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Testimony for Petitioner.

TESTIMONY FOR RESPONDENT.

Notice of Appeal.

Filed September 5, 1917.

New Jersey Supreme Court.

MOUNTAIN ICE COMPANY, a corporation, *Prosecutor-Appellant,* *vs.* COURT OF COMMON PLEAS in and for the County of Morris, and ELIAS BERTRAM MOTT, Clerk of said Court of Common Pleas, and JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor, *Defendants-Respondents.*	*Notice of Appeal.*

TAKE NOTICE that the prosecutor-appellant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Yours respectfully,

M. CASEWELL HEINE,
Attorney for Prosecutor-Appellant.

To JAMES H. BOLITHO,
Attorney for Defendants.

Dated August 28, 1917.

Grounds of Appeal.

Filed September 19, 1917.

New Jersey Court of Errors and Appeals

MOUNTAIN ICE COMPANY, a corporation, *Prosecutor-Appellant,* *vs.* COURT OF COMMON PLEAS in and for the County of Morris, and ELIAS BERTRAM MOTT, Clerk of said Court of Common Pleas, and JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor, *Defendants-Respondents.*	*On Appeal from the Supreme Court.* *Grounds of Appeal.*

The above named appellant states the following grounds of appeal:—

1. The Supreme Court sustained the finding of the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries by an accident arising out of and in the course of his employment by the respondent.

2. The Supreme Court sustained the finding in the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries that were the result of an accident arising out of his employment by respondent.

3. The Supreme Court sustained the finding of the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries that were the result of an accident aris-

ing in the course of his employment by the respondent.

4. The Supreme Court sustained the finding of the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries that resulted from an accident within the meaning of the Workmen's Compensation Act.

5. The Supreme Court determined that Albert McNeil, petitioner's ward, received personal injuries from an accident which was a risk reasonably within the contemplation of the master and incident to the employment under the then existing circumstances.

6. The Supreme Court affirmed the judgment of the Court of Common Pleas.

M. CASEWELL HEINE,
Attorney for Prosecutor-Appellant.

Writ of Certiorari.

Filed November 17, 1915.

NEW JERSEY, *ss.*

The State of New Jersey to the Hon. Joshua R. Salmon, Judge of the [L. S.] Court of Common Pleas, in and for the County of Morris, and Elias Bertram Mott, Clerk of the Court of Common Pleas of the County of Morris, and Jennie McNeil, guardian of Albert McNeil, a minor, GREETING:

We being willing for certain reasons to be certified of a certain determination, judgment, order, and proceedings made and given by Joshua R. Salmon, Esq., Judge of the Court of Common Pleas, in and for the County of Morris, in a certain action, plaint and proceedings brought against Mountain Ice Company, a corporation, at the suit of Jennie McNeil, guardian of Albert McNeil, a minor, to recover compensation under "An Act of the Legislature of New Jersey prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure of the determination of liability and compensation thereunder," approved April fourth, nineteen hundred and eleven; also under the supplement of said act, approved May second, nineteen hundred and eleven, and the acts amendatory thereof and supplemental thereto, do command you that you send under your seals to our Justices of our Supreme Court of Judicature, at Trenton, on the seventeenth day of November, next, the said de-

termination, judgment, order and proceedings made and given by you, with all things touching and concerning the same as fully and entirely as they remain in said Court of Common Pleas, by whatever names the parties may be called therein, together with this, our writ, that we may further cause to be done thereupon, what of right we shall see fit to be done.

Witness, Charles W. Parker, Esquire, Justice of our Supreme Court, at Trenton, aforesaid, this twenty-eighth day of October, in the year of our Lord, one thousand nine hundred and fifteen.

WILLIAM C. GEBHARDT,
Clerk.

M. Casewell Heine,
Prosecutor's Attorney,
Kinney Building,
Newark, N. J.

Allowed October 28, 1915.

Let it be sealed.

C. W. PARKER,
J. S. C.

Return to Writ.

Return.

Filed November 17, 1915.

New Jersey Supreme Court.

MORRIS COUNTY.

JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor, *Petitioner,* *vs.* MOUNTAIN ICE COMPANY, a corporation, *Defendant.*	*Writ of Certiorari.*

The answer of Joshua R. Salmon, Esquire, Judge of the Court of Common Pleas, and Elias Bertram Mott, clerk of said court, holden in and for the County of Morris and within named, the record and proceedings of the plaint whereof mention is within made with all things touching the same, we certify to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained in a certain schedule to this writ annexed as within we are commanded.

(Signed) JOSHUA R. SALMON,
[SEAL] *Judge.*

Attest:

(Signed) ELIAS BERTRAM MOTT,
Clerk.

Petition.

Petition.

Filed August 26, 1914.

Morris County Court of Common Pleas.

Between JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor, *Petitioner,* *vs.* MOUNTAIN ICE COMPANY, a corporation, *Defendant.*	*Petition for Compensation under the Employers' Liability Act of 1911, the Supplements Thereto and the Amendments Thereof.*

To the Honorable Joshua R. Salmon, Judge of the Morris County Court of Common Pleas:

1. The petition of Jennie McNeil, guardian of Albert McNeil, a minor, respectfully shows that on the twenty-eighth day of January, A. D. nineteen hundred and fourteen, at the Village of Mount Tabor, while he was in the employ of the defendant as a laborer, the said Albert McNeil, whose home is at Mount Tabor aforesaid, received personal injuries, consisting of the fracture of his skull, necessitating the removal of a large piece of the same, leaving a hole or depression in his head, and rendering his right arm and leg practically useless, and depriving him of his speech.

2. At the time of the said injuries, said Albert McNeil, in the usual course of his employ-

ment, while working according to the instructions of the defendant, in the ice house of the defendant, and while he was stooping down working at helping to put the ice into the said ice house, was struck in the head by an ice pick, belonging to the defendant, and which was being used by one Edward Toomey, who was then and there also an employee of the defendant, whereby the said Albert McNeil received the permanent injuries as hereinbefore stated, which render the said Albert McNeil unable to do any kind of work and deprived him of his speech.

3. Your petitioner further shows that after said injury was received by said Albert McNeil as aforesaid, he was taken to Memorial Hospital, at Morristown, where he was operated upon and treated by Dr. Francis Glazebrook, under whose medical care and treatment he remained in said hospital for several weeks; and that he is still unable to follow his usual or any occupation as a result of the injury so received, and never will be able to do so again.

4. Your petitioner further shows that at the time the said Albert McNeil received the said injury, he was receiving from the defendant compensation at the rate of ten dollars and fifty cents per week.

5. Your petitioner further shows that knowledge by the defendant, employer as aforesaid, as to the said accident, was obtained at the time of the said accident, and that the said defendant has since that time been notified by your petitioner of the said accident.

6. Your petitioner further shows that she was appointed guardian of the said Albert Mc-

Petition.

Neil by the Surrogate of the County of Morris, qualified as such, and received the letters of guardianship on the twenty-fifth day of July, A. D. nineteen hundred and fourteen; and that the said Albert McNeil is a minor, aged nineteen.

7. Your petitioner further shows that this petition is presented to your Honor, and will be filed as required by law, within one year after the accident by which your petitioner received his said injuries.

By reason of the failure of the defendant to agree upon the claim for compensation between it and this petitioner your petitioner submits to this honorable court the said claim, both as to questions of fact, the nature and effect of the injury and the amount of compensation he should receive therefor, according to the statute in such case made and provided, to hear and determine this dispute in a summary manner.

And your petitioner will ever pray, &c.

JENNIE McNEIL,
Petitioner.

Witness:

James H. Bolitho.

Order Fixing Time and Place of Hearing.

Filed August 26, 1914.

MORRIS COUNTY COURT OF COMMON PLEAS.

Between

JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor,
Petitioner,

and

MOUNTAIN ICE COMPANY,
a corporation,
Respondent.

Under the Employers' Liability Law of 1911, the Supplements Thereto, and Amendments Thereof.

Notice of Hearing.

A petition having been presented by Jennie McNeil, guardian of Albert McNeil, a minor, setting forth his claim and the nature and effect of the injuries to said Albert McNeil, and requesting the court to fix the amount of compensation therefor, according to the statute in such case made and provided, which petition further sets forth the names and residences of the parties, the facts relating to the employment at the time of the injuries, the injuries in their extent and character, the amount of wages received at the time of the injuries and the knowledge of the employer and notice of the occurrence of said injuries, and said petition being verified by oath of the said petitioner, and said petition being now presented to the Judge of the Court of Common Pleas, and by him ordered filed with the clerk thereof:

Order Fixing Time and Place of Hearing.

THEREFORE, I, Joshua R. Salmon, Judge of the Morris County Court of Common Pleas, do hereby fix Monday the fifth day of October, A. D. nineteen hundred and fourteen, at the hour of ten o'clock in the forenoon, as the time, and the court room in the court house in the Town of Morristown in the County of Morris and State of New Jersey as the place for the hearing thereof, and do order that a copy of said petition shall be served as a summons in a civil action, and may be served within six days hereafter, upon the adverse party, and a copy of this notice of hearing shall be served therewith.

(Signed) JOSHUA R. SALMON,
Judge, &c.

Morristown, N. J., August 26th, 1914.

Answer.

Answer.

Filed September 4, 1914.

MORRIS COUNTY COURT OF COMMON PLEAS.

JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor, *Petitioner,* *vs.* MOUNTAIN ICE COMPANY, a corporation, *Defendant.*	*On Petition, &c.* *Answer.*

Defendant, answering the petition of the petitioner in this cause, shows unto this honorable court the following:

1. Defendant has not sufficient knowledge or information of the facts alleged in paragraphs 1, 2 and 3 of petition herein to form a belief, except that defendant denies that Albert McNeil received any injuries by reason of an accident arising out of and in the course of his employment by defendant.

2. Defendant denies that Albert McNeil at the time of his alleged injury was receiving from the defendant compensation at the rate of $10.50 per week, as alleged in paragraph 4.

3. As to the allegations contained in paragraph 5, defendant says that they are not sufficiently certain for it to admit or deny them; therefore, defendant puts petitioner on her proof that it has been notified since the alleged accident of its alleged occurrence, pursuant to the

statute in such case made and provided and that defendant had actual notice of the said alleged accident.

4. As to the allegations contained in paragraph 6, defendant has not sufficient knowledge or information to form a belief.

Defendant's first contention is that the petition does not state facts sufficient to constitute a cause of action under Chapter 95, Laws of 1911, and the several acts amendatory thereof and supplemental thereto.

Defendant's second contention is that Albert McNeil on the 28th day of January, 1914, was a casual employee of defendant.

Defendant's third contention is that the alleged injury was not caused by accident arising out of and in the course of the said Albert McNeil's employment

Therefore, defendant prays that the petition in this cause be dismissed with costs to petitioner.

M. CASEWELL HEINE,
Attorney for Defendant.

Answer.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } *ss.*

John H. Donnelly, being duly sworn on his oath according to law, deposes and says that he is the assistant secretary of the defendant corporation; that he has read the foregoing answer to the petition of Jennie McNeil, guardian, and that the statements therein contained are true to the best of his knowledge and belief.

JOHN H. DONNELLY.

Sworn and subscribed to before me
this 4th day of September, 1914.

MORRIS UMANSKY,
Attorney at Law of New Jersey.

Reasons.

Filed.

New Jersey Supreme Court.

MORRIS COUNTY.

JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor, *Petitioner and Defendant in Certiorari,* *vs.* MOUNTAIN ICE COMPANY, a corporation, *Defendant and Prosecutor in Certiorari.*	*On Certiorari.* *Reasons.*

And the said prosecutor, Mountain Ice Company, by its attorney comes and prays that the judgment entered against it in the Court of Common Pleas in and for the County of Morris by Joshua R. Salmon, Esquire, Judge of the said Court of Common Pleas, may be set aside, reversed and for nothing holden for the following reasons.

First. Because the Court found without any evidence to support said finding, and contrary to law, that Albert McNeil, petitioner's ward, received personal injuries by an accident arising out of and in the course of his employment by respondent.

Second. Because the Court found without any evidence to support said finding, and contrary

Reasons.

to law, that Albert McNeil, petitioner's ward, received personal injuries that were the result of an accident arising out of his employment by respondent.

Third. Because the Court found without any evidence to support said finding, and contrary to law, that Albert McNeil, petitioner's ward, received personal injuries that were the result of an accident arising in the course of his employment by respondent.

Fourth. Because the Court found without any evidence to support said finding, and contrary to law, that Albert McNeil, petitioner's ward, received personal injuries that resulted from an accident within the meaning of the Workmen's Compensation Act.

Fifth. Because the Court found without any evidence to support said finding, and contrary to law, that the personal injuries suffered by Albert McNeil, petitioner's ward, were ninety per cent. (90 per cent.) of a total permanent disability.

Sixth. Because said finding, determination and judgment are in diverse other respects irregular, illegal, oppressive and unjust to the said respondent-prosecutor.

M. CASEWELL HEINE,
Attorney for Respondent and Prosecutor in Certiorari.

Motion to Dismiss Petition.

MORRIS COUNTY COMMON PLEAS.

JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor,
Petitioner,

vs.

MOUNTAIN ICE COMPANY,
a corporation,
Respondent.

Transcript of shorthand notes in the above stated matter taken at the court house on Monday, the twenty-sixth day of October, in the year nineteen hundred and fourteen, before the Honorable Joshua R. Salmon, Judge, in the presence of James H. Bolitho, attorney for the petitioner, and of M. Casewell Heine, attorney for the respondent.

