New Jersey Court of Errors and Appeals

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LENA DUNNEWALD, as Administratrix of Theodore Dunnewald, deceased, Petitioner-Appellant, vs. HENRY STEERS, INCORPORATED, Defendant-Respondent.	On Appeal From the New Jersey Supreme Court. On Certiorari.

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BRIEF OF SAMUEL A. BESSON, COUNSEL FOR PETITIONER-APPELLANT.

The Facts.

The facts of this case are found on pages 12, 13 and 14 of the Case Book. The work was peculiarly hazardous.

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To approach the place where the deceased was employed, it was necessary to walk over a trestle running out into the Hackensack River, and pass over a derrick, and some other temporary constructions. The deceased worked all day on the thirteenth day of April, 1913. That he reached the immediate vicinity of his employment, is un-

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questioned, as his body was found in the Newark Bay, into which the Hackensack River runs, a few days after. The Trial Judge in his conclusion says: "The Court is warranted in the finding of the fact from the evidence that Dunnewald met his death from (1) by falling from the trestle, the approach to the new construction work; or (2) from the
10 derrick on his way from the mainland to the work. On the night in question, the weather was bad. There was a thick fog prevailing. The timekeeper who kept the time of the deceased, was drowned in the river that night, while engaged on the work." The Trial Judge also found that "the deceased was engaged in the employment of the defendant company at the time of his death, and was drowned while engaged in such employment; that the company had notice of the drowning of the deceased;
20 that the liability of the defendant is the liability created by the Second Section of the act in which this proceeding is brought." The work which the decedent was engaged in was very urgent work, and when it was once started it had to be finished. See Case Book, page 22, line 22. The testimony which supports the Trial Judge's finding concerning the means of appropriate access to the place of work, is found in the testimony, Case Book, pages 22, 23, 24, 25, 26 and 27, pages 28, 29 and 30,
30 pages 38, 50, 51, 52, 53 and 54. The kind of work done by the defendant was dock work, railroad building, bridge construction and all classes of heavy construction work, Case Book, page 44; their office is at 17 Battery Place, New York City, Case Book, page 21. The night upon which the death of Mr. Dunnewald occurred was an extraordinarily dark night, by reason of a dense fog which set in early in the evening and prevailed all night. See the remark of the witness Snell,
40 Case Book, page 61, line 19, "My God, I can't

understand how a man got over there safe, that there was not more loss of lives. I had to stop and call for a light or I don't know how I would have got over myself."

The Supreme Court in deciding the case at bar, has decided that the decedent came to his death by accident. See Case Book, page 83, lines 19 and 20 in the opinion of Justice Swayze. This question, therefore, is settled and the appellant finds no fault with that finding. 10

THE LAW.

The question to be argued is whether the accident arose out of and in the course of the employment of the decedent. 20

POINT I.

How the words "arising out of and in the course of his employment" have been defined and construed by the Courts of New Jersey.

I know of but three cases which have been decided by the higher Courts of New Jersey, touching upon these questions in which the opinions are illustrative and illuminating. The first one is 30 Bryant, Adm'x vs. Fissell, decided by the Supreme Court, March 24, 1913, reported in 84 N. J. L., page 72 holds: (1) The Supreme Court accepts the findings of the Common Pleas Court upon the facts, if there be any legal evidence to warrant them. (2) To warrant a recovery under Section 2 of the "Employers' Liability Act" of 1911 (P. L., page 134, ch. 95), from an employer for the 40

death of an employee, it must appear that the employee's death was caused by (a) an accident, (b) arising out of, and (c) in the course of his employment. In other words the three conditions must concur. The accident which causes the death must arise out of the employment and in the course of the employment, or there can be no recovery.
10 (3) The burden of proof rests upon the claimant. (5) An accident is an unlooked-for, an untoward event, which is not expected or designed. (7) An accident arises "in the course of 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. (8) An accident arises "out of" the employment when it is something, the risk of which might have been con-
20 templated by a reasonable person, when entering the employment, as incidental to it. (9) A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. (10) 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.
30 In delivering the opinion of the Court in Bryant, Adm'x vs. Fissell, Justice Trenchard says, "For an accident to arise out of and in the course of the employment, it must result from a risk reasonably incidental to the employment. As was said by Mr. Lord Justice Buckley in Fitzgerald vs. Clarke and Son (1908), 2 K. B., 796, "the words 'out of' point, I think, to the origin and cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes

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place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident, as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment." We conclude, therefore, 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. We conclude, therefore, that 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. That this is so, appears from an examination of Armitage vs. Lancashire and Yorkshire Railway Co. (1902), 2 K. B., 178; Collins vs. Collins (1907), 2 I. R., page 104; Murphy vs. Berwick (1909), 43 Ir. L. T., 126; and Blake vs. Head (1912), 106 L. T., 822, in each of which recovery was denied because the act of the third party was not a risk reasonably to be contemplated by the employee in undertaking the employment. A risk is incidental to the employment when it belongs to, or is connected with what a workman has to do in fulfilling his contract of service. Pope vs. Hill's Plymouth Co. (1910), 102 L. T., 632, and on appeal (1912), 105 Id., 678. "And 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

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the special nature of the employment. Elliot's Workmen's Compensation Act (6th ed.), 71."

The second one, Muzik vs. Erie R. R. Co., decided January 8, 1914, reported in 85 N. J. L., page 129, holds that in the case of a railroad employee, found after a train had gone out, lying some three or four feet from the rails, with his feet
10 toward the track, having an injury in his head, and who died shortly thereafter from a broken neck, that inference arose that his injury was caused by accident, arising out of and in the course of his employment. In delivering the opinion, Justice Voorhees says: "The first point made by the defendant is that there is no evidence that Muzik's death was caused by an accident in the course of his employment. It is true that no direct evidence of these facts was produced. The man
20 was found after the train had gone out, some three or four feet from the railroad, lying with his feet toward the track, with an injury in his head, and died shortly, the case being one of a broken neck. The Bergen County Common Pleas found that the deceased came to his death by accident, while in the railroad's employ, and in the course of it. I do not think that we can question this finding. The facts shown, clearly indicate that the deceased was struck by the train after he had given the
30 way-bills in pursuance of his duty as such employee, to the train agent, and this, of course, would be while in the course of his employment. While it is true, there are many cases outside of the State of New Jersey, holding that the claimant must prove that the applicant was injured in an accident arising out of and in the course of his employment, I do not think the inference in this case varies the rule. See Pomfret vs. Lancashire, etc., Railway Co. (1903), 2 K. B., 718; 19 T. L. R.,
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460. The distinction between that case and the one at hand being the fact that there was no proof at all of the cause of the injuries resulting in death. See also Nicholas vs. Dawson, 15 id., 242; McDonald vs. owner of S. S. Banana (1908), 2 K. B., 926; 24 id., 887; Bender vs. owners of S. S. Kent (1909), 2 K. B., 41; 100 L. T., 639; Gilbert vs. owners of Nizam, 79 L. J. K. B., 1172." 10

The third case is Zabriskie vs. Erie R. R. Co., decided November 16, 1914, by the New Jersey Court of Errors and Appeals, reported in 86 N. J. L., page 266. In this case, in the course of delivering his opinion, Justice Parker says, "the appellant insists that the accident did not arise out of the employment and the question before the Supreme Court was whether there was any evidence before the trial court to justify such a finding. If there was such evidence the finding of the Court 20 of Common Pleas is conclusive. Sexton vs. Newark District Telegraph Co., 84 N. J. L., 85; Bryant vs. Fissell, id., 72." The Supreme Court seems to have gone a step further and to have made substantially its own finding upon the evidence. This was unnecessary, but as it necessarily included a finding that there was evidence to support the finding of the trial court, which is sufficient for an affirmance, we do not concern ourselves with the facts further than to ascertain whether there was 30 evidence in the case which the trial court was entitled to take hold of as the basis for its finding of fact as above.

The opinion of the Supreme Court does not state the evidence with entire accuracy. The deceased was not obliged to cross the railroad, nor was he injured because of so crossing it, but the accident occurred in this way: The tracks of the defendant Erie Railroad Company run through Paterson 40

from north to south, crossing Market Street, which runs east and west. The Paterson station of the appellant was in the southwesterly angle formed by Market Street and the said tracks; the Morris beef building, where the deceased was regularly employed by the appellant as a carpenter, was in the northwesterly angle of Market street and the
10 railroad, and consequently the deceased, in order to reach the station, had to cross, not the railroad, but Market Street, which was a public highway and the principal artery of traffic in Paterson. There was no toilet in the Morris beef building, and of course the defendant's employees had to go somewhere to satisfy the calls of nature. Apparently the most convenient place, and the place where, as the trial court was justified by the evidence in finding, they had been for some time ac-
20 customed to going, was the men's toilet room in defendant's railroad station across Market Street. There was evidence that this was the only place that they had to go, and that for a year or more prior to the accident it was the habitual practice of defendant's employees working in the Morris beef building to use the station toilet for their personal needs. At the time of the accident the deceased was on his way from the beef building across Market Street, and bound for the station
30 toilet, when he was struck by an eastbound automobile on Market Street and thrown or carried over on the railroad track where he was again struck by a northbound train that was just starting from the station. This occurred about eleven A. M.

