, removing these obstructions aided the commerce in vessels transporting goods in international and interstate commerce proceeding on the river. Nevertheless, the Court held:

"In the cause now under consideration, the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the State Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court, which otherwise would exist."

Defendants herein, however, insist that Rexford E. Murphy, the deceased, at the time of his death, was a seaman; that is, a member of the crew of the launch he was aiding in operating. However, if the business of his master and his own employment are of such local concern that the enforcement of the local compensation law would work no material prejudice to any characteristic feature of the general maritime law or interfere.

with the proper harmony or uniformity of that law in its international or interstate relations, his status as contended for by defendants, would not affect his remedy under the Alabama Workmen's Compensation Law. The launch towing defendants' own barge to their plant at Mobile, under the other circumstances of this case, it not comparable to a commercial vessel sailing on the high seas, carrying freight or passengers, or both, from port to port, where, if local law applied, the relationship of seaman to owner would vary, maybe one-half a dozen times in the course of the voyage.

It is clear to the Court that the question here presented is set at rest by the case of Alaska Packers Association vs. Marshall, 95 Fed. 2d. 279 (C.C.A.), decided by the United States Circuit Court of Appeals for the Ninth Circuit. There, two employees of the Alaska Packers Association, a California corporation, were fishing in the waters of Alaska, far distant from their base. While thus engaged in fishing, and after several days away from shore, a storm overtook and destroyed the schooner which they were operating and they were drowned. The small schooner which the two men themselves operated was equipped with all paraphernalia needed for fishing, with provisions, and a galley and with bunks and bedding. Once every twenty-four hours, or more often should occasion require, they reported to deliver their fish to one of several lighters, anchored at Strategic points, called stations. The Court then said:

"they are thus seamen, as well as fishermen".

In the course of its opinion, Circuit Judge Denman, speaking for the Court, said:

"With respect to the dual character of the fishing and sailing of the boats at the time of the death of their employees, as both local and maritime, the Company's brief frankly admits; 'In one aspect their work is purely local in character, in that they never sail their boats farther away than a few miles from the cannery to which they are attached and to which their catch is taken for packing. On the other hand the waters in which they sail their boats and fish are navigable waters of the United States and within the admiralty jurisdiction.'" (Italics supplied by the Court".

Further, in the opinion, the Court considered the question now before this Court, and then said:

"It is thus apparent that the fishing incidents of the whole contract for the varied employment are by function and distance local to the plant and a part of the canning enterprise. Here is no commercial vessel sailing on the high seas carrying freight or passengers, or both, from port to port, where, if local law applied, the relationship of seamen to owner would vary, maybe half a dozen times, in the course of the voyage. So far as this cannery fish supplying is concerned, there is a single locus of employment and no disturbance of uniformity of relationship of employer to employee is created if certain portions of the contract of employment be regarded as maritime, and yet the employment status so created is controlled by the state law.

So far as concerns the whole Alaska employment, the relationship of this California employer and its employees is more uniform if the California law applies, for the Supreme Court has held that it does control not only in the cannery and truly land occupations, but even where the fishermen, standing on the shore, is injured in fully launching a beached schooner partly in the water, to be navigated thence to the cannery. *Alaska Packers' Assn. vs. Industrial Accident Comm.*, 276 U.S. 467, 469, 48 S. Ct. 346, 72 L. Ed. 656.

While if we consider separately from the contract the fishing and sailing incidents, the owner's obligation to the fisherman would clearly be cognizable in admiralty and determined by its particular law, it is not an absolute conformity to the admiralty law in every situation in which it may be applied, which is required by *Southern Pacific Co. v. Jensen*, 244 U.S. 206, 214, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.19180, 451, Ann. Cas.1917E, 900, as interpreted by more recent decisions of the Supreme Court.