Mr. Heine. I desire to make a motion to dismiss the petition on the ground that it is therein alleged that the said Albert McNeil, in the usual course of his employment, while working according to the instructions of the defendant, in the ice house of the defendant, and while he was stooping down working at helping to put the ice into the said ice house, was struck in the head by an ice pick, belonging to the defendant and which was being used by one Edward Toomey, who was then and there also an employee of the defendant, whereby the said Albert McNeil received the permanent injuries as hereinbefore stated, which render the said Albert McNeil unable to do any kind of work and deprived him of his speech.

That is the only allegation in regard to the accident having been in the course of and arising out of the employment, and that the petition is lacking in that it does not allege that the injury arose in the course of the employment.

Court. As this is a motion which is to dismiss the petition on the basis as alleged and stated, what have you to say as to that?

Mr. Bolitho. I have this to say that in the first section of the petition it sets forth that the said Albert McNeil, while in the employ of the defendant as laborer, he received this injury, and in the second section as counsel has alleged, it alleges that these injuries were received while he was at work with a fellow employee, and he was employed at the same time at the same work for the defendant. While it does not state in so many words that the accident arose out of the employment still it says that the injury was received while he was in the employment of the defendant.

Court. Do you seek to have your petition amended to that effect?

Mr. Bolitho. Yes, I do; I make a motion that the pleadings be amended that he received the injury while in the course of the employment, and that the accident arose out of and in the course of the employment.

Court. The Court entertains the motion to amend and denies the motion to dismiss and grants an exception to the respondents, so that your rights may be fully protected on that branch and phase of the matter,

and so we can go along and follow the petition as it stands, plus the amendment represented by your motion.

ALBERT McNEIL, sworn for the petitioner himself.

By Mr. Bolitho.

Q Where do you live, Albert? A Mount Tabor.

Q How long have you lived there? A A long time, I don't know how long.

Q Did you live there in January of this year? A Yes.

Q Were you employed for anybody in January of this year? A. Yes.

Q Were you working for the Mountain Ice Company in January? A Yes.

Q Where? A Mount Tabor.

Q At Mount Tabor? A Yes.

Q Did you say at Mt. Tabor? A Yes.

Q Where at Mt. Tabor? A At the ice house.

Q What were you doing when you were working there? A Switching ice.

Q Was that in the ice house? A Inside.

Q Now who was working there with you at that time; were there some other fellows working there? A Yes.

Q Who were they, do you remember any of them? A. Yes.

Q Give us the names of some of them. A Louis Glysencamp.

Q Who else? A Bert Glysencamp.

Q Who else? A James Mitchell.

Q Do you remember any others? A No, sir, David Strowbridge.

Q Who else? A That is all.

Q Was there a person by the name of Toomey working there?

Mr. Heine. Don't lead him, I object if your Honor please.

Court. That is a very important point.

Q How long had you been working for the ice company? A Two days.

Q Did you receive any injury? A Yes.

Q Will you tell us how you received that injury? What were you doing when you were injured? A Working.

Q Working at what? A With the ice.

Q Switching the ice? A Yes.

Q Were you standing in the—

Mr. Heine. I object to that, if your Honor please.

Court. Have him tell us just what he was doing when he got hurt.

A I cannot tell any more than that.

Q Tell us just what you were doing? A I was switching ice when I got hurt.

Q How did you get hurt, where did you get hurt? A In the head.

Q Where in the head? A Right there.

Q Can you show the Court where you got injured in the head?

Court. I remember of having seen the injury before.

Q Who hired you to work there? A I cannot say now.

Q You don't know who it was? A No answer.

Q Can you tell us just what you were doing when you were injured? A No answer.

Albert McNeil, direct.

Q How were you switching this ice? A I was sitting down.

Q What were you sitting on? A On a box.

Q How were you injured? A I could not walk for a long time.

Q No, how were you injured, were you struck by something? A Yes.

Q What were you struck by? A Ice pick.

Q Who else were working with you there at that time? A Louis and Bert Glysencamp.

Q Anybody else? A James Mitchell.

Q Who else? A David Strowbridge.

Q Who else? A That is all.

Q You don't know of anyone else working there? A No answer.

Q Were these men working for the company? A Yes.

Q Were they working in getting in the ice? A Yes.

Q After you were injured do you know what happened? A No.

Q When did you first remember what happened, after you were injured? A I cannot say when.

Q Was it a month or a week? A About three weeks.

Q Where were you then? A Morristown.

Q Where in Morristown? A I cannot say that, I cannot talk.

Q Now then stop and think a minute, don't you know where you were? A Yes, but I cannot tell.

Q Can you say the word? A No.

Q Can you write it down? A No, I cannot write it down.

Q Were you at the hospital? A Yes.

Q Do you know whether you had a bone removed from your head?

Mr. Heine. I object to that, this witness cannot testify as to a medical fact, as to what was removed from his head.

Court. It is better to have us told of that by the doctors as to what the doctors did.

Q Before you were injured did you have the use of your hands? A Yes.

Q Have you the use of your hands now? A No.

Q Which one do you not have the use of? A This one. (Indicating the right hand.)

Q Did you write with that hand before you were injured? A Yes.

Q Can you use it to write now? A No, sir.

Q What were the condition of your legs before you were injured? A All right.

Q After you were injured could you use both legs? A No, sir.

Q How long was it after you came out of the hospital before you could use both legs? A I could walk a little bit when I come out.

Q You could walk a little bit? A Yes.

Q With the assistance of anything? A Yes.

Q Did you use a cane or a crutch at any time after you came out of the hospital?

Mr. Heine. I object to that, that is leading.

Court. He could walk a few steps, if I remember. It is a fact that is now history, and I don't see any great harm in having him tell it. I think it should be admitted. The objection is overruled, and an exception granted.

A No, sir.

Albert McNeil, direct.

Q When you were injured, at the time you were injured could you talk plain? A No, sir.

Q Before you were injured could you talk plain? A Yes.

Q How long after you were at the hospital was it before you could talk as plain as you can now? A About two months, more than that.

Q Can you use your leg as well now as you could before you were injured?

Mr. Heine.—Which one, please?

Mr. Bolitho. The one that was injured.

Mr. Heine. Which one is that?

Mr. Bolitho. The right leg.

A No, sir.

Q What wages were you receiving from the company? A $1.75.

Q Dollar seventy-five for what? A For nine hours.

Q And when you hired with the company was there any time stated as to how long you were to work?

Mr. Heine. I object to that as leading.

Court. Ask him if he knows how long he was to work.

Q What was said to you how long you were to work? A Nothing.

Q Did you ever see that before? A Yes.

Q Do you know what it is? A Yes.

Q What is that? A Piece of skull.

Q Piece of whose skull? A Mine.

Court. Well the doctor can identify it.

Q Where did you get this? A Dr. Glazebrook.

Q When did the doctor give you this, Albert? A A long time ago.

Q Long time ago? A Yes.

Q Where were you at the time? A In Morristown.

Q Were you in the hospital at the time? A Yes.

Q What did the doctor say to you when he gave you that? A I could not talk.

Q You could not talk, but what did he say? A He told me what it was.

Q He told you what it was? A Yes.

Q Did he say it was a piece of your skull? A Yes.

Q Did he say it was a piece of your skull that he removed? A Yes.

Mr. Heine. Well, that is leading, if your Honor please.

Q Have you been able to do any work since you were injured? A No, sir.

Q Have you tried to do any work? A A little bit.

Q Where did you try? A On the golf links.

Q On the golf links? A Yes.

Q What kind of work was that? A Caddying.

Q You were not able to do that? A Yes.

Q You could do that? A Yes.

Q Did you try to do any other work? A No, sir.

Q Who was your boss at the ice house? A Bert Glysencamp.

Q Is he the person who employed you? A No, sir.

Q Who employed you? A I don't know.

Q You don't know his name? A No, I did not know anything about it.

Albert McNeil, cross.

Q How old are you, Bert? A Nineteen.
Cross examine.

Cross examination.

Q Now, Albert is your name? A Yes.

Q Was this in January—it was in January that you were working? A Yes.

Q You were working as a switcher? A Yes.

Q By that you mean that as the ice would come in there, you switched it, as the blocks of ice come in, will you explain what switching is? A I cannot tell it, I cannot talk.

Q Take it easy and tell me; what do you mean by switching? A I said it four times now.

Q I don't know anything more about switching after you have said switching four times. A Parting the ice.

Q Is there a runway down which the ice comes toward you? A Yes.

Q You sat on a box at the runway where it divides into two other runways? A No, one.

Q What did you do with the cakes of ice as they come to you? A Switch them around.

Q Where to? A Different places.

Q How do they come, to a different place to your runways? A No.

Q How do they come? A They slide.

Q How were these other places arranged in relation to where you were sitting on the box? A No answer.

Q Can you describe how the place looks there? A Sure.

Q I was never there, I want to find out how it looks? A I cannot.

Q That is the inside of the ice house? A Yes.

Albert McNeil, cross.

Q And the cakes of ice come down toward you in the runway? A Yes.

Q Where do they go after they leave you? Into different bins? A No.

Q Where do you switch them to? A No answer.

Q Do you understand my question? A Sure.

Q Well, where do you switch them to? A Different places, wherever they want them.

Q To be stored? A Sure.

Q How are they stored? A In sawdust.

Q Piled up in tier after tier? A Sure in sawdust.

Q They pile up the ice? A Yes.

Q That is how they switch a cake of ice, switch it down where they were piling? A Yes.

Q Were they piling it more than one place? A Yes, what do you think, they piled it all at one place.

Q I don't know, I was never in an ice house in my life; did you see where they need the ice and send the ice there in one place? A No a couple.

Q How many places were there that you was switching to? A One.

Q You just said there were several places; how many places were you switching these blocks to? A There are two sides, one man takes one side and another man another side.

Q You mean there are two men sitting on either side of this runway? A Yes.

Q Who was the other switcher? A Louis Glysencamp.

Q Where was he sitting, across the runway from you? A Yes.

Q Sitting on a box? A Yes.

Q Was there more than one runway there? A No.

Q Just that one? A Yes.

Q Did you see a man named Toomey there? A Yes.

Q Where was he sitting? A Behind me.

Q What was he doing? A. Switching.

Q In pulling where do the blocks come from? A They would pull them from the outside.

Q Where did he get hold of them to pull them? A With a hook.

Q He was on a box behind you? A No, I say.

Q Where was he sitting? A He was standing up.

Q He was standing up? A Yes, sure.

Q How close to you was he working? A I don't know.

Q Was he five feet away? A Yes.

Q Ten feet? A No.

Q Between five and ten feet? A Yes.

Q Did he pull the blocks up to you to switch? A No, pulled them away.

Q When you got a block there to switch, he pulled it away? A Yes.

Q The blocks came in and you switched them? A Sure.

Q He came and got the block from you and pulled it away? A Sure.

Q He came right up close to you? A Sure.

Q He pulled your box out from under you? A Sure.

Q How many times did he do that? A I don't know.

Q What time of day did this injury happen to you? A About two o'clock.

Albert McNeil, cross.

Q How long was it before two o'clock that he pulled the box out from under you the first time? A About an hour.

Q How many times during that hour did he pull the box out from under you? A I don't know.

Q How many times? A Couple.

Q More than three? A No.

Q Couple of times? A Yes.

Q What did you say to him when he pulled this box out from under you? A I told him to cut it out.

Q He did not cut it out? A No.

Q Did you strike him? A No.

Q Did you start to work after he pulled that box out? A Yes.

Q How did you start to make the scuffle after that? A He pulled my hair and I pulled his.

Q He pulled your hair, and you pulled his? A Yes.

Q Did you wrestle back and forth? A Yes.

Q Did anybody tell you to stop doing that? A Yes.

Q Who was it? A Mr. Gerard.

Q He told you to stop the scuffling? A Yes.

Q Then you did stop? A Sure.

Q Did you call Toomey names? A No, sir.

Q What did you say? A Cut it out.

Q When he pulled your hair what did you say to him, did you swear at him? A I don't think so.

Q You might have? A Yes.

Q You were mad? A Yes.

Q Did you start to pull his head back and pull his hair, or did you both go at it together? A The two together.

Albert McNeil, cross.

Q Did you swear at him before he came toward you? A No.

Q Is he bigger than you? A Yes.

Q What did he say to you? A I don't know.

Q Was he guying you or making any annoying remarks? A I don't know.

Q You kept getting madder all the time? A I don't know.

Q And finally you got up and went for him? A Sure.

Q Even if he was bigger than you? A Sure.

Q Then you had this scrap and Mr. Gerard told you to stop? A Sure.

Q Did he knock you unconscious when he hit you? A What do you mean?

Q You don't know what hit you? A No.

Q You don't know that he hit you with an ice pick? A No.

Q All you know is that something hit you? A Yes.

Q Was Mr. Gerard still in the room when you were hit? A No, sir.

Q How long had he been gone? A About an hour.

Q Sure of that, are you? A Yes.

Q What makes you recollect that he had been gone about an hour? A I know.

Q How do you know, how do you fix that time? A No answer.

Q How is that fixed in your memory? A No answer.

Q Can you answer that question?

Court. Mr. Gerard is the foreman, was he, is he?

Mr. Heine. Yes, I think so.

Q Can you answer?

Albert McNeil, cross.

Court. I think you will have to let it stand there probably, he said he was not there.

Q He could not have been gone less than that? A No answer.

Q He may have been gone less than an hour? A No answer.

Court. What do you say to that?

A It could be.

Q Toomey pulled the box out from under you about two o'clock? A Sure.

Q Then a couple of times between then and three o'clock? A I don't know.

Q About what time of day was it you were hit, do you know? A Two o'clock.

Q Then it was about an hour before that he pulled the box out for the first time? A Sure.

Q Then Mr. Gerard had been gone about an hour when you were hit? A Yes.

Q It was after that Toomey had pulled the box out from under you for the second time that you had the scuffle? A No.