There can be no doubt that the trial court was fully justified in finding that the accident occurred in the course of the employment of the deceased;
40 that it took place during the regular working hours

and while he was answering a call of nature, which is liable to occur at any time. It was argued that he was not doing his employer's work at the time, but there is little or no force in this, for in the end it is as important to the employer as to the employee that the latter may do his work without unnecessary physical inconvenience.

The trial court was also justified in finding upon the evidence adduced that the accident arose out of the employment. The difficulty in the case arises from the fact that the place where the deceased was struck was a public street, and that he was struck by an independent agency, to wit, an automobile driven by a stranger and lawfully in said street. Hence it is argued that the deceased was not and could not have been injured by any cause for which the master was responsible, or to which he was subjected by the conditions of his employment. But we consider this argument also to be without support. It is not only conceivable, but it is a matter of daily occurrence that employees are required to do their work under conditions which render them liable to injury by outside agencies. It is only necessary to cite the case of Klotz vs. Newark Paving Co., 91 Atl. Rep., 91, recently affirmed here on the opinion of the Supreme Court, where the place of work of the deceased was in a public street; and during working hours, while waiting for his work to begin, or attending to some incidental matters in the interim, Klotz was struck by a trolley car and killed. It was there held that the accident arose out of and in the course of his employment; and the only ground for claiming the existence of a distinction between that case and the case at bar is that in the Klotz case the deceased was at the place where he had to do his work, and in the present case the deceased had left the place

where he actually worked and was on his way to a convenience. The distinction is unsubstantial; for if the trial court found, as it evidently must have found and was entitled to find, that by reason of the lack of proper appliance in the Morris building and the consequent necessity of going elsewhere—a condition for which the employer was of course re-
10 sponsible—the practice had arisen and been in force for an extended period, of workmen resorting to the only place available, to reach which they were necessarily obliged to cross a public street, and that this practice was known and assented to by the employer (Dierkes vs. Hauxhurst Land Co., 80 N. J. L., 369; 83 id., 623), the workman was as much obliged by the conditions of his employment to be where he was at the time when he was struck as if he had been a laborer tamping paving blocks
20 in the middle of the street.

Viewed in this aspect, the damger was one which, in the language of the cases, was peculiar to the employment, in that the absence of proper facilities at the shop and the necessity of crossing the street to reach them, gave rise to it. It was not the danger of an ordinary member of the public crossing a street on his own business, but was the subjection of the employee to that danger by the conditions of his employment. The fact that the accident may
30 have been and probably was due to the negligence of the driver of the automobile, and perhaps also to the contributory negligence of the deceased, tends to cloud the issue, but does not differentiate the situation from that of any workman who is required in the performance of his work to go into a dangerous place and incur the dangers connected with that place."

These three cases contain the law so far as the statute has been construed in the State of New Jer-
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POINT II.

How the words "arising out of and in the course of his employment" have been defined and construed in England and Scotland.

"Arising out of," points to the origin or cause of the accident, and, "in the course of," to the place and circumstances under which the accident takes place. Buckley, L. J., in Fitzgerald vs. Clarke & Co. (1908), 2 K. B., 796, and the time when it occurred. See Loreburn, L. C., in Moore vs. Manchester Liners, Ltd. (1910), A. C., 498, 500. "The first inquiry is, was he doing any of the things which he might reasonably do while employed? The next inquiry is, did the accident occur within the time covered by the employment?" Not only is this definition extremely vague, but it is contained in a dissenting opinion by Lord Loreburn, holding contrary to the majority of the House of Lords, that, judged by this test, the plaintiff was in the course of employment.

And see Lord Justice Farwell's criticism of it in Kitchenham vs. S. S. Johannesburg (1911), K. B., 523, 531.

The injury must be received in the course of employment and must also arise out of it; neither alone is sufficient. It would appear at first glance that unless the servant is actually engaged in work in the course of his employment, no injury sustained by him could be caused by it and so arise out of it. See Farwell, L. J., in Kitchenham vs. S. S. Johannesburg (1911), 1 K. B., 523, 530, and the Lord President in McLauchen vs. Anderson, 48 Scot, L. Rep., 349; 4 B. W. C. C., 376 (Ct. Sess., 1911).

While this is generally true, cases may arise where an injury is caused by the employment which

at the time of the accident the servant has, under the decisions, left or not yet entered upon. An injury sustained by a servant on his way to or from work at some highly dangerous place over which, though outside the master's premises, he is obliged to pass, seems to be as directly caused by his employment as an injury received upon his master's pre-
10 mises, but before or after his actual work has begun or ended. See Lord McLaren in Menzies vs. McQuibban, 2 Fraser, 732, 735-736 (Scot. Ct. Sess., 1900.) In such cases recovery is denied solely on the ground that the employment is held not to begin until the servant enters his master's premises and to end when he quits it. See Hollness vs. Mackay & Davis (1899), 2 Q. B., 319; 1 W. C. C., 13, which seems to have been such a case.

In the great majority of cases the requirement
20 that the injury be received in the course of the employment is the broader of the two, the requirement that it must arise out of the employment in general operates to restrict recovery to such injuries only, among those which the workman sustains while in the course of his employment, as also arise out of it.

The phrase "in the course of employment" presents two principal questions. The first concerns the period of employment. When does it begin and end, and, during this period, when is its continuity
30 broken? The second raises the question as to how far the servant during the period of employment places himself outside thereof by doing that which he is not employed to do, or by doing his appointed work at a place other than that which his master has appointed for that purpose, or by deliberately adopting a method of performing the work other than that prescribed by his master or forbidden by him.

It is contended that the case of Dunnewald vs.
40 Steers Construction Company, cannot be affected

by any of the cases in which these last mentioned questions have arisen. Dunnewald was not doing anything he was not employed to do. He was not at work at a place other than that which his employer had appointed for the purpose and he had not adopted a method of performing the work other than prescribed by his employer or forbidden by it. 10

After some little vacillation, it is finally settled that the term, "in the course of his employment" is not limited to those periods during which the servant is actually engaged upon work which he is employed to perform. "In the course of employment" does not mean, "in the course of industrial work." Fletcher Moulton, L. J., in Riley vs. Holland & Sons, Ltd. (1911), 1 K. B., 1029, 1033.

Nor is it limited to the time for which wages are paid. Indeed the fact that the workman is paid 20 wages for the time when the accident occurs is of little, if any importance. On the other hand, it is well settled that the course of employment does not include all the many acts of which the employment is the sole or at least predominant cause, which are done solely because the doer is engaged in a particular employment at a particular place, and which neither an idle man, nor one engaged in another employment would have occasion to do. See Hollness vs. Mackay & Davis, Supra. 30

Where a workman was not only required to go upon the railway company's premises and cross its tracks, because of his employment by a contractor with the railway, but would have been a trespasser had it not been for the implied license which he had as the servant of the contractor.

So wide a construction would include not only the whole of the journey to and from work upon the public highways and premises of third persons, but

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also every act done in preparation for the employment, even to the putting on of working clothes at the workman's home.

The course of employment, therefore, is neither limited to the period of actual labor nor is it extended to include all acts necessitated by the workman's employment. The workman is not regarded
10 as outside the scope of his employment unless actually at work or in the receipt of wages, nor is he regarded as within it because what he is doing is something which has relation only to his work. The test finally adopted lies between the two.

The place at which the injury is sustained becomes the determining factor among those things which he does solely because he is engaged in a particular employment; only those are regarded as in the course of the employment which are done within
20 the master's premises or upon some means of conveyance to or from his place of work which is provided by the master for the sole use of his servants and which the servant is required or entitled to use by virtue of his contract of employment. The employment may be either for an extended period, as a week, month, or year, during which the master is entitled to the entire time of the workman, as in the case of seamen and domestic servants, or on the other hand, it may be for a limited number of hours
30 in each day, as in the case of laborers and employees in factories.