Admiralty law is not conceived as a sacrosanct scientific sovereign nor is nonconformance at any place in navigable waters lese majeste. Like other bodies of law, the area of its application may be narrowed by new systems of law and administration more practical for human adjustments and advancement. It was a "characteristic feature of the general maritime law" that there was no survivor's right for a death tortiously caused on the high seas. The Supreme Court offended no such arbitrary sovereign when it held that the law of the state of the vessel's owner created such a liability. *The Hamilton*, 207 U.S. 398, 405, 28 S.Ct. 133, 52 L. Ed. 264. Nor has it been held that the *Jensen Case* overrules *The Hamilton*.

The Control of the status of the employees here comes clearly within the principles enunciated in *Millers' Indemnity Underwriters v. Braud*, 270 U.S. 59, 46 S. Ct. 194, 70 L.Ed. 470. There a diver submerged himself from a floating barge anchored in the navigable Sabine river to remove obstructions to its navigation. While there submerged the air supply failed and he died of suffocation. Obviously, removing these obstructions

aided the commerce in vessels transporting goods in international and interstate commerce proceeding on the river. (Certainly the facts of the appeal before us are of less concern as affecting those engaged in such commerce). Nevertheless, the court held (270 U.S. 59, at pages 64, 65, 46 S.Ct. 194, 195, 70 L.Ed. 470): 'In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; but the matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law. The act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.' \* \* \*

The supplying of the cannery plant does not interfere with any 'international or interstate relations' whatsoever. Just as in the *Millers Case*, the state act 'prescribes the only remedy' to claimants for the death of the fishermen, for under the admiralty law there is none.

To deny compensation would work deep prejudice to the compensation system, now so widely accepted as 'necessarily' an incident to such creative service as supplying the material to this food canning plant, and which enlightened statesmanship, with its eyes opened to modern concepts of human relations, has enacted in so many of the states. While we do not regard the *Millers Case* as necessarily overruling the *Jensen Case*, we are in accord with that portion of the opinion of Mr. Justice Brandeis in *Washington vs. W. C. Dawson Co.*, 264 U.S. 219, 228, 44 S.Ct. 302, 305, 68 L.Ed. 646, which treats of the relationship of the admiralty law to the progressive legislation of the states for the protection of workmen.

With regard to the second appeal, we therefore hold that there was no error in overruling the exceptions to the master's report with reference to the applicability of the California Compensation Act to the claims, or in ordering the confirmation of his report in this respect."

In admiralty, there is no remedy for wrongful death, or for death from any cause, and an admiralty Court has always had to resort to local law to afford a remedy for such a death.

Alaska Packers Ass. vs. Marshall; supra  
Miller Indemnity Underwriters vs. Braud, supra.

Western Fuel Co. vs. Garcia, 257 U.S. 233, 66 L.Ed. 210.

The Hamilton, 207 U.S. 398, 52 L.Ed. 264.

The Court is therefore of the opinion that under the facts and law of this case, *Emmie Fair Murphy*, the widow of said *Rexford E. Murphy*, deceased, is entitled to recover

compensation for herself and minor children, as total dependents of the said decedent, under the Alabama Workmen's Compensation Law.

JUDGMENT OF THE COURT

It is, therefore, ORDERED And ADJUDGED by the Court that the said Emmie Fair Murphy, do have and recover on behalf of herself and said minor children, Rexford E. Murphy, Jr. and Marsha Murphy, of and from the defendants, William Harrison, Jr., Frank D. Harrison, Joseph E. Harrison, Magdalene W. Harrison, and Marion C. Hyland, individually and as partners doing business under the firm name and style of Harrison Brothers Dry Dock and Repair Yard, three hundred (300) weeks' compensation at \$18.00 a week; and as forty-eight (48) weeks expired on October 13, 1949, since the death of the said Rexford E. Murphy on November 13, 1948, with no compensation having been paid, it is, therefore, ORDERED and ADJUDGED by the Court that for said forty-eight (48) weeks, plaintiff do have and recover for and on behalf <sup>of herself</sup> and said minor children, Rexford E. Murphy, Jr. and Marsha Murphy, of and from said defendants, the sum of EIGHT HUNDRED SIXTY-FOUR and no/100 (\$864.00) DOLLARS compensation, being forty-eight (48) weeks' compensation, together with interest thereon, to October 13, 1949, amounting to TWENTY-FOUR and 41/100 (\$24.41) DOLLARS, for both of which let execution issue; and that from October 13, 1949, she do have and recover on behalf of herself and said minor dependents, of and from said defendants, the remaining two hundred fifty-two (252) weeks' compensation at \$18.00 a week; together with all costs in this behalf expended.