Q Then it was after he had pulled the box out from under you the first time you had the scuffle? A Sure.

Q Then after he pulled it out from under you the second time you had another scuffle? A No, sir.

Q I understood you to testify that it was after he done it more than once that you tackled him, is not that right? A It was the second time.

Q How long before you were hit and knocked out was it that you had this tussle?

Mr. Bolitho. Can you answer it Albert?

A No, I cannot.

Albert McNeil, cross.

Q Was it five minutes? A No answer.

Q More than that? A No answer.

Q More than five minutes, was it?

Mr. Bolitho. You understand what counsel wants you to say?

Court. About how many minutes, five or ten or twenty or more or less than five that you were in the scuffle before you got hurt?

A About an hour.

Q You are sure about that? A No answer.

Q Are you sure it was an hour? A No answer.

Mr. Bolitho. You can answer that, can't you Albert?

A What do you mean?

Court. That you had this scuffle before you got hurt, was it as much as an hour?

A Yes.

Q How long is this ice season, Albert, gathering the ice? A I don't know.

Q Well, a few weeks, is it? A Yes.

Q While there is cold weather? A Yes.

Q You did not work for the Mountain Ice Company after January? A No.

Q Only when they were gathering ice? A Yes.

Q They simply hire you for a few days at a time while it is cold? A Yes.

Q When you were hired did they tell you all to come on for a few days? A No, sir.

Q What did they tell you? A Go ahead and work.

Q Did they tell you to go ahead and work as long as it was cold enough to cut? A No, sir.

Albert McNeil, re-direct.

Q Didn't you stop work when it got warmer and they could not cut? A No, sir, we did not stop.

Q You only worked there two days before you were hurt? A Sure.

Q Did you ever work for the Mountain Ice Company before? A Yes.

Q Previous years? A Yes.

Q How many winters did you work for them? A I don't know, a winter or two.

Q Is it not true that they always hired you for a few days at a time while cutting was active? A Yes.

Q That is all.

Re-direct by Mr. Bolitho.

Q How many days or weeks did you say you worked there? A I don't know.

Q Did these other fellows, the Glysencamp boys and Mr. Mitchell work there all the time?

Mr. Heine. I object to that, if your Honor please, as the employment of others is irrelevant.

Court. Yes, I don't think that will help in any way, will it, Mr. Bolitho? I don't think it will help.

Q Were you employed there until the ice house was filled each year?

Mr. Heine. I object, if your Honor please, on the ground that this is the vital point in the case. I object to have suggested to the witness the answer to the question which will fill that gap in his case; it is not proper and it is not re-direct.

Court. I think it appears he was employed there one or two years, now I think

we ought to know what his engagement was, what he was called upon to do, for what purpose he was hired; is not that right?

Mr. Heine. Yes, but if the witness does not know who hired him I don't think Mr. Bolitho should suggest it to him.

Court. Objection sustained.

Q How many years before this year were you employed there?

Mr. Heine. I would like to object to that because on the ground that the employment of previous years is not relative to the year 1914 testified to that was in January, 1914, for the 1914 work.

Court. You object to that question in that form?

Mr. Heine. Yes.

Court. I overrule your objection and grant an exception and direct an answer.

A One or two.

Q Were you there last year, did you work there last year?

Mr. Heine. Same objection

Court. The objection is repeated and the same ruling.

Q I mean the year before this year?

Court. You mean the year before the year he was acting?

Q Did you say yes to that? A Yes.

Q How long were you working there then?

Mr. Heine. Same objection.

Court. It is the same objection and the ruling is repeated.

A I cannot say now.

Q Did you work there the year before this year until the ice house was filled?

Mr. Heine. Same objection.

Court. The objection is repeated and the ruling is repeated.

A No answer.

Q Can you tell how long you worked there before this? A No, sir.

Mr. Heine. Same objection.

Court. Same ruling.

Q Do you know whether it was until the ice house was filled? A No, sir.

Mr. Heine. Same objection.

Court. Same ruling.

Piece of skull offered as an exhibit and marked Exhibit P. 1 on part of petitioner.

ALBERT GLYSENCAMP, sworn for petitioner.

By Mr. Bolitho.

Q Where do you live, Mr. Glysencamp? A Mount Tabor.

Q Do you know Albert McNeil? A Yes.

Q Were you working with him in January of this year? A I was, yes.

Q Where were you working? A Mount Tabor.

Q Where at Mount Tabor? A In the ice house.

Q Whose ice house? A Mountain Ice Company.

Q Mountain Ice Company? A Yes.

Albert Glysencamp, direct.

Q Were you and McNeil working there together? A He was working there.

Q What were you doing? A I was run boss.

Q What do you mean by that? A Have charge of the room.

Q Did Albert McNeil work in this room? A Who?

Q Albert McNeil? A Yes.

Q How long did he work there? A Two and a half days, I think.

Q What was he doing? A Switching.

Q Switching ice? A Yes.

Q Can you explain to us what that is? A Just pulls the ice around, that is all.

Q Were you present at any time when he was injured while doing this work? A I was, yes.

Q Do you remember what day it was? A January twenty-eighth.

Q Of this year? A This year, yes.

Q Do you remember what time of the day it was? A Around three o'clock, I guess.

Q Will you tell us what you saw with reference to this accident? A I saw him get hit, that is all I saw.

Q What was he doing at the time he got hit? A He was working.

Q Did you say he was working? A He was sitting down switching ice.

Q Do you know what he was sitting on? A A little box.

Q Do you know how he was injured? A Struck on the head.

Q How long had you worked there at the ice house? A About a year and a half.

Q Did McNeil work there constantly all the time? A No.

Q Who else was working there with you in that room? A Why, Trowbridge, and my brother.

Q What is your brother's name? A Louis.

Q Who else? A James Mitchell and some Italians.

Q Did these men work there all the time with you? A Just in the winter time.

Q In the ice season? A Yes.

Q Did you work there the year before with McNeil? A No, sir.

Q How long does the ice season usually last? A You mean Mt. Tabor?

Q Yes. A About seven days at Mt. Tabor.

Q Do the men who were employed at Mt. Tabor work anywhere else for this company?

Mr. Heine. I object to that, the contract of employment anywhere else is entirely irrelevant.

Court. I sustain the objection as to its generality.

Mr. Bolitho. I ask for an exception.

Court. Exception granted.

Q Do these men who were employed there with you, Albert McNeil, in the room where you were working on that day, work anywhere else in the ice business for that company after they get through in that ice house? A They can, yes.

Mr. Heine. I object to that.

Court. Objection is sustained. Exception is granted.

Q Did you at any time before this year work with Albert McNeil for that company?

Mr. Heine. I object to that.

Court. The objection is repeated and the ruling is repeated.

Q How many men were employed in that ice house all the year around?

Mr. Heine. I object to that as irrelevant, and not material in the issue in this case, which is whether the injury is out of his employment and in the course of it.

Court. Objection is sustained and an exception granted to the petitioner.

Q Were you foreman of the room? A Of the room, yes.

Q Do you know who employed Albert McNeil? A Why the company's man, I suppose, there was a number of them. Gerard was one.

Mr. Heine. I move to strike the answer out.

Court. Strike the answer out.

Q Did you hire any men there? A No, sir.

Q Who was the superintendent? A Wardell.

Q Was he present at the time McNeil was injured? A He was outside.

Q Had he been there previous to that time? A No answer.

Q The same day? A I don't know, I did not see him.

Q Did you see the general superintendent of the company there? A I saw the president.

Q Who was that?

Mr. Heine. I object to that unless the time is specified.

Q That day, what was his name? A Mr. Bamberger.

Q About what time did you see him there that day? A Around three o'clock.

Q Was that before this accident? A Just before.

Q How long before the accident? A Five minutes, five or ten minutes.

Q What did he say or do? A He did not say anything.

Q Did he say anything? A Why Gerard did and he told him to cut it out.

Q Was the president of the company with Gerard at that time? A Yes.

Q What were they doing when he said cut it out? A They were wrestling.

Q After Gerard told him to cut it out, in the presence of the president of the company, what did McNeil do? A He sat down on the box.

Q Did he do anything else? A I did not see him do anything else.

Q He started to work? A He started to work.

Q Do you know what physical condition McNeil was in before the accident? A He looked very good.

Q Could he talk plainly? A Yes.

Q Did he use his right arm? A Yes.

Q Could he walk well? A Yes.

Q Do you know what condition he was in after the accident? A Do you mean after he was hurt?

Q Yes. A He was unconscious.

Q Did you assist in removing him from the building? A No, Mr. Gerard did that.

Q How long after that did you see him again? A I forget, in a long time.

Q Do you know how many weeks? A No, I don't.

Q Was it after he had come out of the hospital? A No, I was down there once.

Albert Glysencamp, direct.

Q What condition was he in then? A Very bad.

Q Could he talk? A Some, not much.

Q Could he use his right arm then? A He did not seem to.

Q Did you see him after he came out of the hospital? A Sure.

Q How could he walk, or how did he walk? A Very good.

Q What do you mean by that? A He could walk all right; he could walk.

Q Did he walk as well as before he was injured? A No.

Q Have you seen him attempt to use his right arm since that time? A No, I don't know as I have.

Q Were you working with Mr. McNeil at the time he worked there this year? A I was in there, yes.

Q What did he work at? A Switching.

Q Up to the time he was hurt? A Yes.

Q Was he doing the same work? A Yes, I think he was, as far as I know, he was in there.

Q You were foreman? A Of the room.

Q Do you know whether he was doing the same work, switching? A Yes, he was in there.

Q All the time he was there? A Two and a half days.

Q What did you intend to employ him at if he stayed there?

Mr. Heine. I object to that, "if he stayed there."

Court. What force has the intention?

Mr. Bolitho. I will withdraw it.

Q You instructed the men what to do in that room? A Yes.

Q You instructed McNeil what to do? A Yes.

Q How long did you expect to have these men working with you in that house?

Mr. Heine. I object to that, it is not relevant, not material, and not based on any evidence in the case.

Court. I sustain your objection.

Mr. Bolitho. I pray an exception.

Court. Exception granted.

Q When the work was finished in that room would you discharge the men? A No, I did not. I would not.

Q What would you do as soon as the work was done?

Mr. Heine. I object to that.

Court. What would the witness do?

Mr. Bolitho. What would you do with the men?

Court. If you will give us any light, we should have it.

After argument.

Court. Objection sustained, and exception granted.

Q How long did you continue to work in that room after McNeil was injured?

Mr. Heine. I object to that, it is irrelevant.

Court. I sustain the objection and grant you an exception.

Q How large was that room? A I cannot say how large it was. There are three rooms in it.

Q How long did it take you to fill that room with ice? A It took seven days, nearly seven.

Q How nearly was it filled when McNeil was injured? A About half full.

James Mitchell, direct.

Q You mean that room was? A The whole thing.

Q The whole thing? A Yes.

Q When did you begin to fill that house? A I forget now, when it was, in January.

Q Did McNeil start to work there when you began to fill the house? A He was there two and a half days, about two and a half days.

Q Did you start to fill that house at that time? A I forget now when we started.

Mr. Heine. I have no cross examination.

JAMES MITCHELL, sworn for petitioner.

By Mr. Bolitho.

Q Where do you live, Mr. Mitchell? A Mount Tabor.

Q Were you employed by the Mountain Ice Company in January of this year? A Yes.

Q Were you working in the same room with Albert McNeil when he was injured? A Yes.

Q Will you tell us what McNeil was doing when he was injured? A He was sitting on a box.

Q What was he doing with reference to his work? A Switching.

Q Switching ice? A Yes.

Q Will you tell us what you saw with regard to the injury, how he was injured? A He was hit in the back of his head.

Q He was struck in the back of his head? A Yes.

Q What was he struck with? A With an ice pick.

Q Before he was struck with this ice pick did you see him doing any scuffling with anybody? A Yes.

Q How long before that? A I should judge about half an hour or so.

Q Who was he having this scuffling with? A Toomey.

Q Did anybody interfere with the scuffle and tell the boys to return to work?

Mr. Heine. I object to this answering the question for the witness and putting the whole answer in his mouth. I object to it on the ground that it is unduly leading.

Mr. Bolitho. I will withdraw it.

Q Did you see Mr. Gerard there? A I did not see him there at that time.

Q At the time of the scuffle, I mean? A No, sir, I did not see him.

Q Did you know the president of the company? A I did not know him at the time. I was told afterwards it was the president.

Q Did you see him there at the time of the scuffle?

Mr. Heine. I object to that, and I move to strike out the previous answer on the ground that it is hearsay information.

Q Did you see the person who you was told afterwards it was the president there at the time of the scuffle?

Court. It is not competent testimony, it is recognizing his answer.

Q After these boys had the scuffle what did they do? A They went to work again.

Q Both of the boys returned to work? A Yes.

Q Were they working at the time of the accident? A Yes, they started to work.

James Mitchell, direct.

Q Do you know when McNeil went to work there first? A No, sir, I do not.

Mr. Heine. I have no cross examination.

By the Court.

Q Did you ask him Mr. Bolitho, whether he actually saw the assault?

Mr. Bolitho. I think I did, and he saw it.

Court. Well ask him one question, or I will: In whose hand the ice pick was at the time he saw the assault on Albert McNeil.

Mr. Bolitho. I will ask the question. Who did you see hit Albert McNeil with an ice pick?

A Martin Toomey, not Martin Toomey, but Toomey Martin.

Court. Do you know Edward Toomey, Mitchell, do you know a man by the name of Edward Toomey?

A I don't know his last name. I know his father, he was Martin, so I supposed he was Martin, too, all I know was Toomey his first name.

Q When McNeil was struck by the ice-pick was it in the hands of this Toomey? A Yes.