If the employment be in the first class, it seems reasonably well settled that the employment begins when the employee presents himself at the beginning of his term of service upon his master's premises, or at the place designated by the latter. The only difficult questions which arise are those concerning his temporarily quitting the service and his return thereto. It is only in those cases where the
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employment is to devote a certain number of working hours to some definite piece of work that the question as to when the employment begins and ends usually becomes vital. This question, of course, arises once even in an employment of an extended time, i. e., when the servant originally goes into service. See Whitbread vs. Arnold, 99 L. T., 103. But it arises daily when the employment is for a number of hours a day. In the great majority of such employments neither the actual work nor the wages begin until after the workman has reached some point well within his master's premises or the place at which the master is carrying on his business. 10

Both the English and the Scottish agree that the employment begins when the workman has arrived at the place where his actual work is to be done, though the work itself has not begun. And they agree that he is in the course of his employment if he is engaged in doing some act which he is required to do upon the employer's premises in preparation for his labor, or when he reaches some place upon his employer's premises where such required preparatory work is to be done. 20

Anderson vs. Fife Coal Co., Ltd. (1910), Scot. Sess. Cas., 8, in which it was held that a miner was not in the course of his employment until he had reached the spot where he was to get his lamp. The Lord Justice Clerk rejects the rule that the moment a man enters the premises of his master, he is in the course of employment, and adopts the rule that "he must come to some point at which he enters upon the work which he has to do." 30

Compare Tod vs. The Caledonian Railway Co., 1 Fraser, 1047 (Scot. Ct. Sess., 1899), with Caton vs. The Summerlee, etc., Co., Ltd., 4 Frazer, 989, (Scot. Ct. Sess., 1902). But see Haley vs. The

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United Collieries, Ltd. (1907), Scot. Sess. Cas., 214; Hendry vs. The United Collieries, Ltd., 47, Scot. L. Rep., 635, in which workman, injured in one case on his way to get his pay and in the other on his way home, were denied compensation not because they were not at their working place, but because they had not used the paths pro-
10 vided by their employers.

The English cases go further and regard him as in the course of his employment when he is using as a means of approach to or exit from the scene of his duties some part of his master's premises, provided by the master for such use or which the workmen have used for this purpose with the master's knowledge and with his consent, or at least without his prohibition. Gane vs. Norton Hill Colliery Co. (1909), 2 K. B., 539; Hoskins vs. J.
20 Lancaster, 3 B. W. C. C., 476 (1910).

It is enough that the workman is using a path or route which is customarily used by workmen to the master's knowledge, at least if the master has not forbidden its use.

While the workman may not loiter unnecessarily upon his employer's premises, Smith vs. South Normantown Colliery Co. Ltd. (1903), 1 K. B., 204; Benson vs. Lancashire and Yorkshire Railway Co. (1904), 1 K. B., 242, he is allowed a reasonable
30 time to go to and from his work. What is a reasonable time depends upon the circumstances of the case. So if the workmen are obliged to come and go by trains which arrive and leave some little time before and after the work begins and ends, the workmen are not required to pass these intervals upon the public highways, but are in the course of their employment while passing them upon their employer's premises, especially if their custom of so doing is known to their employer and he has pro-
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vided for their accommodation. Sharpe vs. Johnson & Co. (1905), 2 K. B., 139.

And a workman is held to be in the course of his employment while traveling to or from his work upon the conveyance which, though not owned or controlled by the employer, is provided by him for the sole use of the employees and which the workman, though not required, is permitted to use by virtue of his contract of employment. 10

Cremins vs. Gest, Keene & Nettlefords, Ltd. (1908), 1 K. B., 469, 1 B. W. C. C., 16. In this case mine owners provided a daily train by which their employees traveled to and from the nearest town to the mines. The coaches were the property of the employers, but the engine was owned by the railway, which operated the train with its own crew and over its own line. The train was run exclusively for the use of the miners, no charge being made for conveyance upon it; but the miners were not required to travel by it and no allowance was made to those who did not travel by it. 20

The accident happened at the platform upon the railway property which had been constructed by the mine owners and was repaired by them. The platform was two hundred yards from the mine premises, and in order to reach them the miners had to pass along a public highway. The claimant's decedent was killed by being pushed from the platform in front of a train by a rush of fellow workmen who were seeking to board the train. Therefore, while the coaches were owned by the employers and the platform was repaired by them, the injury was not received by reason of any bad condition therein, and the case seems to stand for the broad proposition before stated. It would seem that the mine owners would have been liable as fully had they not owned the coaches nor had provided the platform and had control of it for the 30 40

purpose of lighting and repairs. See, however, Davies vs. Rhymney Iron Co., 16 T. L. R., 329, 2 W. C. C., 22 (C. A., 1900), and Walters vs. Stavely & Co., 4 B. W. C. C., 89 (C. A., 1910), 4 B. W. C. C., 303 (H. L., 1911), especially Lord Shaw, pages 305-306, and Cf. Holmes vs. Gt. Northern Ry. Co. (1900), 2 Q. B., 409, 2 W. C. C., 19.

10 Recent cases, however, hold that any means of access provided by the vessel and permitted by those in command to be used for that purpose are a part of the vessel, and that a sailor on his return from shore-leave reenters employment when he has actually reached such means of access. These cases proceed upon the same principles as those which, as has been seen, determine when the employment of a workman entering his employer's premises begins; the vessel is regarded as the place at which 20 the work is to be done, the ladders and gangways which are provided by the vessel and under its control are the equivalent of those parts of the premises provided by the master as an entrance to and exit from the place of work.

Moore vs. Manchester Liners (1909), 1 K. B., 417, 2 B. W. C. C., 87 (1910); A. C., 498, 3 B. W. C. C., 527. A sailor, if he has not reached the vessel itself, must be using some means of access to the vessel itself, owned or controlled by it and pro-30 vided by it or permitted by it to be so used. If he is injured at any other point, whether it be a dock or quay or a gangway leading to another ship, which the sailor must cross to reach his own ship, no matter how near he may be to it and though the place where the accident occurs is one over which he must pass to reach it, compensation is denied. This is clearly shown by the cases of Kitchenham vs. S. S. Johannesburg, and Leach vs. Oakley, Street & Co., argued together (1911), 1

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K. B., 523, 4 B. W. C. C., 91 (1911) A. C., 417, 4 B. W. C. C., 311, in the second of which compensation was granted to the dependents of the deceased who fell off the gangway between his own and another vessel and was drowned; in the first it was denied, the sailor having fallen from the dock before reaching the gangway of his ship. See also Hewitt vs. S. S. Duchess (1910), 1 K. B., 772, 3 B. W. C. C., 239 (aff'd in House of Lords [1911], A. C., 671, 4 B. W. C. C., 317), and Kelly vs. Foam Queen, 3 B. W. C. C., 113 (1910), in each of which the sailor fell off a public dock while or after hailing a boat to take him to his ship. In Kelly's case, the boat hailed was a public one; in Hewitt's case, it was his ship's boat. Had the sailor been injured while being rowed to his ship in a ship's boat it would seem that he would be entitled to recover, since such boat would seem to be as much a means of access to the ship as was the gangway in Moore's case. In Keyser vs. Burdick & Co., 4 B. W. C. C., 87 (C. A., 1910) compensation was granted to a riveter injured while trying to leave a ship on which he had been working by sliding down a rope hanging from the side of the ship, which was the only means of leaving, the gangway having been removed, and in Kearon vs. Kearon, 45 Ir. L. T., 96, 4 B. W. C. C. 435 (C. A. Ir., 1911), compensation was given to a sailor who tried to board his vessel on his return from leave by jumping from the dock to the boat some five feet away, there being no gangway or ladder and no attention having been paid to his hail. Prof. Bohlen says:

> "In one case, Fletcher Moulton, L. J., expressed the opinion that it is not necessary that the sailor should actually touch the ship or the means of access thereto provided by the master, but that it is enough if he has taken some specific step towards getting from the

quay to the vessel, as if it were shown that in a dense fog he had fallen into the water while trying to find the gangway. So far the cases, whether dealing with the employment of a sailor upon a vessel or a workman employed to do work upon his master's premises, have made the workman's presence upon the employer's premises, or the means of access thereto provided by the master and required or allowed to be used by the servant, the decisive test as to the beginning of the employment; the test may be arbitrary, but it depends solely upon the external facts capable of exact proof. The dictum of Fletcher Moulton would destroy this test and substitute in place of it one purely subjective to the sailor depending upon what he intended to do and would introduce a multitude of difficult issues."