It is further ORDERED, ADJUDGED and DECREED by the Court that the firm of Johnston, McCall and Johnston, Lawyers, are entitled to compensation for their services as plaintiff's attorneys in the amount of fifteen percent (15%) on the first THREE HUNDRED and no/100 (\$300.00) DOLLARS recovered in this case, and ten percent (10%) on the balance thereof as recovered, to be paid to them as such compensation is paid under this judgment.

ORDERED and ADJUDGED this the 17 day of October, 1949.

*(s) C. A. Grayson*  
JUDGE



No. 1434  
AMENDED COMPLAINT

EMMIE FAIR MURPHY and REXFORD E.  
MURPHY, JR., and MARSHA MURPHY,  
as minors, suing by their next  
friend and mother, EMMIE FAIR  
MURPHY,

Plaintiffs,

VS.

LOUISVILLE AND NASHVILLE RAILROAD  
COMPANY, a Corporation, and GARY  
ROBERTS,

Defendants.

*In the Circuit Court of  
Baldwin County, Alabama  
at Law*

RECORDED

FILED

SEP 24 1951

MURPHY, DUCK, Clerk

J. B. BLACKBURN

ATTORNEY AT LAW

BAY MINETTE, ALABAMA

(2)

EMMIE FAIR MURPHY, and REXFORD E. MURPHY, JR., and MARSHA MURPHY, as minors, suing by their next friend and mother, EMMIE FAIR MURPHY,	:	IN THE CIRCUIT COURT OF
Plaintiffs	:	BALDWIN COUNTY, ALABAMA
versus	:	
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a corporation, and GARY ROBERTS,	:	
Defendants	:	

DEMURRER

Come the defendants in the above styled cause, separately and severally, and demur to Count 1 and Count 2 of the complaint, separately and severally, upon the following separate and several grounds:

1. Because the allegation that the defendant Gary Roberts "negligently failed to maneuver or open said railroad bridge" is a mere conclusion of the pleader.
2. Because the allegation that the defendant Gary Roberts "negligently failed to maneuver or open said railroad bridge" attempts to aver the quo modo of the alleged negligence, but the facts averred do not show negligence as a matter of law.
3. Because the allegation that the defendant Gary Roberts "negligently failed to maneuver or open said railroad bridge, so as to allow or permit a motor launch" to pass through said bridge is a mere conclusion of the pleader.
4. Because the allegation that the defendant Gary Roberts "negligently failed to maneuver or open said railroad bridge, so as to allow or permit a motor launch" to pass through said bridge constitutes an effort to plead the quo modo of the alleged negligence, but the facts set forth do not constitute negligence as a matter of law.
5. Because said count fails to aver any facts constituting negligence on the part of the defendants, or either of them.
6. Because said count fails to aver any facts showing that the

decedent was killed as a proximate result of negligence on the part of the defendants, or either of them.

7. Because said count fails to aver facts showing any liability of the defendants, or either of them.

8. Because said count fails to show that the plaintiffs have any right to prosecute this suit.

9. Because this court has no jurisdiction over this alleged cause of action.

10. Because there is no statute of the State of Alabama authorizing the prosecution of this suit by the plaintiffs.

11. Because the Act of the Legislature of the State of Alabama, approved October 9, 1947 (General Acts of Alabama, 1947, page 484) does not authorize the prosecution of this suit by the plaintiffs.