Q Were you looking at him just previous to the striking? A Just switching a cake around, when I saw him come with the ice pick on his head.

Q Do you mean by that you saw the blow struck when he was switching the ice around? A Yes.

Q Who was switching the ice? A Bert was switching the ice.

Q Bert McNeil? A As the cake was coming and I was grabbing it, I was not on his side then.

Jennie McNeil, direct.

Q What was Bert doing when he got struck by this ice pick? A Switching the cake.

Q Switching the cake of ice? A Yes.

Q Did you say whether you had worked with Bert the day before? A No answer.

Q How long had you worked there this time?

Mr. Heine. I object to that as leading.

Court. Now then, let us see.

A I think I worked there two days.

Court. Unless you want to argue it, I think it is proper.

Q When you went to work there was McNeil working there? A Yes, he was switching.

Q Switching ice? A Yes.

Q During the time between the time he went to work and until he was injured did he continue at that job, switching the ice? A He was switching all the time.

Q That is all.

Mr. Heine. I have no cross examination.

JENNIE McNEIL, sworn for the petitioner.

By Mr. Bolitho.

Q Are you Bert McNeil's mother? A Yes.

Q You are his guardian?

Mr. Heine. Perhaps I can admit all that you want to call this witness for.

Mr. Bolitho. Perhaps you can admit the guardianship.

Mr. Heine. Yes.

It is admitted that Jennie McNeil is the guardian of the petitioner, and also his mother.

Jennie McNeil, direct.

Q Mrs. McNeil, do you know what condition Bert was in before this accident? A He was in good health.

Q What will you say as to his ability to speak plainly? A He seemed to be all right.

Q What will you say with regard to the use of his right hand? A He had and could use it all right until he got hurt.

Q Could he write? A Yes.

Q What will you say with reference to the use of his right leg? A He used that pretty freely.

Q What has been the condition of his arm since the accident? A He has not seemed able to use it at all.

Q What has been the condition with reference to speech? A His speech seemed to be all right before he got hurt.

Q I mean since he got hurt? A I cannot understand him at all, I have to holler at him.

Q Does he appear to understand you as well since he got hurt as before? A No, sir.

Q Does he use his leg as well as before he was injured? A No, sir, he does not.

Mr. Heine. I have no cross examination.

Mr. Bolitho. If your Honor please, I tried to get our physician here this afternoon, but he is still on that case and I could not get him. I would like to have a chance to put him on if he comes in.

Court. What have you to say about the extent of the injury?

Mr. Heine. I have nothing about the condition which has been testified exists, and when that comes in, in regard to the specific injuries that are enumerated in the act would be something, I have no medical tes-

timony to offer, I would take your Honor's judgment on that point. I concede the man is injured, and the use of the arm and leg and speech is deficient.

Court. We will take it up in that order waiting for the doctor to come in.

Mr. Heine. I would make a motion, if your Honor please, to dismiss the petition on the ground that no specific hiring has been shown, and that if any such hiring has been shown it clearly appears to be casual, is not regular or permanent, but the opposite of permanent, and on the further ground that it appears that this man was struck wilfully by a fellow employee with a pick and that the blow was given some short time after an altercation in which they had engaged in a physical encounter, and that this clearly shows that the injury was out of the employment, particularly out of the employment, nor in the course of the employment. The cases I think before the Court show where it has been decided recently in the skylarking case. This case is even stronger than that for the respondent comes here, and these men are picked out of a promiscuous lot, at manual labor at $1.75 a day, the habits of the men do not make any particular difference, so long as they can switch this ice around. These men are fooling; this man pulls a box out from under him and he tells him to cut it out. Whether it was done more than two times or not we do not know; it arouses feeling so that this man McNeil, although a small man, tried to vindicate his race, and they had an altercation, so called by the super-

intendent, which was quelled by the superintendent saying cut it out; and then the contestants going back to their work. Then after the superintendent goes out comes this wilful assault. I think you will take notice of this that these acts came before you on a charge of assault, after the record is introduced to show that. The trouble came through a scuffle, and while it came while at work, it cannot be stretched to hold through the course of the employment, and if the master is to be held liable for the assaults of a criminal character of the employees, if he is to be held to that there is no limit. I think the limit is reached here; it is even stronger than the skylarking case. I will submit to the Court that there is no evidence that the injury occurred so that it would bring it under the act.

Court. I am going to defer passing upon this now, and place the respondent upon its defense so that we get the entire case.

Mr. Heine. Decision will be reserved on that point.

Court. Yes, decision will be reserved on that point, but I will hear Mr. Bolitho on that point now.

Mr. Bolitho. I would rather be heard later.

Court. All right, we will take up your case then.

LOUIS C. GERARD, sworn for the respondent.

By Mr. Heine.

Q Mr. Gerard, where do you live? A Mount Tabor.

Q What is your business? A Carpenter.

Q You work for the Mountain Ice Company? A I do in the winter time as a rule.

Q This year, the winter of 1913-1914 were you employed by the Mountain Ice Company? A I was.

Q How was you employed? A As general foreman for the plant.

Q Was this man working with you? A He was.

Q Do you recall the circumstances of his being struck by an ice pick? A I do.

Q Just tell the Court what happened? A Mr. Bamberger and I were going through the building at the time, I did not see it, but as we were going through into this No. Three room my attention was called to Albert Glysencamp in stopping the boys from fighting. I looked over and I don't say they were fighting, exactly, they were in a clinch over up against the side of the building. It looked like a tussling match, they were not striking any blows. Mr. Bamberger told me to have them stop. I went over and said "cut it out." From there, Mr. Bamberger and I passed over out into the other room. I did not think any more of it until they came running through; one of them said, I don't recall which one said it, whether it was one of the men who had hold—

Mr. Bolitho. Would that be competent?

Court. It strikes me as a hearsay proposition. I will uphold your objection and grant an exception, let us have another question.

Q When you went out of the room they had stopped this? A Yes.

Q The scuffling? A They had.

Q You went in the adjoining room? A I did.

Q Did you see McNeil again that afternoon? A I did.

Q Where was he then? A The next time I saw him was when I went back after he was struck.

Q How long was that after you stopped this scuffling? A Ten minutes.

Q From the time you stopped them until you went back in their room was how long? A Ten minutes.

Q When you saw McNeil where was he then? A I saw him lying on the ice and two or three holding him.

Q Was anything said to you at that time? A No, only the ones going through the room.

Mr. Bolitho. I object to that, he can ask if anything was said.

Q Was anything said by these people standing around McNeil? A I presume there was; something was said, I would not say what it was.

Q If you cannot remember exactly the words can you remember the subject?

Mr. Bolitho. I object to that.

Court. The question is yes or no whether he can remember the subject.

A I cannot recall what was said.

Q Not the exact words? A No.

Q But can you tell the substance of what was said? A Yes.

Q Tell the Court the substance.

Mr. Bolitho. I object to that.

Mr. Heine. I will withdraw these last two questions at this time.

Q When you saw this man McNeil on the ice there did you see this man Toomey? A No, Toomey had gone through into No. 1 room and McNeil was in No. 3.

Q After you stopped this scuffle where and when did you next see Toomey? A When he was brought there into No. 1 room from No. 3.

Q Who brought him there? A Albert Glysencamp and David Trowbridge.

Q Did Toomey say anything to you? A Not at the time, in the other room.

Q He was talking to you? A He did talk.

Q What was that?

Mr. Bolitho. I object.

Mr. Heine. I will withdraw the question.

Q Were these others holding Toomey when they brought him there? A They were.

Q Were they running? A No, sir, they were walking.

Q Was he trying to break away from them? A No, not that I noticed at all.

Q Did either one of these men who were holding Toomey say anything to you when they brought him in? A Yes, they did.

Q What was it?

Mr. Bolitho. I object to what they said.

After argument.

Court. Now this is a statement by either A or B who brought Toomey in. Now why cannot we have Mr. A or B brought here to tell just what was said?

Objection sustained, and exception granted.

Q Was Toomey brought back to where you found McNeil lying on the ice? A No.

Q What did you do when you came in and found McNeil in this condition? A I told two or three of the men, I said "pick him up and take him outside where we can look after him better."

Q Had you ever seen this man attack McNeil or say anything of that kind? A Not to my knowledge.

Q This man Toomey, was he known to be quarrelsome, or did he have a reputation for being quarrelsome? A Not any more than these boys together.

Q Never heard him quarrel before? A No, sir.

Cross examination by Mr. Bolitho.

Q Do you know how old a man Toomey was? A You mean Ned, the boy?

Q Yes. A No, I don't know how old he was.

Q Did you employ him? A No, sir.

Q Did you say that there was some gentleman there with you at the time this scuffling was going on? A Mr. Bamberger was there.

Q Who was he? A He was the president of the ice company.

Q What did he say? A He saw them, over there, and he said you will have to either discharge them or have them quit.

Q What did you say? A I said to them that they would have to cut it out.

Q What did they do? A They quit it and went on with the work.

Louis C. Gerard, cross.

Q Where did you go? A In the next room.

Q How far away were they when they were scuffling? A Fifty feet.

Q How did you enter it there? A Through the middle door.

Q Then when you left you had no reason to believe they would continue their quarrel? A No reason to believe but what they were going to work.

Q What did you say, something with regard to their working there steady, did you work there steady? A Yes.

Mr. Heine. I object to that, that is immaterial.

Mr. Bolitho. That was brought out on the direct, I think. I will withdraw the question.

By the Court.

Q You said that these two young men, McNeil and Toomey, went back to work before you and Mr. Bamberger left that room? A I did.

Q What kind of work did they go back to? A McNeil went back and sat on his bench switching ice and Toomey stood behind him to place the ice.

Q Did you see McNeil switch any ice before you left the room? A No, sir.

Q And he was there the last you observed? A Yes.

Q Did you see him standing behind McNeil? A Yes.

Q Did you see him receive any ice? A No, sir.

Q Nor dispose of any? A No.

Q They were there ready when you left the room? A Yes.

LOUIS GLYSENCAMP, sworn for the respondent.

By Mr. Heine.

Q You were employed by the Mountain Ice Company in the ice house at Mount Tabor in the winter of 1913-1914? A 1914.

Q In January, 1914? A Yes.

Q Were you in this room No. 3 when McNeil was hit with this pick? A Yes.

Q You knew this man, Toomey? A Yes.

Q Was he in the room there? A Yes.

Q Before McNeil was hit had Toomey and McNeil been playing or fighting or doing anything? A Been quarreling.

Q Tell us what they were doing before he was hit? A I saw Toomey knocking the boy out from under him.

Q Out from under McNeil? A Yes.

Q What did you see McNeil do? A He started to quarrel also; I did not watch them very close, they went back to work after that.

Q Did you see them having any tussle or fooling? A Yes, I saw them.

Q Did Mr. Gerard come in the room while they were doing that? A I don't remember.

Q Did you see McNeil hit with this pick by Toomey? A Yes.

Q You saw him strike the blow? A Yes.

Q Just describe what took place just before that? A Nothing so far as I can remember.

Q Before Toomey hit him where was McNeil? A Sitting down on a box.

Louis Glysencamp, cross.

Q How long had he been sitting on that box since the scuffle? A Not very long.

Q How many times had you seen Toomey pull the box out from under McNeil? A I did not see him pull it at all; I saw him start around to fool around the box.

Q Then you saw the hair pulling? A I don't know that they were hair pulling, they were in a clinch.

Q A short time before that McNeil was on the box there and Toomey came up and hit him? A Yes.

Q Had McNeil called Toomey any names? A I don't know.

Q Were they calling names back and forth? A I don't know.

Q After Toomey hit McNeil on the head what did you see then? A Somebody took McNeil out and somebody took him out in back of the ice house.

Cross examination by Mr. Bolitho.

Q After they were scuffling did they both return to work? A Yes.

Q You saw them both working there before this blow was struck? A Yes.

Q They were both working? A Yes.

Q How long had you worked in that ice house in January? A How long?

Q Yes.

Mr. Heine. I object to that if your Honor please.

Court. On the ground that it was not touched on in the direct?

Mr. Heine. Yes, and on the ground that it is immaterial.

Court. I sustain your objection.

David J. Trowbridge, direct.

DAVID J. TROWBRIDGE, sworn for respondent.

By Mr. Heine.

Q Mr. Trowbridge you were in the employ of the Mountain Ice Company working with the man McNeil? A Yes.

Q And these other men? A Yes.

Q You remember the occurrence of McNeil being hit with the pick? A Yes.

Q By Toomey? A Yes.

Q Did you see Toomey hit him? A Yes.

Q What did you see if anything before he actually hit him in the ice house? A I saw them have a little scuffle.

Q What about? A A little fooling; Toomey was pulling the box or trying to pull the box out from under him, hitting it with his pike pole, and that started a little scrap.

Q Then you were all there? A Yes.

Q Right after that Toomey hit McNeil with the pole? A Yes.

Q It began with pulling hair? A Yes.

Q Did you hear McNeil say anything to him? A I heard McNeil say "cut it out."

Q How many times did you hear him say that? A Only once.

Q Did you hear any names called? A No, sir.

Q Did you see this little scrap, you call it? A Just a clinch.

Q How long was it after they were clinching that you saw him hit him in the head? A I cannot say how long, but he was told to remove a cake of ice and I thought the thing was settled, when I saw him hit him, and the room boss was running out this cake of ice.

David J. Trowbridge, cross.

Q Between the time that they resumed work and the time you saw him hit him was the length of time it took you and the boys to remove that cake of ice? A Five minutes.

Q Did you hear Mr. Gerard speak to them about fooling? A Yes.

Q What did he say? A He said "cut out this fooling, if they wanted to fool to go outside."

Q After he hit him what did you do? A I grabbed Toomey.