The workman must not use a needlessly dangerous path or means of transportation to or from his work. It is not necessary that he is using the place or path provided by his master in Elliott vs. Rex, 6 W. C. C., 27. The place where the injury was received was one provided by the master. It is enough that it is customarily used for this purpose by the workman. Gane vs. Norton Hill Colliery Co., Supra; McKee vs. Gt. Northern Ry., 42 Ir. L. T, 132, where it seems to be held that a general order that the servants are not to use a short cut is immaterial if the employer knew that a large number of workmen were in the habit of using it and it is enough that the use of such path and place is not specifically forbidden. Barnes vs. Nunnery Coal Co. (1910), 4 B. W. C. C., 43. In that case Fletcher Moulton, L. J., dissenting, held that a boy who chose a dangerous and forbidden method

of going to his working place could not recover. Kane vs. Merry & Cunninghame, 48 Scot. L. Rep., 430. Compare McKee vs. Gt. Northern Ry., supra. In this case the dangerous way was selected to save the workman trouble.

In every case in which a workman, injured while coming or going to work or while engaged in doing something "ancillary" to his employment, has 10 been given compensation, the injury has been in whole or in part one due to the nature or condition of the premises or vessel, or to some operation of the employer's business thereon—in a word, because of some danger incident and peculiar to the place where he is required or entitled by virtue of his contract of employment to be for these purposes.

Farwell, L. J., in Gilbert vs. S. S. Nizam (1910), 2 K. B., 555, 558, 3 B. W. C. C., 455: "The man who 20 is crushed by a falling wall on his employer's premises while he is eating his dinner recovers compensation because he is entitled to be on the spot by virtue of his contract of employment." "If he (he is speaking of a workman in a deep slate quarry) has to use some perilous means of access (or is required or permitted to satisfy his natural wants in a dangerous place) the dangers which he runs in such use are to my mind incident to his employment just the same as those he runs while ac- 30 tually working. It is by reason of the employment that he becomes subject to those risks." Fletcher Moulton, L. J., in Moore vs. Manchester Liners (1909), 1 K. B., 417, 2 W. C. C., 87, 97.

And so in Collins vs. Collins (1907), 2 I. R., 104, 108, Fitz Gibbon, L. J., says:

"I cannot understand how the occurrence could arise out of and in the course of a par-

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> ticular employment unless it was something the risk of which might have been contemplated by a reasonable person on entering the employment, as incidental to it."

The injury should arise from a risk incidental to the employment, that is, one capable of being
10 perceived as constituting a danger to those engaged therein.

Lord Kyllachy says in Haley vs. United Collieries, Ltd. (1907), Scott. Sess. Cas., 214, 44 Scot. L. Rep., 193, 195:

> "The question—whether the accident arose out of and occurred in the course of the employment—cannot be solved by reference to any formula or general principle but must al-
20 ways depend upon the circumstances of each case."

And see the protest of Lord Loreburn, L. C., in the course of argument in Kitchenham vs. S. S. Johannesburg (1911), A. C., 417, and Walters vs. Stavely Coal and Iron Co., Ltd., 4 B. W. C. C., 303, 304 (1911), against the citation of prior decisions upon any but precisely identical facts.

The workman is singled out for protection not be-
30 cause peculiarly apt to be injured, but because, as a class, workmen are regarded as peculiarly unable to take care of the loss resulting from injury without serious detriment to society, present and future. This incapacity is present whenever he is injured; it should be enough that in fact his employment has brought the injury upon him.

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POINT III.

The general rule deduced from the English and Scottish cases.

The general rule deduced from the English and Scottish cases, then, is that stated by Lord Kyllachy, in which he says:

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> "The question whether the accident arose out of and occurred in the course of employment cannot be solved by reference to any formula or general principle but must always depend upon the circumstances of each case."

In

Haley vs. United Collieries, Ltd., supra.

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POINT IV.

The influence of the English and Scotch decisions on the Courts of New Jersey. Stare decisis.

In deciding the case of Dunnewald vs. Henry Steers, Inc., see Case Book, page 83, lines 26 to 32 inclusive, where reference is made to two English cases, Case Book, page 84, where two English cases are referred to, and on page 85 of the Case Book, lines 9 to 12 inclusive, where Justice Swayze says:

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> "The question seems pretty well at rest in the English Courts where most of the discussion is to be found, owing to the fact that their statute antedates our American statutes."

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And on the same page of the Case Book two more English cases are referred to, on page 86 three more English cases are cited and referred to. The frequent citation of the English cases in the opinion and the language of Justice Swayze, above quoted on page 85 of the Case Book, lines 9 to 12 inclusive, show the inclination of the Courts of
10 New Jersely to follow the lead as far as possible of the English decisions. While this may relieve the Court of the labor of doing some independent thinking, I respectfully suggest that it is to be regretted, because the general rule established by the decisions of those Courts, as formulated in division III of this brief, and formulated in the language of Lord Kyllachy, viz., that "the question whether the accident arose out of and occured in the course of employment, cannot be solved by refer-
20 ence to any formula or general principle, but must always depend upon the circumstances of each case," leads to nowhere. It establishes no general principle or rule which can be respected. If the Courts of New Jersey try to follow these decisions, the result can only be the frequent doing of injustice in causes brought before them for decision. No two cases are ever exactly alike. The stretching or amputating by Procrustean methods to make the cases sub judice conform to the case
30 selected as authority can never accomplish justice. Lord Loreburn, L. C., in the case of Swansea Vale (Owners) vs. Rice (1912), A. C., 238, has well expressed the danger of the practice in these words:

> "Cases are valuable in so far as they contain principles of law. They are also of use to show the way in which Judges regard facts. In that case they are only used as illustrations. What you want is to weigh probabil-

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ities, if there be proof of facts sufficient to enable you to have some foot-hold or ground for comparing and balancing probabilities at their respective value, but one against the other."

My objection to the English cases is that they establish arbitrary rules, if they are to be regarded as precedents, which have no foundation in sound reason. Many of the English and Scottish cases hold that the employment does not begin until the servant enters his master's premises, and ends when he quits it. See for instance the case of Hollness vs. Mackay and Davis, 2 Q. B., 319, as a sample. No consideration is given to the question of the circumstances under which the employee approaches the place of labor, what great peril he may be subjected to in making the approach, the seriousness of the risk he takes in endeavoring to be loyal and efficient in his employer's service. The Court of Errors and Appeals of New Jersey is not bound by the decisions of the English and Scottish Courts, and should not be influenced by them. The words of the statute, to use the language of Lord James of Hereford, are vague, and they were purposely made vague by the Legislature in order that the Courts would have freedom and amplitude to lay down general principles of law by which these accident cases arising under this statute could be classified and precedents for each class established, which should permit the doctrine of Stare Decisis to be applied to a reasonable extent. This would enable the Courts to recognize the loyalty and efficiency of the workmen and also to recognize the disloyalty and inefficiency of the workmen, to recognize the circumstances of the time and place at which the accident occurred,

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which resulted in injury or loss of life, which the English and Scotch decisions do not intelligently do.

POINT V.

The construction which should be
10 **given by this Court.**

The Supreme Court, in the opinion, says:

> "We think that the evidence in the present case would not have justified a finding that the accident arose out of the employment."

See Case Book, page 87, line 12. In other words, there was no evidence to show that Mr. Dunnewald
20 met his death by an accident arising out of and in the course of his employment.

This question was fairly before the Supreme Court on the certiorari. It had been raised before the Trial Court on a motion to dismiss the petition for that reason and the motion was denied. Case Book, page 63, line 13.

My contention is that the Supreme Court erred in directing a reversal of the judgment of the Hudson Common Pleas. The Supreme Court after a
30 tentative review of the evidence outside of the findings of fact of the Judge of the Common Pleas is forced to the conclusion:

1st. That the deceased lost his life in an accident. Case Book, page 83, lines 18 to 26.

2nd. As to whether or not this accident arose in the course of his employment, the Court is overcome with doubt, and is unable to determine.