12. Because the Act of the Legislature of Alabama, approved October 9, 1947 (General Acts of Alabama, 1947, page 484) is unconstitutional and violative of Article IV, Section 45, Constitution of Alabama of 1901.

13. Because the allegation of said count that the defendant Gary Roberts "wantonly killed" the said decedent is a mere conclusion of the pleader.

14. Because the allegation of said count that the said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to maneuver or open said railroad bridge" is a mere conclusion of the pleader.

15. Because the allegation that said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to maneuver or open said railroad bridge" constitutes an effort to aver the quo modo of the alleged wanton injury, but the allegations fail to show such wanton injury as a matter of law.

16. Because the allegation that the said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to

maneuver or open said railroad bridge so as to allow or permit a motor launch" to pass through the same is a mere conclusion of the pleader.

17. Because the allegation that said decedent was killed as a proximate result of the defendant Gary Roberts "wantonly failing to maneuver or open said railroad bridge so as to allow or permit a motor launch" to pass through the same constitutes an effort to aver the quo modo of the alleged wanton injury, but the facts averred fail to show such wanton injury as a matter of law.

18. Because said count attempts to aver the quo modo of the alleged wanton injury, but the facts averred do not show a wanton injury as a matter of law.

19. Because, under the allegations of said count, Harrison Brothers Dry Dock and Repair Yard was a joint tort feisor with the defendants in this case, and the award rendered in the Circuit Court of Mobile County, Alabama, in favor of the plaintiffs, releases the defendants in the instant case from any liability to the plaintiffs.

20. Because it affirmatively appears that the plaintiffs have obtained an award against Harrison Brothers Dry Dock and Repair Yard.

21. Because it affirmatively appears that the plaintiffs have made a binding election to proceed solely under the Workmen's Compensation Law of the State of Alabama.

22. Because it affirmatively appears that the plaintiffs have elected to proceed solely under the Workmen's Compensation Law of the State of Alabama and such law cannot lawfully give the plaintiffs any rights or cause of action against the defendants in the instant case.

23. Because it affirmatively appears that the plaintiffs are estopped or barred from recovering from the defendants, or either of them.

24. Because it affirmatively appears that the plaintiffs are estopped or barred from recovering from the defendants, or either of them, by virtue of the award which they have sought and obtained under the Workmen's Compensation Law of the State of Alabama.

25. Because the award obtained by the plaintiffs under the Workmen's Compensation Law of the State of Alabama constitutes an accord and satisfaction of the plaintiffs' alleged claim or cause of action against the defendants.

26. Because the plaintiffs have no right to recover twice for the same injury.

27. Because it affirmatively appears that the prosecution of this suit is barred by the award rendered under the Workmen's Compensation Law of the State of Alabama.

28. Because it affirmatively appears that the plaintiffs had a choice of remedy and have elected to proceed under the Workmen's Compensation Law of the State of Alabama.

29. Because the award rendered in favor of the plaintiffs under the Workmen's Compensation Law of the State of Alabama operates to release the defendants in the instant case from any liability.

30. Because the award rendered in favor of the plaintiffs under the Workmen's Compensation Law of the State of Alabama constitutes a settlement of all of the plaintiffs' claims.

31. Because any recovery in this cause would be for the benefit of Harrison Brothers Dry Dock and Repair Yard, the other alleged joint tortfeasor.

32. Because any application of the Workmen's Compensation Law of the State of Alabama in the instant case would be violative of Section 2, Article 3 of the Constitution of the United States.

33. Because any application of the Act of the Legislature of Alabama, approved October 9, 1947 (General Acts of Alabama, 1947, page 484) to the instant case would be violative of Section 2, Article 3 of the Constitution of the United States.

34. Because it appears that this suit was filed, and plaintiffs seek to maintain and to recover, under and by virtue of the provisions of the Workmen's Compensation Law of Alabama, when such law does not apply.

35. Because it appears from the complaint that plaintiffs have already recovered for the matters and things complained of against their intestate's employer, which settles and discharges their alleged claim against these defendants.