Q Was he going to hit him again? A I don't know.

Q Did he make any motion? A He had the pike up in the air.

Q You grabbed him? A Yes.

Q What did you do? A I lead him out in the other room.

Q Who did you find there? A I found Mr. Gerard and the president, they said it was Mr. Bamberger, the president.

Q Did you ever see these boys fight before? A No, sir.

Q Did you ever see Toomey fight before? A No, sir.

Q Had he been working around there? A No, sir, that was the first in five years I had worked for the company.

Cross examination by Mr. Bolitho.

Q Was the president of the company there when Gerard stopped them from scuffling? A Yes.

Q After Gerard stopped them from scuffling what did they do? A They went back to their work.

Stipulations.

Q And they were working there a few minutes before this accident happened? A Yes.

Q Both at work? A Yes.

Q And Gerard and the president went out of the room? A Yes.

Re-direct by Mr. Heine.

Q They had been working all the afternoon while he was poking the box with the pole? A Yes.

Q Between times Toomey would poke the box with the pole? A Yes.

Re-cross by Mr. Bolitho.

Q You said you saw him poke the box only once? A Yes.

Q Did you hear him talk about it being poked some other times? A No.

It is hereby stipulated between counsel that the Edward Toomey mentioned in the petition is the man who was indicted by the May Grand Jury of this County for the year 1914, for assault upon Albert McNeil the petitioner, and that he plead guilty to the charge and was committed to the New State Home for Boys at Lower Jamesburg by this Court in June, 1914, and that the charge of assault was based upon the same act of striking on the head as the act mentioned in the petition in this action as causing the injury set forth in the petition.

It is also stipulated between counsel that in the event of the Court finding for the petitioner and against the respondent on the subject of liability that counsel will endeavor to adjust by agreement the damages for injuries sustained and failing such agreement by counsel that the petitioner shall have the right to produce his physi-

cian for examination or cross examination before the Court and the Court can then find independently on the extent of injuries.

MORRIS COUNTY COMMON PLEAS

ALBERT MCNEIL,
Petitioner,
vs.
MOUNTAIN ICE COMPANY,
Respondent.
} *Testimony.*

Testimony taken in the above stated cause at the Court House in Morristown, New Jersey, on Wednesday June 9th, 1915, before Honorable Joshua R. Salmon, Judge, in the presence of James H. Bolitho, Esq., attorney for the petitioner, and M. Casewell Heine, Esq., attorney for the respondent.

DR. FRANCIS H. GLAZEBROOK, a witness produced on the part of the petitioner, being duly sworn, testifies as follows:

By Mr. Bolitho.

Q Will you state to the Court as to the disability of McNeil the petitioner in this action? A He was permanently disabled, and has been permanently disabled until the present time, and from now on I should say he would have ninety per cent of permanent disability. Do you wish to know about his injury?

Q I want the Court fully informed, and so go on. A He had a compound fracture of

the skull which injured his brain substance, also producing paralysis at the time and which rendered him unconscious. When he regained consciousness he had lost his sense of speech and he was paralyzed on the right side completely. He did not regain his power of speech while he was in the hospital. He did gain in other ways and was able to get about at the end of two months, that is to walk about a little with help. I did not see him again until about six months ago. At that time he had regained his power of speech, that is he could talk brokenly, but could not say everything that he wanted to. The motor area of speech is permanently damaged to the extent that it is now. In other words he will never talk any better than he does now. He has partial paralysis of his right arm, hand and of the right leg. I consider this paralysis permanent. I don't think he will ever recover any more than he has now.

Q Figuring on this basis of the man's working ability at 100 per cent what has he now? A I should say he has only ten per cent of working ability; he can only be a watchman or work at selling newspapers.

Cross examination by Mr. Heine.

Q How long was he in the hospital? A I cannot say exactly, I should say two or three months.

Q This condition of paralysis has been practically the same from the beginning? A He improved since the accident to his present condition. He has been in the same condition for the last six months.

Q You have not seen him until to-day? A I saw him about six months ago; his condition

has remained the same. It is no different than it was six months ago.

By the Court.

Q That part of the area which controls the arm has been removed? A It is my opinion that it has been destroyed by the injury. The remaining part of the brain was damaged by pressure due to hemorrhage, etc. Some brain substance has been lost. This injury was limited to the head; that he was not injured in the arm but in the head is shown by the paralysis of the right arm and the right leg and in the loss of the power of speech. That is where the motor areas lie; they are located on the cortex of the brain, and are what we call the motor areas of the brain, right along the fissure of Rolando as that part of the brain is called. The speech areas lie a little lower than the other motor areas. He evidently had a considerable hemorrhage which was causing pressure, and that causes compression from the blood clot. He regained part of his speech and regained part of the motion of his arms and leg, after absorption of this clot. He can never regain anything more because what he has now is due to the loss of brain tissue. I consider that the present disability is absolutely permanent. I don't think he will ever get any better than he is to-day, and I think my friend agrees with me. In other words he has ten per cent of himself left. He lost brain substance, and you cannot replace brain substance.

Finding of Facts.

Filed April 6, 1915.

MORRIS COUNTY COURT OF COMMON PLEAS.

JENNIE MCNEIL, guardian of Albert McNeil, a minor, *Petitioner,* *vs.* MOUNTAIN ICE COMPANY, a corporation, *Respondent.*	*On Petition under "Workmen's Compensation Act" of 1911, its Supplements and Amendments.* *Findings.*

Mr. James H. Bolitho, attorney for petitioner.

Mr. M. Casewell Heine, attorney for respondent.

SALMON, *J.*

The facts of this case appear to be substantially as follows: Albert McNeil, a youth of nineteen years, was engaged in "switching" ice at the plant of the respondent at Mt. Tabor, Morris County, on January 28, 1914. The respondent's work consisted in filling its house with ice. "Switching" ice is shown to be the operation of guiding a cake of ice as it traverses its course after entering the house, toward a particular destination there to be stored. There are those to whom the cakes are assigned by the "switcher" according to the necessities of the case having regard to the equal distribution of the ice in its storage in the house. While said McNeil was thus engaged sitting upon a box, and operating with an ice pick with which to guide the

ice cake, and actually guiding or "switching" a cake of ice, a fellow workman, (a youth under sixteen years) whose duties were to receive the ice from the switchers, struck a blow upon the head of said McNeil with an ice "pick," at the time standing in the rear of the victim, and under circumstances that McNeil was unaware of the impending attack. The injured was made unconscious, removed to a hospital, where a portion of his skull was removed, and with the result that he suffers impairment in his power of speech, and use of his right arm and right leg. The assailant was indicted by the Grand Jury for assault upon said McNeil, pleaded guilty to the charge and was committed by the Court to the State Home for Boys at Lower Jamesburg, the said charge of assault being based upon the same act alleged as the cause of injury and above mentioned. It further appears that the assault in question had been preceded, at a time variously stated to have been from ten minutes to an hour, by an altercation and physical encounter in which the said assailant appears to have been the aggressive party. This altercation and encounter was provoked by the assailant, who persisted in pushing from in under the said McNeil, the box upon which he sat in the progress of his work, which acts were resented by McNeil with directions to desist. While thus engaged in the encounter, which consisted in a tussling match, while clinched together and mutually pulling the hair of one another, the general foreman and the president of the respondent company happened along, and the president directed the foreman that he, the foreman would "have to either discharge them (referring to McNeil and his fellow employee) or have them quit." Both

of the latter went back to work while the president and foreman were yet in the room, and in the words of the said general foreman: "McNeil went back and sat on his bench switching ice and Toomey (the assailant) stood behind him to place the ice." The president and foreman passed out of the room, and according to the foreman, "ten minutes" thereafter he, the foreman, saw McNeil injured. The injured had worked a period of two and one-half days, and the probable time necessary to fill the house appears to have been seven days. The wages of the injured were $1.75 per day.

It is stipulated that in the event of the Court finding for the petitioner and against the respondent on the subject of liability that counsel will endeavor to adjust by agreement the damages for injuries sustained and failing such agreement by counsel that the petitioner shall have the right to produce his physician for examination and cross examination before the Court and the Court then to find independently on the extent of injuries.

In respondent's brief, there are two points advanced why a recovery should not be had.

Point one is as follows: "The criminal assault upon McNeil by Toomey is not an injury received by McNeil arising in the course of and out of his employment." Point two is, "The employment of McNeil was a casual employment and therefore not within the scope of the act."

Considering the second point first, it is apparent from the testimony that it does not show the stated terms of a specific hiring, although such there may have been. The mental condition of McNeil on the stand was such, as there exhibited, to make the impression that there were

circumstances during the course of his two and one-half days' service and matters incidental to his employment that he was unable to tell and presumably unable, because of his injury affecting his speech and possibly his memory. It is not too much to say that the contract of hiring was to extend at least during the period required to fill the ice house where the injury occurred. This being so, the rule as applied in the case of James Scott *v.* Payne Brothers, incorporated, 85 Law 446, should control here. In the case of Sabella *v.* Braziliero, 91 Atl. 1032, it is held that "An employment is not casual—that is, arising through accident or chance—where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period." In the former case the petitioner was employed for an indefinite period to work on a contract for the erection of a structural steel building. In the latter case the injured was a longshoreman and sustained injury while assisting in loading a ship. The Supreme Court held that the evidence showed that the deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his service wers required for that purpose. The evidence in the case at bar shows that McNeil had been similarly employed in previous years by the respondent, and that he was justified at the time of injury in believing that his employment would continue until the ice house was filled. It is found that the employment was not casual within the purview of the "Workmen's Compensation Act."

This first point made by the respondent is one of difficulty and so far as investigation has re-

vealed, has not been settled in this state, for the apparent reason that no case has arisen that is squarely upon such facts that here obtain. Substantially those facts are that an employee is injured by the wilful and criminal act of his fellow employee while the former is actually engaged in the prosecution of his duties and from an assault in no wise provoked by the injured, or arising out of circumstances for which he was responsible. That the injury was sustained in the course of the employment there seems no doubt, but as to whether "by accident arising out of" his employment is the question that must receive careful consideration.

In the case of Elizabeth Bryant, administratrix *et al. v.* William H. Fissell, &c., 84 Law, 72, we find that an "accident" is defined as "an unlooked-for and untoward event which is not expected or designed;" also that "An accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time;" also "An accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it;" also "a risk is incidental to the employment when it belong to or is connected with what a workman has to do in fulfilling his contract of service;" and further "a risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment, or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment."

Measured by the definition of "accident" as given above, the injury in question arose from an accident in legal contemplation because the event was unlooked for and untoward and was neither expected or designed so far as the injured was concerned. The evidence is convincing that the injured was entirely oblivious to any situation that would tend to warn him of the impending assault. That the accident arose in the course of the employment is evident from the fact that the injured was in the act of "switching" a cake of ice when the injury was received. Did the accident arise "out of" the employment? This must be tested by the "victim's point of view" as was said in the case of Nisbet *v.* Rayne & Burn (1910) 2 K. B. 689; 3 B. W. C. C. 507, and referred to in Bryant *v.* Fissell. The precise circumstances surrounding and confronting the injured should be the important basis of judgment upon the proposition of whether or not the accident arose "out of" the employment, that is the employment of the injured person.

In this case we find the injured engaged in no "skylarking," "fooling" or "playing" as between himself and his fellow worker; but the injury arose while the injured was following the duties for which he was employed. It is true that previously, the injured and his assailant, had been mutually engaged in a "scuffle," as the evidence shows, but the injured had been an unwilling participant, and the "scuffle" had ensued after a very evident attempt on the part of the fellow-workman, and an attempt repeated, at least once, to prevent the injured from performing his duties, and the assault itself was the successful culmination of thus attempting to prevent

the injured from further continuing his work. It is not amiss to recall the ages of the participants, the assailant under sixteen years and the injured nineteen years, and to remark that the altercation, such as it was, was sufficient to call for an order from the president of the company, that the young men must either be discharged or must cease their further physical combat, and the inquiry arises whether that situation did not put the respondent on notice (the conduct being such as to merit dismissal), to investigate the circumstances, and remove the workman, who presently developed to be a source of danger, from among his fellows. It is not shown that the injured encouraged, countenanced or actively participated in the previous "tussle," excepting as he was provoked to participate because of the interference of his duties by his afterward assailant. It may very well be had the assault occurred while the injured was engaged with his assailant in the "scuffle," that no accident arising out of the employment could be said to have occurred, even though there was no fault on the part of the injured, and likewise had the injured at the time of the assault ceased his work; but here we find so far as the injured is concerned an extraordinary risk indirectly connected with his employment, because of the immature age of the assailant and the latter's proclivity to endeavor to so interfere with his fellow workman as to prevent him altogether in carrying on the master's work, the injured and assailant of necessity working in close association.

In Scott *v.* Payne, 85 Law 446, cited hereinbefore, it was held that "disobedience by fellow workmen of orders is as much one of the risks of a man's employment as a defect in the mechan-

ical appliances." May not then an overt, criminal act of a fellow worker be a risk of an employee's employment, if the fact be that the latter is entirely uncontributing to such act and the injury which grows out of it? "Under the Workmen's Compensation Act, the master assumes all risks reasonably incidental to the employment. The risk or extraordinary risk, in the present case, under the prevailing circumstances, was reasonably incidental to the employment, and the attack made upon the injured was so connected with his employment as to place it in the class of risks reasonably incident thereto.

In the recent case of Hulley *v.* Moosbrugger, 93 Atl. 79, the Supreme Court held that "it is a matter of no consequence whether or not the workman, at the time he made the attack, was acting within the scope of his employment." And that "it was a negligent act of the fellow workman to make a pass at the decedent while passing him on the slant of the concrete floor," on which he slipped and received fatal injuries. That case is distinguished in that the fellow workman's act did not appear to have been criminal; but the principle that it emphasizes is the conduct of the injured person in that it did not invite the attack, and that whether or not the workman who made the attack was acting within the scope of his employment was of no importance.