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The Court then separates the words of the statute "Arising out of and in the course of his employment" into two phrases, viz., "Arising out of his employment" and "Arising in the course of his employment." I respectfully contend that the language of the Legislature ought not to be and cannot be killed and dissected in this manner. The statute is a new one and was wrought out and forged into language by the legislative branch of the government with great forethought and labor. The two phrases above mentioned were not intended to be separated and read separately, they were intended to be read together as formulated in the statute and ought to be so read. The language of the statute, wihout being dissected and mutilated until its spirit and life have left it, was intended to be broadly, liberally and generously comprehensive and to cover and include all cases where an employe is injured or killed by reason of an accident which he would not have been in, or been affected by had he not been in the employment of his employer or on his way to his work a reasonable time before, and up to the time of his injury or death. And this does not mean that he shall be actually engaged in working at the very time of his injury or death, upon the particular kind of work or particular job for which he was hired, or that he shall have reached the particular place where he is actually to begin his work. The relation of employer and employe or master and servant, for these words are synonymous (see P. L., 1911, page 144, Section 23), forbids the narrow construction given by the Courts of England and followed to some extent by the Supreme Court of New Jersey in the comparatively few cases which have been before it. Such a narrow construction is against public policy. It is for the best interest

of every employer that his employe shall be concerned for the welfare of his employer and for the success of his employer's business ventures. That the employe shall be loyal to his employer and exert himself physically and mentally, and show courage to the extent of risking his life and body for the successful execution and performance of
10 his master's undertakings. We are living under new conditions. Cities containing great populations require speedy transportation.

Railroads and bridges must be repaired quickly, oftentimes in the night in a few hours, under conditions and circumstances attended with great peril of life and limb to the different kinds of employes engaged in the work. In the case under consideration, this draw-bridge had to be moved in one night, shifted to a new track that had been
20 built as part of a railroad constituting a great highway to New York City. The night was exceedingly dark and foggy, which rendered the work not only unusually difficult, but extraordinarily dangerous. The decedent had been in the employ of the defendant for many years (about 20), and as his conduct showed, was a faithful, loyal and courageous servant, who had his master's welfare at heart. The public was interested that this highway should be open for travel. If the
30 deceased had reasoned in this way, and had said, this is a very dark and dangerous night. If I go to my work tonight, it is quite likely I will fall in the river and get drowned, and in that case my employer will not take care of my widow. I will be dead myself, and the courts will decide in favor of my employer, if my widow sues it. I know I am a skilled workman and my employer needs me, but the risk is too great. I believe I will stay at home tonight and go back into my house and go
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to bed. The judgment of the Supreme Court justifies such reasoning. If all the employes reason hereafter in this way, how will the bridges be repaired? How will the public be impeded in their travel? The statute is new in this country. It has never been construed in this State by the Court, except in a few cases. You are free to construe it the best way. The decisions of the English courts have no binding force here. They ought not to have, unless there is some very excellent reason why they should. The House of Lords and all the other English courts are composed of hereditary aristocrats, by birth, education and training not in sympathy with labor and the laboring men and their interests.

It thus appears of the highest importance to the welfare in the future of employer and employe that such a rational construction shall be given to the words "Arising out of and in the course of" by the court of last resort of this State, as (1) will tend to cause the employe to give and the employer to receive the loyalty and most efficient service of the employe; and as (2) will tend to cause the employe to be rewarded for his loyalty, industry, courage and efficiency.

The way is open to give a rational construction which will forever enure to the benefit of both employer and employe, and largely diminish the unceasing stream of litigation arising from the intent of the employer to escape liability.

THIS COURT, IN DECIDING THE DUNNEWALD CASE VS. HENRY STEERS, INC., MAY LAY DOWN THE GENERAL PRINCIPLE THAT WHERE THE EMPLOYE IS COMING TO HIS PLACE OF EMPLOYMENT, AND IT IS NECESSARY FOR HIM TO TAKE

THE RISK OF PASSING OVER A VERY DANGEROUS MEANS OF APPROACH OR BRAVING ANY OTHER PERIL AT THE RISK OF HIS LIFE TO REACH HIS EMPLOYMENT, IN SUCH CASE THE ACCIDENT ARISES OUT OF AND IN THE COURSE OF HIS EMPLOYMENT. AND THIS IS THE PRINCIPLE ACCORDING TO WHICH THIS CASE SHOULD BE DECIDED, UNLESS THIS COURT CAN FORMULATE THE PRINCIPLE IN BETTER LANGUAGE, WHICH IT IS QUITE POSSIBLE IT MAY BE ABLE TO DO.

POINT VI.

The object and intent of the statute.

The motive which dominates probably the largest body of persons who advocate workmen's compensation acts is sentimental humanitarianism, that altogether admirable instinct which revolts from the contemplation of individual suffering and which regards as unjust any condition, social or legal, which throws a loss upon a class of individuals unable to bear it without actual suffering. There is a further body of public opinion, that of the advanced collectivist who believes that society as a whole should share the shock of industrial accidents rather than that it should be borne by the particular individual whose ill fortune it is to suffer it immediately, and so desires to place the burden primarily upon the employer, who, in theory at least, can add the cost to the price of his product and so distribute the loss among that part of the community, at least, whose wants call his business into existence. This sentiment is stated by a considerable group of economists in the form

of the economic law or doctrine, to the effect that the consumer should bear, as part of the cost of the article which he uses, all the loss which its manufacture entails, including the destruction and impairment of the human instrument of manufacture as well as the destruction and impairment of the other instruments, which, since such instruments are owned by the employer, is already taken into account in fixing the price of the commodity. There is a large body of public opinion that believes that the task of maintaining those reduced to want by industrial accident should be borne primarily by the industry which creates it, and ultimately by the consumer to whose wants such industries minister, rather than it should be thrown directly upon the public funds realized by taxation. Another considerable body of public opinion is inspired by that different species of humanitarianism which considers the improvement of the human race as a primary object of consideration rather than the relief of unfortunate individuals. To such a one it appears intolerable that workmen and their families as a class should be subject to the risk of fortuitous degradation in the social scale by an accidental injury to the head of the family, thereby throwing the entire family back into a submerged or pauper class or into a class but little better, and so rendering nugatory the effort expended in raising them to the position from which their mere misfortune has cast them. To workmen as a class, such legislation may well appear a distinct gain, and their support has undoubtedly been a strong impulse to the adoption of this sort of legislation.

But there is in addition a large class who entertain a well-grounded and growing dissatisfaction

with the waste and uncertainty of the present state of the law,—a waste which is inseparable from any system which requires the proof of fault as a basis to liability and which, being based upon the essentially common-law idea of antagonistic litigation, makes the right to recovery depend upon the proof of difficult and uncertain issues
10 of fact. If the acts passed and those which undoubtedly will be passed, accomplish no more than the extension of the field within which claims of workmen for compensation may be advanced with a chance of success, but within which the employer may hope equally to resist liability successfully, the waste of litigation instead of being diminished will be increased by widening the area in which it may occur. Such a result would satisfy no one.

20 View expressed in the earlier cases in England and Scotland was, that where the workman officiously undertook a work outside the course of his employment, or received an injury because of a slight deviation to carry out his own purposes, the employer was not liable.

The later cases hold that the risk in such instances is not incidental to the employment, and the injury does not arise out of it.

Under either the earlier or the later view, the
30 employee's right to compensation is made to depend upon his regard for his employer's will and interests. Phrase it as one will, the servant is given the right to recover if, and only if, he is obedient and faithful; while not deprived of compensation by mere inadvertent wrong or stupidity, he is denied compensation if he deliberately disobeys his employer's directions and officiously acts in defiance of his master's will as expressed in the latter's definition of his servant's duties.

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But perhaps the most fundamental objection, both in theory and in practice, to this phrase, as construed in the British Cases, is that it makes the master's liability depend upon the foresight of himself and his servant as to the probability that the servant will be subjected to the risk of injury of the sort which he sustains. Such a conception, while appropriate to determine the extent of duties and rights created by a contract voluntarily entered into, or to determine whether an individual is guilty of wrongful disregard of the rights of others in not preventing harm to them by removing the cause thereof, has no proper place in an act designed to throw upon the business a part of the loss which it in fact causes to those engaged therein, irrespective of the negligence or care with which it is conducted. Even in an elective act the obligation to compensate is not wholly the creature of the consent of the employer. The election is to accept the compensation scheme as prescribed by the act, as an alternative to an increased liability in an action of tort or as an alternative to losing statutory rights already granted. The election is to accept or reject the scheme in its entirety. The nature of the scheme is dictated by the Legislature, and the extent of the liability under it is determined by its will and not by the wishes of the parties. To make the foresight of the master the test is to carry into an act in which the fault of the master is absolutely immaterial a conception of cause, as including culpability, appropriate only to tort law in which the defendant must not only be the cause, but the guilty cause, of the plaintiff's harm. Whether the master or the servant had or had not reason to expect injury of the sort suffered or from the cause which in fact produced it, is utterly imma-

terial in determining whether the business in fact caused the injury. This depends on the sequence of events and is wholly objective.