36. Because it appears from the complaint that plaintiffs have already recovered for the matters and things complained of against another alleged joint tortfeasor, which, by operation of law, settles and discharges said claim against these defendants.

37. Because, for aught that appears, the compensation awarded plaintiffs in their suit against intestate's employer has been paid or is being paid, and such constitutes payment by one alleged joint tortfeasor, which would settle and discharge said alleged claim against these defendants.

38. Because it appears from said complaint that for the identical claim asserted or attempted to be asserted against these defendants plaintiffs have received payment, or are receiving payments, in settlement and discharge thereof from another alleged joint tortfeasor, which payment or payments discharged said claim against these defendants.

*Smith, Hand, Amick, Bedard*  
Attorneys for Defendants

Of Counsel:

Messrs. Steiner, Crum & Weil  
Montgomery, Alabama

RECORDED

FILED

DEC 12 1949

ALICE J. DUCK, Clerk

RECORDED

RECORDED

*[Handwritten signature]*

THE STATE OF ALABAMA }  
Baldwin County - Circuit Court }

TO ANY SHERIFF OF THE STATE OF ALABAMA — GREETING:

Whereas, at a Term of the Circuit Court of Baldwin County, held on the 14th day of March 1952

Monday in , 194 , in a certain cause in said Court wherein EMMIE PAIR MURPHY ET ALS

Plaintiff, and LOUISVILLE AND NASHVILLE RAILROAD CO.,  
A CORP. and GARY ROBERTS Defendant, a judgment was rendered against said

to reverse which judgment, the said EMMIE PAIR MURPHY ET ALS

applied for and obtained from this office an APPEAL, returnable to the <sup>April</sup> Supreme Court

Term of our <sup>Supreme</sup> Court of the State of Alabama, to be held at Montgomery,

on the 7th day of April, 1952 next, and the necessary bond

having been given by the said EMMIE PAIR MURPHY ET ALS

with Fidelity and Deposit Company of Maryland, sureties,

Now, You Are Hereby Commanded, without delay, to cite the said Louisville and Nashville

Railroad Co., and Gary Roberts or Smith, Hand & Arendall ; Chason & Stone

, attorney, to appear at the Term of our

said Supreme Court, to defend against the said Appeal, if they think proper.

Witness, ALICE J. DUCK, Clerk of the Circuit Court of said County, this 12th

day of March 1952, A. D., 194 52

Attest:

*Alice J. Duck*, Clerk.



Received in Sheriff's Office  
this 17 day of Mar 1952  
TAYLOR WILKINS, Sheriff

Executed 3-19-52  
By serving a copy  
of the within  
citation of appeal  
on John Chason  
attorney

Taylor Wilkins Sheriff  
By H F Hall D.S.

*Chason & Stone*

1434

**CIRCUIT COURT**  
**Baldwin County, Alabama**

EMMIE FAIR MURPHY ET ALS

vs. } Citation in Appeal

LOUISVILLE & NASHVILLE RAILROAD CO  
and GARY ROBERTS

Issued ..... 19th day of March ..... 19452.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA

AT LAST

NO. \_\_\_\_\_

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ALICE J. BULL, CLERK

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 51-52

To the Clerk of the Circuit Court,  
Baldwin County—Greeting:

Whereas, the Record and Proceedings of the Circuit Court  
of said county, in a certain cause lately pending in said Court between  
Emmie Fair Murphy et al., Appellant<sup>s</sup>,  
and  
Louisville and Nashville Railroad Company et al., Appellee<sup>s</sup>,  
wherein by said Court it was considered adversely to said appellant<sup>s</sup>, were brought before our  
Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant<sup>s</sup>:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered, ordered, and adjudged by  
our Supreme Court, on the 30th day of June, 1952, that said  
Judgment of said Circuit Court be in all things  
affirmed, and that it was further considered, ordered, and adjudged that the appellant<sup>s</sup>, and  
Emmie Fair Murphy, and Rexford E. Murphy, Jr., and Marsha  
Murphy, as Minors suing by their next friend and Mother,  
Emmie Fair Murphy, and Fidelity and Deposit Company of Maryland,  
surety on the appeal bond, pay - - - - -

the costs accruing on said appeal in this Court and in the Court below, for which costs let execution  
issue.