The conclusion is therefore reached that the said Albert McNeil sustained personal injuries, the extent of which is not here and now determined, by an accident arising out of and in the course of his employment by the respondent in this case.

Supplemental Facts.

Supplemental Findings.

Filed September 8, 1915.

MORRIS COUNTY PLEAS.

JENNIE MCNEIL, guardian of Albert McNeil, a minor, *Petitioner,* *vs.* MOUNTAIN ICE COMPANY, a corporation, *Respondent.*	*On Petition under "Workmen's Compensation Act" of 1911, its Supplements and Amendments.* *Supplemental Finding.*

Mr. James H. Bolitho, attorney for petitioner.

Mr. M. Casewell Heine, attorney for defendant.

SALMON, *J.*

On April 6, 1915, the findings in this case were filed stating therein, however, as follows:

"It is stipulated that in the event of the Court finding for the petitioner and against the respondent on the subject of liability that counsel will endeavor to adjust by agreement the damages for injuries sustained and failing such agreement by counsel that the petitioner shall have the right to produce his physician for examination and cross examination before the Court and the Court then to find independently on the extent of injuries."

Pursuant to said stipulation, further hearing was had on June 9, 1915, at which medical testimony was produced on the part of the peti-

tioner concerning the disability of petitioner's ward and from which it is found that the latter is permanently disabled and in the language of the physician, "has been permanently disabled until the present time (June 9, 1915), and from now on I should say he would have ninety per cent. of permanent disability." The physician further testified concerning petitioner's ward—"He had a compound fracture of the skull which injured his brain substance, also producing paralysis at the time and which rendered him unconscious. When he regained consciousness he had lost his sense of speech and he was paralyzed on the right side completely. He did not regain his power of speech while he was in the hospital. He did gain in other ways and was able to get about at the end of two months, that is to walk about a little with help." And further—"At that time (December, 1914), he had regained his power of speech, that is he could talk brokenly, but could not say everything that he wanted to. The motor area of speech is permanently damaged to the extent that it is now. In other words he will never talk any better than he does now. He has partial paralysis of his right arm, hand and of the right leg. I consider this paralysis permanent." The physician further testified "Some brain substance has been lost. This injury was limited to the head; that he was not injured in the arm but in the head is shown by the paralysis of the right arm and the right leg and in the loss of the power of speech. That is where the motor areas lie; they are located on the cortex of the brain, and are what we call the motor areas of the brain, right along the fissure of Rolando as that

part of the brain is called. The speech areas lie a little lower than the other motor areas. He evidently had a considerable hemorrhage which was causing pressure, and that causes compression from the blood clot. He regained part of his speech and regained part of the motion of his arms and leg, after absorption of this clot. He can never regain anything more because what he has now is due to the loss of brain tissue. I consider that the present disability is absolutely permanent." And further: "He has ten per cent. of himself left. He lost brain substance and you cannot replace brain substance."

To the purport of all which testimony, respondent seems to agree. Its physician was present at the hearing, but did not take the stand owing to the fact, as was stated by counsel, that respondent did not question the character, quality nor extent of the disability as testified to by petitioner's physician.

Further opportunity for argument was granted by the Court upon the merits of the main case, and while the English cases cited by respondent, namely, Weekes *v.* William Stead, Lim. W. C. & Ins. Rep. 1914, page 434 and Clayton *v.* Hardwick Colliery Company, same report, page 343, have received attention and have been studied with interest, in view of the whole circumstances as found in this matter and stated in the previous findings, there is no reason for a different view of the result than is found therein. The question as to whether the said injury was received "by accident arising out of" the employment is deemed to be novel under workmen's compensation cases in Great Britain as well as in the states of

this country which have adopted the act, no case with similar circumstances appearing in the reports. The first case above cited, namely Weekes *v.* William Stead, Lim., was decided in favor of the petition, and there are several elements therein which coincide with those in the case at bar. The second case, namely, Clayton *v.* Hardwick, was decided, upon appeal, against the petitioner. The latter case while anologous in many ways to the one at bar, has not within its statement of facts a set of foundational circumstances that are as favorable to the petitioner as those in this case are favorable to the peculiar position of the petitioner's ward. It is remarked in Clayton *v.* Hardwick by one of the concurring Judges that, "these cases, no doubt, run very near the line on one side and the other." This is no doubt true, but the case before this Court as developed in the testimony shows such a situation this Court believes, as comes within the purview of the act.

Therefore, the original findings should stand and compensation should be awarded petitioner under section two, paragraph eleven, and subdivision B, being for disability total in character and permanent in quality to the extent of ninety per cent of the same. Compensation should be awarded of five dollars and twenty-five cents per week from February 11, 1915, and paid during the period of such disability not, however, beyond three hundred and sixty weeks, the latter being ninety per cent of the maximum period named in the statute.

Costs to be taxed by the Clerk should be paid by the respondent.

Supplemental Facts.

Allowance to counsel is hereby made of one hundred dollars which should be paid by petitioner to her legal adviser as his compensation in this proceeding.

An order will be made conforming to the findings filed April 6, 1915, and the supplemental finding as above set forth.

Rule for Judgment.

Rule for Judgment.

Signed October 22, 1915.

MORRIS COUNTY COURT OF COMMON PLEAS.

JENNIE MCNEIL, guardian of Albert McNeil, a minor, *Petitioner,* *vs.* MOUNTAIN ICE COMPANY, a corporation, *Respondent.*	*On Petition under Employers' Liability Act of 1911.* *Rule for Judgment.*

A petition to the Judge of the Court of Common Pleas of Morris County, made under the provisions of an Act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating precedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the amendments thereto and supplements thereof, setting forth the names and residences of the parties thereto, the facts relating to the employment of petitioner's ward by the respondent at the time of an accident and injury received by petitioner's ward while within said respondent's employ and relating to the injury in its extent and character, the amount of wages received by the petitioner's ward at the time of injury, the knowledge of the employer, and notice to the employer of the occurrence of said injury,

and such other facts as were necessary and proper for the information of the Judge, including the matters in dispute and the contention of the petitioner with reference thereto, and requesting the Court to fix a time and place of hearing, verified by the oath of the petitioner, having been filed with the clerk of the Court; and the time and place of hearing having been fixed; and service of a copy of said petition and order having been served on the respondent; and an answer, duly verified, having been filed by the respondent; and at the time fixed for said hearing, to wit, October 26th, 1914, the witnesses presented by the petitioner and respondent respectively having been heard under oath; and it appearing by the testimony that the matters and things set in said petition are true, and that, on the twenty-eighth day of January, A. D. 1914, a personal injury was caused to the said Albert McNeil, by accident arising out of and in the course of his employment by Mountain Ice Company, in the Village of Mount Tabor, in said County of Morris, of which the actual or lawfully imputed negligence of the respondent employer was the natural or proximate cause, which injury was as follows: A compound fracture of the skull which injured his brain substance, producing paralysis at the time which rendered him unconscious, and resulting in ninety per centum of permanent disability; leaving petitioner's ward with only ten per centum of working power, because of loss of brain substance, which cannot be replaced; and that the said Albert McNeil, at the time of the infliction of said injury, was receiving from the said respondent for his wages an average weekly wage of ten dollars and fifty cents; and a written determination of the findings

having been filed by the Judge on the sixth day of April, A. D. 1915, and a supplemental finding, according to the stipulation of the parties, having been filed on the eighth day of September, A. D. 1915, within thirty days after the final hearing:

It is, on this thirteenth day of October, A. D. 1915, ordered that judgment be entered for the petitioner, Jennie McNeil, guardian of Albert McNeil, a minor, according to the determination aforesaid, viz. Under section two, paragraph eleven, and subdivision B, being for disability total in character and permanent in quality to the extent of ninety per cent. of the same; and compensation will be awarded of five dollars and twenty-five cents per week from February 11th, 1914, and paid during the period of such disability not, however, beyond three hundred and sixty weeks, the latter being ninety per cent. of the maximum period named in the statute; and for the further sum of twenty-five dollars for medical services and medicines; and also the costs of the several hearings in these proceedings of $36.97 and the stenographer's service in preparing the testimony according to stipulations of $15.45, the total amounting to fifty-two dollars and forty-two cents.

And it is further ordered that the sum of one hundred dollars be paid by the petitioner as compensation to James H. Bolitho, her legal adviser, as his compensation in this proceeding.

JOSHUA R. SALMON,
Judge of the Court of Common Pleas of the County of Morris.

Certificate of Clerk.

On motion of

JAMES H. BOLITHO,
Attorney for Petitioner.

Total taxed costs, $36.97.

Judgment signed Oct. 22, 1915.

JOSHUA R. SALMON,
Judge, &c.

STATE OF NEW JERSEY, }
COUNTY OF MORRIS. } *ss.*

I, ELIAS BERTRAM MOTT, Clerk of the County of Morris, and also Clerk of the Court of Common Pleas, holden in and for said County, do hereby certify that the foregoing is a true, full and correct copy of a Rule for Judgment made in the case of Jennie McNeil, guardian, *v.* Mountain Ice Company, a corporation, as fully and entirely as the same remains of record in my office in Book R of Common Pleas Judgments, on pages 155, &c.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said
[L. S.] Court at Morristown, this twenty-seventh day of October, A. D. one thousand nine hundred and fifteen.

ELIAS BERTRAM MOTT,
Clerk.

Opinion.

Filed July 18, 1917.

New Jersey Supreme Court.

FEBRUARY TERM, 1917.

MOUNTAIN ICE COMPANY, a corporation,
Prosecutor,

vs.

COURT OF COMMON PLEAS, in and for the County of Morris, *et al.*,
Defendants.

Submitted February term, 1917; decided July, 1917.

On Certiorari.

Before Justices Swayze, Minturn and Kalisch.

For the prosecutor, M. Casewell Heine.

For the defendants, James H. Bolitho.

Per Curiam:

The single question presented for review on this certiorari relates to a finding by the Court below in a workmen's compensation case, that the accident to the employee arose out of his employment.

The legal propriety of this finding is assailed, by counsel for prosecutor, thus: "that the Court improperly found from the above facts that the accident arose 'out of' the employment by respondent."

Opinion.

McNeil, a youth nineteen years of age, was employed by the prosecutor as a switcher at its ice house near Mount Tabor. The method of work appears to have been as follows: the ice after being cut, was run into the ice house along a runway, and at the end of this runway in the house two workmen known as switchers, were stationed, who sat or stood opposite to each other at the end of the runway. As the ice came along the runway, the switchers grappled them with hooks and switched them over in the direction of the place where they were to be stored and to which the blocks were finally conducted by other workmen who received them with long poles with hooks on the end, by means of which they guided the cakes to their final position in which they were stored tier upon tier.

On the day of the accident Toomey, a youth not quite sixteen years of age, was stationed with McNeil at the end of the run, Toomey standing from five to ten feet behind McNeil, who was sitting on a box and engaged in switching the blocks of ice as they came along on the run over to Toomey who in his turn disposed of them.

It appears that an hour or two before the accident McNeil was sitting on a box at the runway and Toomey was teasing and annoying him by pulling out the box from under McNeil, with his pole. He did this several times and McNeil repeatedly told Toomey to stop and not to interfere with the work. Toomey, however, persisted in annoying McNeil, whereupon a scuffle ensued between them, during which time the president and the foreman of the company came along and the foreman said

to the boys cut it out and go to work, which order was obeyed. About ten minutes later while McNeil was at work, Toomey struck him a blow on the side of the head with an ice pick fracturing his skull and rendering him unconscious.

Counsel for the prosecutor relies on *Hulley* v. *Moosbrugger,* 95 Atl. 1007, as controlling. But the facts of the present case clearly distinguished it from the case cited and relied on.

Here it appears that the master had knowledge of what had transpired between the two youths and ordered them back to work. Therefore, it cannot be fairly said that what did happen to McNeil was not a risk, reasonably within the contemplation of the master, and incident to the employment under the then existing circumstances.

In *Hulley* v. *Moosbrugger, supra,* the master had no previous knowledge of skylarking going on among the young men in the shop and therefore it was held that it was not a risk within the contemplation of the master as incident to the employment.

The judgment will be affirmed, with costs.

Rule Affirming Judgment.

Entered August 18, 1917.

New Jersey Supreme Court.

MOUNTAIN ICE CO., a corporation, *Prosecutor,* *vs.* COURT OF COMMON PLEAS in and for the County of Morris, *et al.,* *Defendants.*	*Rule affirming Judgment and Remittitur.*

The Court having inspected the transcript and proceedings of the Court of Common Pleas of the County of Morris, and also the findings of the said Court, returned with the certiorari in this cause, and the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same;

It is, on this 18th day of July, A. D. 1917, ORDERED that the judgment of the Court of Common Pleas of the County of Morris, be in all things affirmed, with costs; and that the record and proceedings be remitted to the Court of Common Pleas of the County of Morris to be proceeded with in accordance with the judgment and the practice of said Court.

Entered August 18, 1917.

On motion of

JAMES H. BOLITHO,
Attorney for Defendants.

A true copy,

WM. C. GEBHARDT,
Clerk.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

MOUNTAIN ICE COMPANY, a corporation, *Prosecutor-Appellant,* *vs.* COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF MORRIS, and ELIAS BERTRAM MOTT, Clerk of said Court of Common Pleas, and JENNIE MCNEIL, guardian of ALBERT MCNEIL, a minor, *Defendants-Respondents.*	*On Certiorari.* *On Appeal from Supreme Court.*

Brief of Appellant.