In dealing with the casual relation necessary between the employment and the injury, only three courses appear to be open. The first is to regard it as enough that the employment furnishes the
10 occasion for the employee's injury, that the servant by reason of his service is in fact exposed on the occasion of his injury to the force which injures him, whether it be one originating in the business itself or be a force or condition of which the business is in no way the cause. It may be possible to suggest cases where the broad right to compensation is at least seemingly unjust to the master, but the only other logical and workably definite alternative is to give compensation only where the oper-
20 ations of the business or the condition of the plant or premises are the active and immediate cause of the injury. In such cases a greater injustice will be done to the employee. The third alternative is to leave the phrase as it stands, so making—if American courts follow the course of English decision, as they will in all probability do—the foresight of the parties the test and inviting the very difficulties and uncertainties which experience has shown to have resulted therefrom.

30 One would suppose it to be impossible to find a more uncertain question * * * one less susceptible of definite proof, the result of which is more difficult to predict * * * upon the solution of which legal rights could be made to depend than the effect of an infinite variety of circumstances upon the human mind, were it not that the test now discussed makes the right to compensation depend not upon what the parties do actually foresee, but upon what they ought to foresee, under circumstances
40 not actually known but which ought to be known;

it introduces that most uncertain factor, the ideal mind of the socially normal man, by whose foresight the rights and liabilities of the parties must be determined. Until, after years of litigation, there is built up an elaborate system of rules determining what under given circumstances must be regarded as foreseeable, the question must always depend upon the circumstances of each case and upon the opinions of the triers of fact thereon. In its nature it is mere matter of opinion in every situation differing in the slightest degree from those already litigated; in practice, experience in those jurisdictions in which this test has been adopted to determine the existence or extent of liability in an action of negligence has shown it to lead to the very uncertainty and consequent litigation which it is the object of workmen's compensation acts to prevent.

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POINT VII.

How the object and intent of the statute has been thwarted and restricted in England and Scotland, and may be in New Jersey.

The object and intent of the statute has been thwarted and restricted and its power and force emasculated by the construction given to the words "Arising out of" and "In the course of" by the courts of England and Scotland, in those cases in which the judges speak of the "ambit" and the "sphere" of the workman's employment. They have constricted the signification of the words "arising out of" and given them a meaning equivalent to "Injury suffered while actually engaged in working at" or "Injury suffered while actually working on the premises of employer." This is a

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construction which nullifies the effect of the act to a very great extent. It is a construction which is not in sympathy with the purpose and intention of the act. It is on a par with, *nam qui haeret in litera, haeret in cortice.* A good example of this arbitrary narrow minded construction is the case of Webber vs. Wannsborough Paper Co. Limited (1913), 3 K. B., 615, cited in the opinion of the Supreme Court, Case Book, page 86, line 30. Such a decision shames the humanity and intelligence of the age we live in. The words of the statute are broad and liberal and should be construed for the benefit of the employee.

The "ambit" should not be measured in feet and inches, and the "sphere" bounded by the employer's premises, but should be measured and bounded by the noble limitations loyalty, courage, diligence, obedience, efficiency and determined effort to serve the employer, which will advance the permanent interest and welfare of both employer and employee for all future time. The words "Arising out of and in the course of" do not call for an ambit of feet and inches, nor a sphere contained within a *locus in quo.*

POINT VIII.

Application of the rules laid down in New Jersey to the case at bar.

Let us now apply the principles which have been established to some degree by Bryant, Adm'x vs. Fissell, supra, to Dunnewald's case:

1. It is admitted that his death was caused by an accident. This is the condition required by the Paragraph 2 of the syllabus, subdivision (a).

2. The construction of the words "in the course of employment" enunciated in the 7th paragraph of the syllabus do not comprehend all the accidents which can arise in the course of employment. Therefore, the construction so enunciated does not bar Dunnewald's Administratrix from recovery, if she can show that the intestate's death was caused by an accident which arose out of and in the course of his employment in some other manner. 10

3. The risk of drowning is a risk which might have been contemplated by a reasonable person, when entering the employment of Henry Steers, Incorporated. It was engaged in building and repairing docks, wharves, piers and railroad and other bridges over waters of great depth and extent, and any person of common sense when entering its employment would contemplate the risk of drowning, as incidental to that employment. The risk of drowning is a risk peculiarly incidental to that employment. Therefore, it comes under Paragraph 8 of the syllabus of Bryant vs. Fissell, and the accident arose "out of" Dunnewald's employment. 20

4. This risk belongs to and is connected with what a workman working for Henry Steers, Inc., has to do in fulfilling his contract of service and pursuant to Paragraph 9 of the syllabus of Bryant vs. Fissell is, therefore, incidental to his employment. 30

5. The risk of drowning while in the employment of Henry Steers, Inc., is an ordinary risk directly connected with the employment from the nature of the employment.

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6. This risk of drowning was intensified, increased and multiplied many fold by the extraordinarily dense fog and darkness on the particular night when Dunnewald drowned. No one can dispute that his death was owing to the special nature of his employment.

10 7. In order to reach the place where he was to work that night, it was absolutely necessary for Dunnewald to pass over the trestle of the railroad which was the approach to the new construction work (the shifting of a drawbridge in a tidal river of great depth and velocity of current), and after leaving the trestle, to go upon a large floating derrick. There was a large open space between the two ends of the trestle which approach each other from
20 Easterly and Westerly banks of the river. It was necessary for Dunnewald to pass over the route mentioned, because there was no other path or route by which a person could get where he was to work. The Court can take judicial notice of the Hackensack River at this point, of the Railroad Bridge over it, and of the draw-bridge which forms part of the Railroad Bridge and by permitting the passage of vessels through its draw when open preserves
30 the navigability of the river. Whart. on Ev. 2nd ed., Section 339, supported by notes 6, 7 and 8. Dunnewald had been working there that same day until five o'clock P. M. Went home to his supper and left his home to return at 9 P. M. He was familiar with the place and the way to it, and the means of access. His body was found dead at a point where it would logically be expected to be, if he had fallen in the river at the place of his employ-
40 ment.

It is respectfully contended that under the authority of Bryant, Adm'x vs. Fissell, the administratrix of Dunnewald is entitled to recover compensation.

In the case of Muzik vs. Erie R. R. Co., 85 N. J. L., 129, page 130, it was claimed by the defendant, that no direct evidence of the facts which showed or proved that Muzik's death was caused by an accident in the course of his employment, was produced, but the Bergen County Common Pleas decided that the evidence was sufficient, and the Supreme Court affirmed the judgment of the Bergen Common Pleas. 10

Muzik was found alongside the railroad with a broken neck.

Dunnewald was found in the Hackensack River, about where he would be if he had fallen in at the time he arrived at the place where he was to work.

Yet in the Muzik case, the Supreme Court affirmed the judgment of the Common Pleas, that the deceased came to his death by accident, while in the railroad's employ, and in the course of it. 20

There can as well be a judgment in favor of Dunnewald in this case as there was in favor of Muzik in his case.

In the case of Zabriskie vs. Erie R. R. Co., 86 N. J. L., page 266, the deceased was killed on Market Street in the City of Newark and not upon the premises of the Erie Railroad Company. The Courts say "it was argued that he was not doing his employer's work at the time, but there is little or no force in this, for in the end it is as important to the employer as to the employee, that the latter may do his work without necessary physical inconvenience. The Trial Court was also justified in finding upon the evidence adduced, that the accident arose out of the employment. 30

"The difficulty in the case, arises from the fact that the place where the deceased was struck was 40

a public street, and that he was struck by an independent agency, to wit, an automobile driven by a stranger and lawfully in said street. Hence it is argued that the deceased was not and could not have been injured by any cause for which the master was responsible, or to which he was subjected by the conditions of his employment. But
10 we consider this argument also to be without support. It is not only conceivable, but it is a matter of daily occurrence, that employees are required to do their work under conditions which render them liable to injury by outside agencies."

This is the language of this Court.

Dunnewald was required to do his work under conditions which rendered him liable to death by drowning. This Court held, that Zabriskie was killed by an accident which arose out of and in the
20 course of his employment. There is no real distinction between his case and that of Dunnewald. It was incumbent upon the Henry Steers, Inc., to provide a safe means of access and approach to the place where its employees were to work on the night when Dunnewald was drowned. This it did not do. See Case Book, page 61, line 9. Remark of Joseph E. Snell, General Superintendent of Henry Steers, Inc.

"My God, I cannot understand how a man got
30 over there safe. I had to stop and call for a light, or I don't know how I would have got over myself."