Witness, J. Render Thomas, Clerk of the Supreme  
Court of Alabama, at the Judicial Department  
Building, this the 30th day of

June 19 52  
*J. Render Thomas*

Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 19 51-52

1st Div., No. 503

Emmie Fair Murphy et al.

*Appellant<sup>s</sup>*

vs.

Louisville and Nashville

Railroad Company et al.

*Appellee<sup>s</sup>*

From Baldwin Circuit Court.

CERTIFICATE OF  
AFFIRMANCE

The State of Alabama,

Baldwin County.

} Filed

this 2nd day of July 1957

*Arcy J. Smith*  
*clerk*

JUN 30 1952

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPRING TERM, 1952

1 Div. 503

Emmie Fair Murpny et al.,

v.

Louisville & Nashville Railroad Co., et al.,

Appeal from Baldwin Circuit Court.

BROWN, JUSTICE.

This is an action under the Homicide Act by Emmie Fair Murphy, the widow of Rexford E. Murphy, deceased, and the other dependents of said Rexford E. Murphy, deceased, against the Louisville & Nashville Railroad Company, a corporation, and Gray Roberts. — Code of 1940, Tit. 7, § 123.

2.

Rexford E. Murphy was killed in an accident arising out of and in the course of his employment by Harrison Brothers Dry Dock and Repair Yard, a partnership, and the individuals constituting the same. At the time of his death Murphy was engaged as a seaman in the operation of a motor launch towing a barge on the Mobile River. While engaged in pulling said barge with launch attached through a draw bridge operated and maintained by the Louisville & Nashville Railroad Company over the Mobile River, through the alleged negligence of the railroad bridge tender, Gray Roberts, in failing to open the bridge sufficiently to permit the motor boat and barge to pass through, the launch overturned and sank. As a proximate consequence of such alleged negligence Murphy was thrown from said launch or barge and was drowned.

The plaintiffs rest their right to sue under the provisions of § 312, Title 26, Code of 1940, Pocket Part, as amended by the Act of 1947 (Acts of 1947, p. 484).

There is an absence of averment in the complaint that the workman, Murphy, and his employer were subject to the provisions of the Alabama Workmen's Compensation Act. To supply this defect in the complaint, the pleader makes the following averments in substance common to each of its several counts:

Emmie Fair Murphy is the widow of Rexford E. Murphy and Rexford E. Murphy, Jr. and Marsha Murphy are the minor son and minor daughter of said Rexford E. Murphy, deceased, being three years and two years of age respectively. Plaintiffs are the total dependents of said Rexford E. Murphy, who came to his death on the

3.

13th day of November, 1948, as the result of an accident arising out of and in the course of his employment by William Harrison, Jr., Frank D. Harrison, Joseph E. Harrison and Magdalene W. Harrison, and Marion C. Hyland, individually, and as partners doing business under the firm name and style of Harrison Brothers Dry Dock and Repair Yard; that compensation under the Workmen's Compensation Law of the State of Alabama not having been paid plaintiff for herself and minor children, but having been refused to them by said employers, the plaintiff, subsequent to the death of the said Rexford E. Murphy, and before the expiration of twelve months therefrom filed in the Circuit Court of Mobile County, Alabama, an action against the said employers of Rexford E. Murphy hereinabove named as defendants therein, said action being cause No. 6588 on the docket of the Circuit Court of Mobile County, Alabama, At Law, for the recovery of compensation for herself and minor children under the Workmen's Compensation Law of the State of Alabama; that said employers, as the defendants in said action, answered said complaint and denied that the plaintiff and her minor children were entitled to recover compensation under the Workmen's Compensation Law of the State of Alabama; that upon the trial of said cause the court on the 17th of October, 1949 entered a final judgment, awarding the plaintiff's compensation against the defendants under the Workmen's Compensation Law of the State of Alabama for the death of the said Rexford E. Murphy and that the time has not expired for the defendants to apply for a writ of certiorari to the Supreme Court of the State of Alabama.