Abstract of Case.

Defendant, Jennie McNeil, as guardian, heretofore instituted proceedings under the Workman's Compensation Act in the Morris County Court of Common Pleas, which resulted in a determination and judgment in favor of the petitioner and against the defendant, the prosecutor and appellant herein. A writ of certiorari to the Supreme Court was allowed, which Court affirmed the judgment of the Court of Common Pleas, and a rule of affirmance and remittitur were entered accordingly. This appeal is taken from the affirmance by the Supreme Court of said judgment of the Morris County Court of Common Pleas.

Grounds of Appeal.

The above named appellant states the following grounds of appeal:

1. The Supreme Court sustained the finding of the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries by an accident arising out of and in the course of his employment by the respondent.

2. The Supreme Court sustained the finding in the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries that were the result of an accident arising out of his employment by respondent.

3. The Supreme Court sustained the finding of the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries that were the result of an accident arising in the course of his employment by the respondent.

4. The Supreme Court sustained the finding of the Court of Common Pleas that Albert McNeil, petitioner's ward, received personal injuries that resulted from an accident within the meaning of the Workmen's Compensation Act.

5. The Supreme Court determined that Albert McNeil, petitioner's ward, received personal injuries from an accident which was a risk reasonably within the contemplation of the master and incident to the employment under the then existing circumstances.

6. The Supreme Court affirmed the judgment of the Court of Common Pleas.

Brief of the Argument.

On the trial of this cause in the Common Pleas the principal question before the Court was whether the injuries received by the ward of petitioner were the result of an accident arising "out of" the employment in which he was engaged. The facts testified to are as follows:

McNeil was employed by the Mountain Ice Company at its ice house near Mount Tabor. He had been employed about two days before the accident occurred. (Case, pp. 20 and 32).

McNeil's particular job was that of a switcher (pp. 19, 25 and 26). The method of work was as follows: the ice after being cut, was run into the ice house along a runway, and at the end of this runway in the house, two men known as switchers were stationed, who sat or stood opposite to each other at the end of the runway (pp. 20, 25, 26, 27, 35).

As the cakes of ice came along the runway, the switchers grappled them with hooks and switched them over in the direction of the place where they were to be stored and to which the blocks were finally conducted by other men who received them from the switchers and handled them with long poles with hooks on the end, by means of which they guided the cakes to their final position in which they were stored tier upon tier (pp. 20, 25, 26, 27, 35).

Another employee, one Toomey, was one of the men who received the cakes from the switchers and conducted them to their final position, He stood five or ten feet behind McNeil, who switched the ice over to him and Toomey with his pole and hook, took the cakes and disposed of them (p. 27).

On the day of the accident, work was being conducted in this way and for an hour or so

before the accident, Toomey had been teasing McNeil, who was sitting on a box (p. 21) by pulling out the box from under McNeil with his pole (pp. 27, 28). He did this, according to the testimony, at least a couple of times during the hour before the accident (pp. 28, 30, 31).

McNeil told Toomey to "cut it out," but Toomey did not do so, and kept annoying McNeil. McNeil says he may have sworn at Toomey and that he got mad and "went for him" (pp. 28, 29). This resulted in a hair-pulling match, or wrestling between the two boys (pp. 28, 29, 38, 41, 42). While the two lads were engaged in this scuffle, the superintendent came through the room and told them to stop their fooling or quit the job (pp. 28, 29, 38). The boys then stopped and went back to work (pp. 28, 42), the superintendent went on out of the room. Shortly after this, Toomey came up behind McNeil and struck him over the head with an ice pick (pp. 21, 29, 35, 41, 43).

There is no evidence that Toomey was of a vicious disposition or had any reputation as being a quarrelsome lad or a person with whom it was dangerous to work.

Toomey was indicted for the above assault by the May, 1914, Grand Jury of Morris County. He pleaded guilty and was committed to the New State Home for Boys at Lower Jamesburg by the court in June, 1914 (p. 57).

On this testimony the Court of Common Pleas found that McNeil sustained personal injuries by an accident arising "*out of*" and in the course of his employment by the respondent in this case. On certiorari to the Supreme Court that court in a *per curiam* opinion, after stating a resume of the facts above set out, came to the conclusion that the case at bar was "clearly"

distinguishable from the case of *Hulley* v. *Moosbrugger,* decided by the Court of Errors and Appeals, in 88 N. J. L. 161 (95 Atl. Rep. 1007), and affirmed the decision of the Common Pleas that the injuries were sustained by accident arising *out of* employment. It is of this ruling that appellant complains, maintaining that the case at bar cannot be distinguished from the case of *Hulley* v. *Moosbrugger* and is controlled thereby.

Argument.

Point I.

THE INJURIES SUSTAINED BY THE WARD OF PETITIONER ARE NOT THE RESULT OF AN ACCIDENT ARISING "OUT OF" THE EMPLOYMENT OF SAID WARD BY APPELLANT, AS THE CASE AT BAR IS CONTROLLED BY THE DECISION OF THIS COURT IN HULLEY VS. MOOSBRUGGER.

The Supreme Court in its opinion, reciting the facts, correctly summarizes them in connection with the present question, as follows:

> "It appears that an hour or two before the accident McNeil was sitting on a box at the runway and Toomey was teasing and annoying him by pulling out the box from under McNeil, with his pole. He did this several times and McNeil repeatedly told Toomey to stop and not to interfere with the work. Toomey, however, persisted in annoying McNeil whereupon a scuffle ensued between them, during which time the president and the foreman of the company came along and the foreman said to the boys cut it out and go to work, which order was

obeyed. About ten minutes later while McNeil was at work, Toomey struck him a blow on the side of the head with an ice pick, fracturing his skull and rendering him unconscious."

Continuing, the Court says: "Counsel for prosecutor relies on *Hulley* v. *Moosbrugger,* 95 Atl. 1007, as controlling, but the facts of the present case clearly distinguish it from the case cited and relied on. The Court then proceeds to set forth and make what it calls this clear distinction, as follows: "Here" (in the case at bar) "it appears that the master had knowledge of what had transpired between the youths, and ordered them back to work. Therefore it cannot be fairly said that what did happen to McNeil was not a risk, reasonably within the contemplation of the master and incident to the employment under the then existing circumstances."

"In *Hulley* v. *Moosbrugger, supra,* the master had no previous knowledge of skylarking going on among the young men in the shop and therefore it was held that it was not a risk within the contemplation of the master as incident to the employment." Clothing this legal conclusion from the facts of the case the Court decided:

1. The master had knowledge of what transpired, namely, a scuffle between the two boys.

2. The master told the boys to stop scuffling and go back to work, which they did.

3. Therefore, says the Court, it was immediately within the contemplation of the master that the continuance of these two boys (who had obediently gone back to work) in its employ, created a risk that one was likely to

feloniously assault the other, and that the risk of this felonious assault was a risk reasonably incident to their then continuing in the master's employment. It is submitted that this proposition needs merely to be stated to show its utter lack of logic and support in law.

In the first place, there is no evidence in the case that Toomey, the boy who committed the assault, had any reputation as being a quarrelsome lad, or was a person with whom it was dangerous to work. This takes the case clearly from under the case relied on by the defendants-respondents, *McNichols case,* 215 Mass. 497 (102 N. E. 697) where the master employed as a fellow workman of his other workmen a man known to the superintendent to have the *habit* of drinking to intoxication and when in that condition of being quarrelsome, dangerous and unsafe to work with. In the McNichol case, when the master employed an habitual drunkard and fighter it was obviously within his contemplation that a risk reasonably incident to the employment of such a man was that he might assault some of his fellow workers, and upon those facts that decision is sound.

In the present case, however, there is no evidence that the boy, Toomey, was quarrelsome or was in any way different from the other employees, including the petitioner's ward. The fact that the foreman and president of the ice company when they were going through one of the rooms of the ice house found these two boys scuffling cannot be sufficient to show that Toomey was an habitually quarrelsome person, or a dangerous person to continue in the master's employ. The scuffling of these two boys in the presence of the master could not reasonably be expected to be notice to the master

that if he left Toomey in his employ he would be likely to commit an assault upon a fellow employee.

The very fact that the boys desisted from scuffling and went back to work quietly and obediently would be an assurance to the master that his orders were being obeyed and that the boys would continue their work in the ordinary way without further trouble. Having been admonished to stop their scuffling they went back to work, and what possible inference could the master draw from those facts except that work would be likely to go on as usual? Assuming the most unfavorable inference possible to a reasonable mind, the master might have thought that after he had gone out of the room the boys might again sometime during the day resume their skylarking, but what was there from their conduct, or what is there in the case to indicate to the master that one of these boys who had been scuffling and who had obediently returned to work would commit an atrocious assault on the other boy shortly thereafter? The risk of this atrocious assault could not have been reasonably anticipated by the master as incident to the continuance of these two boys in his employ after they had indulged in this scuffling.

As the Court says in *Hulley* v. *Moosbrugger*:

> "The employer was not charged with the duty to see to it that none of his employees assaulted any other one of them, either wilfully or sportively, and when one made such an assault upon another he was guilty of the doing of a negligent act as an individual tort-feasor, for which his employer was not responsible."

The Supreme Court by inference seems to try to distinguish the Hulley case because there the master had no previous knowledge of skylarking going on between employees, whereas in the case at bar the master did see the boys scuffling, which may be considered skylarking, at the time that he told them to desist and they went back to work.

But even assuming that the master did have notice that the boys were indulging in skylarking, can it be successfully contended that this was notice to him that one boy might atrociously assault the other? We think not, under the Hulley case, where the Court said, as above quoted, whether the assault was wilful or sportive made no difference. The employer was not charged with the duty of seeing that one employee did not assault another. The only modification of this might be under the McNichol case, *supra,* where the employer hired an habitually quarrelsome employee, but that element does not enter into the case at bar. If the law as laid down by the Supreme Court in this case stands it means that an employer who at any time sees any of his employees engaged in any kind of altercation or unpleasantness, whether verbal or physical, thereafter retains those employees at the risk that if either feloniously assaults the other he will be liable for the results. If in a gang of workmen an Italian and a German are heard disputing or seen making threatening gestures at each other the employer must thereafter at his peril prevent an assault by either upon the other at the risk of being responsible for the consequences, be they maiming or death. The enforcement of such a doctrine may be one way of accelerating the coming in of the Golden Rule, by requiring

the master to keep all his employees civil and good natured, but it is not legal under the decisions of this Court in this State.

It is submitted that the case at bar is undistinguishable from and controlled by the decision of this Court in *Hulley* v. *Moosbrugger*.

Point II.

The judgment of the Supreme Court should be reversed and the petition in the Common Pleas dismissed.

Respectfully submitted,

M. CASEWELL HEINE,
Attorney and of Counsel for
Prosecutor-Appellant.

New Jersey Court of Errors and Appeals

JENNIE MCNEIL, Guardian of Albert McNeil, a minor, (Petitioner), Defendant in Certiorari, vs. MOUNTAIN ICE COMPANY, a corporation, (Respondent), Prosecutor in Certiorari.	On Petition under "Workmen's Compensation Act" of 1911, its Supplements and Amendments. On Certiorari.

BRIEF OF JENNIE McNEIL (PETITIONER), DEFENDANT IN CERTIORARI

Statement of the Facts

Albert McNeil, a minor, the petitioner's ward, was injured while employed by Mountain Ice Company, the respondent, at its ice plant, at Mount Tabor, Morris County, New Jersey, on January 28, 1914, by being struck a blow in the head with an ice "pick," in the hands of one Edward Toomey (a youth under sixteen years of age) who was employed with Albert McNeil at switching ice in the ice house of respondent.

The evidence shows that Edward Toomey had been trying to pull out the box upon which Albert McNeil sat while engaged at his work; that he had been doing this for some time, and had been told repeatedly to stop it, by McNeil, who desired to attend to his work; that finally, because of Toomey's action Toomey and McNeil had a scuffle, during which time the president of the respondent company, and the foreman in charge of the men at work there, came in, saw the boys scuffling, and ordered them back to their work; that McNeil, who had not been the aggressor at any time, returned to his work, and so did Toomey; that sometime afterwards, and while McNeil was engaged at his work, Toomey struck him the blow in the side of his head with the ice "pick," fracturing his skull and rendering him unconscious.

Through his guardian, Albert McNeil applied for compensation under Workmen's Compensation Act of 1911, its supplements and amendments, and, after a hearing (and stipulation to try to agree as to the extent of the injuries in the event the Court found respondent liable), the Court in its findings, filed April 6, 1915, did find respondent liable, and the evidence of petitioner's physician was taken as to the extent of the injuries, a re-argument had, and the Court again found for petitioner, and awarded compensation under section two, paragraph eleven, and subdivision B, in the Supplemental Findings, filed Sept. 8, 1915.

Respondent seeks to set aside these findings of the Morris County Court of Common Pleas, because it claims that there was no evidence to support the findings, (1) that Albert McNeil received personal injuries by an accident arising

out of and in the course of his employment by respondent; (2) that he received personal injuries that were the result of an accident arising out of his employment by respondent; (3) that he received personal injuries that were the result of an accident arising in the course of his employment by respondent; (4) that he received personal injuries that resulted from an accident within the meaning of the Workmen's Compensation Act; (5) that the personal injuries suffered by him were ninety per cent (90%) of a total permanent disability; and because (6) said finding, determination and judgment are in divers other respects irregular, illegal, oppressive and unjust to the said respondent.

Argument

"The more one sees of these cases under the * * * act the more one feels that all of them are in reality pure questions of fact, with regard to which the only function of the Court is to interpose when there is no evidence in support of a particular finding."