This remark of the General Superintendent is enough to condemn the company and make it liable. The defendant company should have placed men along the approach with lighted lanterns to guide the employees on their way to their work. The approach over the trestle was the means of access furnished by the defendant company, and
40 the only means by which the employees could gain

access to the place where they were to work. There was a lack of proper and safe facilities for entrance to the place of employment, a condition for which the employer was responsible. The defendant knew that the workmen were necessarily obliged to go over this dangerous path to reach their work, and this practice was known and assented to by the defendant. The danger was one which was peculiar to the employment, because the absence of a safe path to the work, and the necessity of travelling over the dangerous path of the trestle and pile driver gave rise to it. The employee was subjected to the danger of drowning by the conditions of his employment. Dunnewald was required, in the performance of his work, to go into a dangerous place and incur the dangers connected with that place. The rational conclusion is that the evidence sustained a finding by the Trial Court, that the accident arose both out of and in the course of the employment of deceased, and that Dunnewald's Testatrix is entitled to compensation.

POINT IX.

Application of rules laid down in the English and Scotch Courts to the case at bar.

Webber vs. Wansborough Paper Co., Ltd. (1913), 3 K. B., 615. Near the bottom of page 620 and at the top of page 621, the Courts say, "If the risk is one due to the means of access to his ship as in Moore vs. Manchester Liners, Ltd., the accident is rightly said to arise out of his employment." Dunnewald's death was due to the means of access to his work. In Moore vs. Manchester Liners (1910),

A. C., 498-502, Lord Ashbourne, says, "The mode of access to the ship was by a ladder which was not fixed, and which swayed, and, in the words of the Judge, was an unsafe contrivance." But it was the only mode by which deceased could fulfill his necessary duty of returning.

This ladder attached to the ship, was a requisite of it for the purposes of access, and practically for that purpose almost formed part of it. The deceased fell off the ladder whilst seeking to re-enter the ship. On the facts, I arrive at the conclusion that the accident arose out of and in the course of his employment, and therefore I think the appeal should be allowed. Dunnewald was under the necessary duty of returning to the place of his work on the night when he lost his life. The mode of access by means of the trestle and pile driver, in the language of the English decision, was an unsafe contrivance, but it was the only mode by which Dunnewald could fulfill his necessary duty of returning.

Lord James Hereford says, "The words 'arose out of' are vague and somewhat indefinite, and must, I think, be construed broadly. Moore left the ship for the purpose of obtaining goods which enabled him to carry out his employment; surely an accident occurring during the absence for such purpose, arose out of the employment." Dunnewald left the pile driver and went home for the purpose of obtaining food and rest to enable him to carry out his employment that night. The accident which caused his death, occurred apparently almost at the moment he had returned to his work, and therefore, according to the reasoning of Lord James Hereford, arose out of his employment.

Fletcher-Moulton, Law Judge, says, "for instance if it was shown that when the sailor returned to the ship, there was a dense fog, and that in trying to find the gangway, which I will suppose was not lighted, he fell into the water and was drowned, I think that the accident would arise out of his employment, but if all that is shown is that it occurred during his return to the ship, but while he was still on the shore, and before he had taken any specific step towards getting on board the vessel, I think that it would not thereby be established that the accident arose out of his employment." 10

In Moore vs. Manchester Liners, Ltd., 1 K. B., on page 422, where Fletcher-Moulton, L. J., dissented, but thus stated the basis of his judgment. "In countless cases the Court of Appeal has had to deal with accidents happening to workmen coming to their employment or going away from it, and where the accident has arisen through the workmen using special modes of access provided by their employers to enable them to go to or come from the actual place of employment. The Court has, so far as I know, never hesitated in holding that the accident arose out of and in the course of their employment." Employment may be continuous as that of a sailor on a voyage, or a domestic servant, or it may be discontinuous, in "which case the nature of the express employment and the incidents that are reasonably necessary or proper for the due performance thereof, have to be taken into consideration. This consideration also arises when a continuous employment is temporarily discontinued, either with leave or without leave. The employment of no necessity entering into the risk as in the case of Marshall, in Marshall vs. S. S. Wild Rose, who was engaged in securing his own comfort, when his death occurred and was not do- 20 30 40

ing what was necessary for him to do, in order to engage in the work of his employer." Lord Shaw of Dunfermline, at the end of his contra opinion says, "I desire, however, specifically to guard against my opinion being any precedent in what I may call the ordinary case of a sailor, whose life is sacrificed in circumstances of mystery—say, of loneliness
10 during a night watch or confusion during a storm. The performance of duty in such circumstances would raise presumptions of a kind consistent with the seaman's case completely satisfying the conditions laid down by the Act. I think the view expressed on that subject in the latter part of Farwell, L. J.'s, judgment to be both humane and sound." In the case of Marshall vs. Owners of S. S. Wild Rose, supra, Lord Lorburne, L. C. Marshall was an engineer on board the ship. The night was
20 very hot. He went on deck with his trousers, shirt and socks on. At midnight he was not on deck. His body was searched for next morning and found just underneath where the crew usually sat. Beyond this we know nothing. "Now, in the affairs of life where much is often obscure, men have to draw inferences of fact from slender premises.

"A plaintiff or claimant must prove his case. The burden is upon him, but this does not mean that he must demonstrate his case. It only means that if
30 there is no evidence in his favor upon which a reasonable man can act, he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved. I cannot possibly say that County Court Judge was wrong, because I also conclude from the slight material before us, that this man fell into the water by accident (suicide was not ever suggested) and so was drowned, and I do not be-
40 lieve any jury would hesitate in saying so."

Now, in the case at bar it is an admitted fact that the deceased man, Dunnewald, was in the employ of the respondent, Henry Steers, Inc., and that in pursuance of that employment he left his home at nine o'clock on the night of April 13th, 1912, to go to resume his work. He had been working that same day until five o'clock in the afternoon. He was particularly familiar with the way to and from the place where he was to work. His dead body was found in the river at a point which indicates that he had arrived at the place where he was to work, when he fell into the river. When I say "at the place where he was to work" I mean, "the immediate vicinity of the work." When or after he arrived he might have been ordered to work on either side of the open space between the two ends of the railroad track, into which the drawbridge was to be inserted. I do not think it would be at all material exactly where he was to work, within the language and meaning of the statute upon which the action is based. The evidence as to the details of his death are slender, to use the language of Loreburn. But it cannot be said truthfully that there is no evidence in his favor upon which a responsible man can act. The main circumstances surrounding his death are strong. The facts that he was found drowned in the river at a point where it might reasonably and almost certainly be expected that he would be found if he had reached the place where he was to work, and there met with the accident which caused his death, seem in my judgment to demonstrate his case. The extraordinary darkness of the night, and density of the fog on that night, made it the duty of the respondent, Henry Steers, Inc., to take care to provide safe access and approach to their work for the employees of the respondent, and the failure of the respondent to do so, brings the accident within the

words to arise out of and in the course of his employment.

Lord James of Hereford in his opinion in the Wild Rose case, says, "but it remains to be determined, did the death of the deceased arise out of his employment? I think it did. Now, what do the words 'arising out of the employment' mean? They are vague words, very different in their effect from such words as 'caused by the employment.' This seems to point to an indirect connection with the employment, and I think they are fulfilled if the accident occurred during the employment and under circumstances which show that the injured person had not, at the time of the injury, departed from the controlling incidents of the employment. It may be that independent circumstances may show that the accident occurring during the employment did not arise out of it, but if the conditions I have examined are fulfilled, the burden of establishing such circumstances must be borne by the employer. The words of the statute of arising out of the employment are, as I have said, somewhat vague, but I read them, as I think they ought to be read, liberally, and, doing so, it seems to me that the facts of this case establish a right to compensation, and that, therefore, the appeal should be allowed."

In the case at bar the risk was a necessary risk which Dunnewald could not avoid. It differs from cases where there is no necessity entering into the risk as in the case of Marshall vs. S. S. Wild Rose. Marshall was engaged in securing his own comfort when his death occurred, and was not doing what was necessary for him to do in order to engage in the work of his employer. This Court, in deciding the Dunnewald case vs. Henry Steers, Inc., may lay down the general principle,

that where the employee is coming to his place of employment, and it is necessary for him to take the risk of passing over a very dangerous means of approach or braving any other peril at the risk of his life to reach his employment, in such case the accident arises out of and in the course of his employment. And this is the principle according to which this case should be decided, whatever results have been reached by the English and Scotch Courts or by the Courts of any other country, or of this State in any previous cases, and the judgment of the Supreme Court should be reversed, and the judgment of the Hudson County Common Pleas affirmed.

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POINT X.

Application of the proposed principle or rule of construction in addition to the rules already established in this State, to the case at bar.