4.

There is no averment in the complaint that the defendant, Louisville & Nashville Railroad Company was a party to the proceedings.

The defendants demurred to each of the counts of the complaint on the ground, among others, that the counts failed to aver that the workman and his employer were subject to the Alabama Employers' Compensation Act. - Code of 1940, Tit. 26, § 312, Pocket Part. Such averment is essential as a basis for the right of the plaintiffs to sue the railroad company under the Homicide Act. - Code of 1940, Tit. 7, § 123. The court sustained the demurrer, in consequence of which the plaintiffs suffered a nonsuit and appealed as provided by § 819, Title 7, Code of 1940.

The contention of the appellants is that the averments set out above supply the basis for plaintiffs' right to sue under § 312, Title 26, Code of 1940, and that the determination by the Circuit Court of Mobile County of its jurisdiction to entertain the proceedings under the Workmen's Compensation Act is conclusive against all parties including the defendant, the Louisville & Nashville Railroad Company, who, as stated above, was not a party to the proceedings. This contention cannot be sustained. That proceeding as to the defendants in the instant case is res inter alios acta and does not relieve the plaintiffs from averring that the workman and his employer were under the Alabama Workmen's

5.

Compensation Act. — Fuller v. Whitlock, 99 Ala. 411, 13 So. 80; Randle v. Walker, 17 Ala. App. 211, 214, 84 So. 551; McGillivray v. Reynolds, 224 Ala. 435, 140 So. 417; Robinson v. Western Railway, 243 Ala. 278, 9 So. 2d 885; American Mut. Liability Ins. Co. v. Louisville & N. R. R. Co., 250 Ala. 354, 34 So. 2d 474; Louisville & N. R. R. Co. v. American Mut. Liability Ins. Co., 254 Ala. 128, 47 So. 2d 206.

The right of the workman and his dependents to maintain a suit against said employer is governed by the Maritime Act. — 45 U. S. C. A., p. 118, §§ 51—60. See also U. S. C. A., Tit. 46, pp. 211 — 232, Commentary on Maritime Workers and The Jones Act.

Where the court is without jurisdiction of the res—the subject matter—and has no jurisdiction of the person, it is without jurisdiction as a matter of law and its finding is not res judicata. — Carter v. Mitchell, 225 Ala. 287, 142 So. 514; Kalb v. Feuerstein, 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. 370; Griffin v. Bozeman, 234 Ala. 136, 173 So. 857; Brooks v. City of Birmingham, 239 Ala. 172, 194 So. 525.

We are, therefore, of opinion that the court did not err in sustaining the demurrer to the several counts of the complaint.

Affirmed.

Livingston, C. J., Lawson and Stakeley, JJ., concur.

THE STATE OF ALABAMA---JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1st Div., No. 503

Emmie Fair Murphy et al.

, Appellant,<sup>S</sup>

vs.

Louisville & Nashville Railroad Company et al.

, Appellee,<sup>S</sup>

From Baldwin

Circuit Court.

The State of Alabama,  
City and County of Montgomery, }

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to five inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the Supreme  
Court of Alabama, this the 30th day of

June

, 1952

*J. Render Thomas*  
Clerk of the Supreme Court of Alabama.

THE SUPREME COURT OF ALABAMA

October Term, 1951-52

1st Div., No. 503

Emmie Fair Murphy et al.,  
Appellant, s

vs.

Louisville & Nashville

Railroad Company et al.,  
Appellee. s

From Baldwin Circuit Court.

COPY OF OPINION

BROWN PRINTING CO., MONTGOMERY 1950