Martin v. Lovibond & Sons, Ltd., 7 B. W. C. C., 247, per Evans, P.
Trim Joint District School v. Kelly, 7 B. W. C. C., per Lord Shaw, 317, etc.

"All we know is that there were two most violent assaults by Stone, * * * That being so, can it possibly be said that there was no evidence on which the learned County Court Judge was justified in finding that there was a *special* risk incident

to this employment beyond that affecting any other inhabitants of Brighton? In my opinion I cannot say that."

Cozens-Hardy, M. R. in Weeks v. Stead & Co., 7 B. W. C. C., p. 403.

See also Howard v. Rowsell & Matthews 7 B. W. C. C., 556.

The words "out of" necessarily involve the idea that the accident arises out of a risk incidental to the employment. An accident arises out of an employment where it results from a risk incidental to the employment as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind.

Pierce v. P. C. & S. Co., 1 K. B., 997; 4 B. W. C. C., 242;

Thorn v. Hunn & Co., 8 B. W. C. C., 190;

Bett v. Hughes, 8 B. W. C. C., 362, etc.

The Supreme Court will accept the findings of fact of the Common Pleas Court, if there be any legal evidence to warrant them.

Sessler v. Peters, 98 Atl., 834;

Siemientkowski v. Berwind White Coal Mining Co., 92 Atl., 909;

Zabriskie v. Erie R. Co., 92 Atl., 385;

Winter v. Atkinson-Frigele Co., 96 Atl., 360;

Jackson v. Erie R. Co., 91 Atl., 1035;

Bryant v. Fissell, 86 Atl., 458;

Sexton v. Newark District Telegraph Co., 84 N. J. L., 85.

See Findings—State of Case—pages 61-73.

The question is then, is there evidence to warrant the findings of the Court of Common Pleas that Albert McNeil sustained the injuries complained of "by an accident in the course of his employment" for the respondent, and "by an accident arising out of" such employment?

The testimony of all the witnesses is that Albert McNeil was at his work, and in the act of "switching" a cake of ice (which was the work he was hired to do) when the injury was received.

> See pages 20 (line 20), 35 (line 30), 41 (line 20), 52 (lines 20, etc.) 54 (lines 24, etc.), 56 (cross-examination) of the evidence in the State of the Case.

It was "an unlooked-for and untoward event which was not expected or designed by Albert McNeil, and it occurred while he was doing what a man so employed might reasonably do within a time during which he was employed, and at a place where he had a right to be during that time."

> Zabriskie v. Erie R. Co., 92 Atl., 385;
> Bryant v. Fissell, 84 N. J. L., 72.
>
> "If it appears that the accident occurred while the servant was in the doing of an act which he was expressly forbidden, by his master, to do, recovery cannot be had."
>
> Smith v. Corson, 93 Atl., 112;
> Reimers v. Proctor Pub. Co., 85 N. J. L., 441.

Conversely: Albert McNeil was doing an act which he was expressly ordered to do, by his master, through its servants, when he received the injuries.

See pages 44 (1st to 20th lines), 40 (lines 30 to 40), 48 (first line to 49), 49 (twentieth line), 51 (21st line to line 30 on page 52), 54 (cross-examination), 56 (line 34), of the evidence in the State of the Case.

In *Trim Joint District School v. Kelly*, 7 B. W. C. C., 274, etc., there had been at least two previous assaults and the learned trial judge came to the conclusion that some of the boys were unruly and badly disposed, so that, although what Kelly did was his duty, it was attended with a certain risk (see p. 277), and at pages 286 and 287 Viscount Haldane says:

> "In inquiring whether or not an injury by accident in fact arises *out of* the employment, it surely is unnecessary to ask whether such a thing has ever happened before or is likely to happen again within, say, a hundred years, or, for that matter, forever. It may happen, and has happened, because (in that case) the poor man was a schoolmaster. The event has proved that it was a risk of his employment. I can see no reason for saying there is to be compensation only when the misadventure was one which would be foreseen as probable, or contemplated as possible, or otherwise apprehended either by the workman or by his employer, or by a County Court Judge."

On page 318, same case, Lord Shaw, quoted approvingly from Lord Macnaghten in *Clover Clayton & Co.*, 3 B. W. C. C., p. 249, as follows:

> "The real question, as it seems to me, is this, did it arise out of his employment? On this point the evidence before the County Court Judge was undoubtedly conflicting; but he has held that it did, and I think there was sufficient evidence to support that finding, although I do not say I should have come to the same conclusion myself."

And see on page 319 quotation from Lord Kinnear in *Henderson v. Glasgow Corporation.*

In pages 326 and 327 of *Trim Joint District School v. Kelly,* 7 B. W. C. C., Lord Reading says:

> "The only question here is whether the obligation imposed upon the employer extends to injuries inflicted by the design of another, construing the words in their ordinary and popular sense, I think they mean an injury caused to the workman by some sudden and unexpected occurrence, whether the injury was inflicted by design or otherwise, as distinguished from an injury caused to him by some gradual process."

Whether the accident arose "out of" the employment must be tested by the "victim's point of view."

> Bryant v. Fissell, 84 N. J. L., 72.
> Nisbet v. Rayne & Burn, (1910) 2 K. B., 689; 3 B. W. C. C., 507.

Albert McNeil was subjected to the danger by the conditions of his employment.

> Zabriskie v. Erie R. Co., 92 Atl., 385.

The President and the Foreman of respondent

company had notice that Toomey was interfering with Albert McNeil while the latter was attending to his work, and they did not separate them, but ordered them back to work together, and after they had returned to their work as so ordered, and while McNeil was engaged at the work which he was employed to do. Toomey struck the blow, resulting in the injuries complained of.

Schmoll v. Weisbroid & Hess Brewing Co., 97 Atl., 723, and cases cited;
McNichol v. Paterson, Wilde & Co., 102 N. E., 697.
See pages 44 (13th line), 48 (lines 10 to 40), 49 (first line), 51 (beginning with line 30), 54 (line 22, etc.), 56 (line 34) of the evidence in the State of Case.

See pages 62-67 (lines 20 to 30) State of Case.

The accident was one "arising out of and in the course of the employment" of Albert McNeil by the respondent.

Hulley v. Moosbrugger, 93 Atl., 79.
Zabriskie v. Erie R. Co., 92 Atl., 385.
Zabriskie v. Erie R. Co., 88 Atl., 824.
DeFazio's Estate v. Goldschmidt Detinnig Co., 88 Atl., 705.

The fact that the injury was caused by a fellow workman upon whom a fine had been inflicted because of the violation of the law is no reason for denying compensation to the employee who has been injured.

Gibson v. Dunkerley Brothers, 3 B. W. C. C., 345.
Re William Wharton, Op. Sol. Dep. C. & L., 250.

The fact that the act resulting in the injury was criminal would not affect Albert McNeil's rights under the Workmen's Compensation Act, unless he were a party to the criminal act at the time of receiving the injury, and the testimony of all the witnesses is to the effect that Albert McNeil was working, and in the due performance of his duties, when he received the injuries complained of. The other cases are different from this, because the party claiming compensation was a party to the criminal act out of which the injury arose; or because the employe was injured after he had left the employment, and while he was not at work; or because the employer attacked the employe.

Re G. M. Armstrong, Op. Sol. Dep. C. & L., 240.
Shaw v. Wigan Coal & Iron Co., 3 B. W. C. C., 81.
Armitage v. Lancashire & Yorkshire Ry. Co., 86 L. T., 883.
William Baird Co. v. Burley, 45 Scotch L. B., 416.
Murphy v. Berwick, 43 Irish L. T., 126.
Blake v. Head (1912) 5 B. W. C. C., 303.

And in the *McNichols* case, 102 N. E., 697, the criminal act resulted in murder.

In *Weeks v. Stead & Co.,* 7 B. W. C. C., 400, a furniture remover was criminally assaulted, and he recovered. See also *Trim Joint District School v. Kelly,* 7 B. W. C. C., per Lord Shaw, p. 310, etc., and per Lord Reading same case on pages 325 and 326.

Compensation was not allowed in *Clayton v. Hardwick Colliery Co., Ltd.*, 7 B. W. C. C., 643, etc., because there was not direct evidence that the boys were in the habit of throwing stones at each other, therefore the employer was without knowledge of the risk.

The case of *Hulley v. Moosbrugger* is not so strong in favor of the injured as is the case of Albert McNeil, because at the time of the injury McNeil did no act which contributed in any way to the injury, whereas in *Hulley v. Moosbrugger* petitioner's husband probably would not have been injured if he had not tried to "duck, dodge or side-step" the blow aimed at him. And the effort to strike him savored strongly of a criminal assault.

The English cases which hold that where the employe who inflicts the injury does so in disobedience of the rules or orders of the employer, the employer is not liable to the injured, do not apply in New Jersey, as the rule laid down by our Courts is that, "disobedience by fellow workmen of orders is as much one of the risks of a man's employment as a defect in the mechanical appliance."

Scott v. Payne, 85 N. J. L., 446.

And "it is a matter of no consequence whether or not the workman, at the time he made the attack, was acting within the scope of his employment."

Hulley v. Moosbrugger, 93 Atl., 79.
Walther v. American Paper Co., 98 Atl., 264.

In *Hulley v. Moosbrugger,* 95 Atl., 1007, etc., (p. 1009) the Court of Errors and Appeals said:

> "We regard the McNichol Case (102 N. E., 697) as an authority for the result reached in the case at bar *(Hulley v. Moosbrugger).*"

and the Court makes two very pertinent quotations from that case, which will be of profit if carefully read.

In considering the case of *McNeil v. Mountain Ice Co.,* let us remember the principle enunciated in the *McNichol* case, *i. e.,*

> The injury "'arises out of' the employment, when it is apparent to the rational mind upon consideration of all the circumstances that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person *familiar with the whole situation as a result of* THE EXPOSURE OCCASIONED BY THE NATURE OF THE EMPLOYMENT, then it arises 'out of,' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and *which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work* and not common to to the neighborhood * * * *It need not have been foreseen or expected, but* after the event it must appear to have had its origin in a RISK CONNECTED WITH THE EMPLOYMENT."

In this respect the case of *McNeil v. Mountain Ice Co.,* is much stronger than *Zabriskie v. Erie R. Co.,* 88 Atl., 824 (affirming 92 Atl., 385).

> "Injuries, resulting in death, received by a checker in the employ of a firm of importers, *while doing his work at a dock,* from blows or kicks given him by a fellow workman in 'an intoxicated frenzy and passion,' where such fellow workman was known to the superintendent in charge of the work to have the habit of drinking to intoxication and when in that condition to be quarrelsome, dangerous, and unsafe to work with, and *knowingly was permitted by such superintendent to continue to work on the day of the injury while in such a condition of intoxication,* are injuries arising *out of* and received in the course of the workman's employment within the meaning of the Workmen's Compensation Act."—102 N. E., 697.

In the case at bar the Court of Common Pleas in its Findings says:

> "In this case we find the injured engaged in no 'skylarking,' 'fooling,' or 'playing' as between himself and his fellow worker; but the injury arose while the injured was following the duties for which he was employed. It is true that previously the injured and his assailant had been mutually engaged in a 'scuffle,' as the evidence shows, but the injured had been an unwilling participant and the 'scuffle' had ensued after a very evident attempt on the part of the fellow workman, and an at-

> tempt repeated, at least once, to prevent the injured from performing his duties, and the assault itself was the successful culmination of thus attempting to prevent the injured from further continuing his work. It is not amiss to recall the ages of the participants, the assailant under sixteen years and the injured nineteen years, and to remark that the altercation, such as it was, *was sufficient to call for an order from the president of the company that the young men must either be discharged or must cease their further physical combat and the inquiry arises whether that situation did not put the respondent on notice* (the conduct being such as to merit dismissal), *to investigate the circumstances and remove the workman,* who presently developed to be a source of danger, *from among his fellows.*''

See pages 66 and 67 of the State of Case; also pages 62, 63, 71, 72 and 773.

The employment was not casual.

> Sabella v. Braziliero, 91 Atl., 1032.
> Scott v. Payne, 85 N. J. L., 446.

As to the Fifth Reason of respondent, it is sufficient to say, in the language of the Supplemental Findings, that respondent agreed to the purport of the testimony of petitioner's physician.

> ''Its physician was present at the hearing, but did not take the stand owing to the fact, as was stated by counsel, that respondent did not question the character, quality or extent of the disability as testified to by petitioner's physician.''

The petitioner's physician testified that,

> "From now on I should say he (Albert McNeil) would have ninety per cent of permanent disability."

See Supplemental Findings, page 71 (lines 15, etc.), of State of Case.
See evidence of Dr. Glazebrook, pages 58, 59 and 60 of State of Case.

The President and General Foreman of the respondent company knew that Toomey had been interfering with McNeil, while the latter was attending strictly to his work, and that he had been trying to pick a fight with McNeil for some time; that finally there was a fight, or scuffle, evidencing bad blood between Toomey and McNeil; that they could not work together in peace; that it was unsafe for them to work together at the work they were doing after what had happened; that the resulting injury might follow as a natural incident of their continuing to work together, yet, though this should have been contemplated by a reasonable person, familiar with the whole situation (from the exposure occasioned by the nature of the employment), the said President and General Foreman ordered them back to work together, and knowingly permitted Toomey (who had been bent on making trouble) to work behind and next to McNeil, as the latter sat upon the box switching ice, contrary to the duty which respondent owed to McNeil under the circumstances. This makes this case the same, in principle, as *Mc Nichol's* case, 102 N. E., 697, and different from *Hulley v. Moosbrugger,* 95 Atl., 1007.

See page 67 lines 2 to 36 State of Case.

Petitioner respectfully submits that the Findings of the Court below should be sustained, as they are according to the law and the evidence.

Respectfully submitted,

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