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From what has already been said, it seems apparent that under the cases already decided in the State of New Jersey, the administratrix of Dunnewald is entitled to recover compensation. Much more, then, is she entitled to recover in the case this Court shall lay down the principle contended for that where the employee is going to his place of employment, and it is necessary to take the risk of passing over a very dangerous means of approach, or braving any other peril at the risk of his life to reach his employment. In such case the accident arises out of and in the course of his employment.

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Dunnewald had arrived in the vicinity of the place of his employment.

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He was an honest and courageous employee, devoted to the service of his employer. He reached the trestle, a very dangerous means of approach to his work, owing to the character of the path and the unusual darkness of that night, he proceeded on his way at the risk of his life, and was drowned while endeavoring to serve the best in-
10 terest of his employer.

The Supreme Court, in the opinion of Justice Swayze, say: "The accident may have happened at some other point in the river, from the decedent having mistaken other railroad trestles for that of the Central Railroad, from his getting in the swamp, where his son afterwards sought for his body, or at best for the petitioner's case on the trestle or tracks at the Central Railroad bridge, which he had to cross to reach his work. If we
20 assume the latter as the more probable, it is a conjecture or likely guess, no more. It does not reach the certainty of a logical inference." These suggestions are conclusively refuted by the fact that Dunnewald had been at work at five o'clock in the afternoon of that same day at the place in question. He was perfectly familiar with the place and the way to and from it. He lived in Hoboken, in Hudson County, many years continuously, and was thoroughly familiar with the place where he
30 worked, and the mode of going to and from it.

His body was found in the river at a point where it would logically be found if he had fallen from the trestle or the derrick.

The circumstantial evidence is sufficient to sustain a logical inference with certainty. It is entirely immaterial whether the Central Railroad Company owned the trestle and controlled it, because they allowed the Henry Steers, Inc., to use it, and the workmen of Henry Steers, Inc., used it
40 with the knowledge and consent of their employer,

and under a number of the English and Scotch decisions cited supra, the employer is liable in such cases. The accident which caused Dunnewald's death arose out of and in the course of his employment, and his administratrix should be given a compensation.

In many places in this brief, I have made liberal use of the writings of Professor Francis H. Bohlen, professor in the University of Pennsylvania Law School, particularly his essays on "A Problem in the Drafting of Workmen's Compensation Acts." 10

Respectfully submitted,

SAMUEL A. BESSON,
Counsel for Petitioner-Appellant.

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The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

New Jersey Court of Errors and Appeals.

LENA DUNNEWALD, as Administratrix of Theodore Dunnewald, deceased, Petitioner-Appellant, vs. HENRY STEERS, Incorporated, Defendant-Respondent.	**On Appeal from New Jersey Supreme Court. On Certiorari.**

BRIEF FOR DEFENDANT-RESPONDENT.

Appellant filed her petition alleging that on April 13, 1912, her husband, Theodore Dunnewald, was killed by accident arising out of and in the course of his employment by the respondent, and claiming compensation under Chapter 95 of the Laws of 1911, known as the Workmen's Compensation Act. The answer denies these allegations. The case was heard before Judge Carey in the Hudson County Court of Common Pleas, who filed his conclusions, together with a determination and finding of fact on May 5, 1913. Judgment for the appellant was entered thereon on June 16, 1913. The case was taken to the Supreme Court on *certiorari* by the respondent, that court reversed the judgment of the Court of Common Pleas (85 N. J. L. 449), and appellant has appealed to this Court.

I.

The facts found by the Court of Common Pleas are not sufficient to support the judgment for the appellant in that Court.

The conclusions of the Court of Common Pleas state that the court is warranted in finding that Dunnewald met his death either by falling from the trestle, the approach to the new construction work, or from the derrick on his way from the mainland to his work (Case, p. 13, lines 25-29) and the same statement appears in the determination (Case, p. 16, lines 11-15). The actual finding, however, is that the deceased was engaged in the employment of the respondent and was drowned while engaged in such employment (Case, p. 14, lines 13-16) (p. 16, lines 37-40). There is no finding that his death occurred by accident arising out of his employment. The most that can be said is that it amounts to a finding that deceased met his death in the course of his employment. This is insufficient. It must also appear that the deceased was killed by accident arising out of his employment (*Bryant* v. *Fissell*, 84 N. J. L. 72; *Reimers* v. *Proctor Publishing Co.*, 85 N. J. L., 441).

If the Court be considered as having found what it stated it was warranted in finding, there is still no sufficient basis for a judgment for appellant. If appellant's intestate in fact met his death by falling from the trestle, the approach to the new construction, or the derrick, there is still lacking the essential finding of an accident arising out of and in the course of employment. The trial court did not consider itself warranted in finding whether the deceased fell from the trestle, the approach, or the derrick, but only that he fell from one or the other. It cannot, therefore, appear that the deceased met his death in the course of his employment. The trestle

and its approaches were the property of the Central Railroad Company and maintained by it and not by respondent (Case, p. 52, lines 28-35). If Dunnewald fell from the bridge or the approaches, the respondent would not be liable under the ruling in *Hewitt* v. *Owners of Ship "Duchess"* (1910), 1 K. B. 772, and *Kitchenham* v. *Owners of S. S. "Johannesburg"* (1911), 1 K. B. 523 (1911), A. C. 417, hereafter referred to.

II.

There is no evidence to support a finding that Theodore Dunnewald's death was caused by an accident arising out of and in the course of his employment by appellant.

There is no reported case in this state where the precise question here involved has been considered. In *Bryant* v. *Fissell*, 84 N. J. L. 72, the Supreme Court, following the rule laid down by the English Courts, in construing the provision that compensation can be recovered for injury or death caused "by accident arising out of and in the course of" the workman's employment, which is contained in the English Workmen's Compensation Act, held that to warrant a recovery under the New Jersey Act of 1911 (P. L. 1911, Chap. 95, p. 134) it must appear that the employee's death was caused by (*a*) an accident (*b*) arising out of and (*c*) in the course of his employ ment. Even if the injury arose out of and in the course of his employment, if it be not an accident within the purview of the act, there can be no recovery; if there be an accident which occurred "in the course of" the employment there can be no recovery if it did not also "arise out of" the employment; and if there be an accident "arising out

of" the employment there can be no recovery if it did not also arise "in the course of" the employment. See also *Reimers* v. *Proctor Publishing Co.*, 85 N. J. L. 441, hereafter referred to, and *Hulley* v. *Moosbrugger*, 95 Atlantic R. 1007.

There is, in the case at bar, not only no evidence to support a finding that Dunnewald was killed by accident arising out of and in the course of his employment, but there is no evidence to support a finding that Dunnewald met his death by falling from the Railroad Company's trestle, or the approach thereto, or from the derrick, or that he was drowned while engaged in his employment. There is no evidence at all as to when, where, or how he met his death. It appears that he had been employed upon a pile driver near the Central Railroad Bridge over the Hackensack River (Case, p. 24, lines 17-21; p. 29, lines 2-18). The bridge was located on the Hackensack River, between West End Avenue and Passaic Street, Jersey City (Case, p. 24, lines 40-41; p. 25, lines 1-5). On April 13, 1912, the date of the alleged accident, Dunnewald worked from seven in the morning until half-past four in the afternoon, when he left the scene of his empoyment in company with his foreman, and went home (Case, p. 64, lines 18-24; p. 28, lines 18-22; p. 31, lines 2-6). He was instructed to return to work that night (Case, p. 28, lines 22-24; p. 31, lines 10-12). He did not report for duty in accordance with these instructions (Case, p. 28, lines 26-27; p. 31, lines 11-14; p. 64, line 23). It does not appear that he was ever seen at or near the bridge, the approaches, the derrick, or the pile driver, by anyone. The foreman never saw him after he left for home on the afternoon of April 13 (Case, p. 28, lines 26-27; p. 31, lines 11-14). It is proved that he reached home after leaving his work that afternoon. His wife testified that he left his home at No. 318 Clinton Street, Hoboken, at 9 o'clock on the evening of April 13th, stating that he was going to work. She watched him until he reached the corner of Second Street and Clinton

Street, Hoboken. She never saw him again alive (Case, p. 19, lines 39-40; p. 20, lines 1-20) and there is no evidence that anyone else did.

On April 29, 1913, sixteen days after Dunnewald's disappearance, a boatman saw a body floating in the Hackensack River off Dryer's Point (Case, p. 41, lines 8-18). Dryer's Point is between two thousand and twenty-two hundred feet from the Central Railroad bridge (Case, p. 40, lines 25-29). The boatman had never seen Theodore Dunnewald (Case, p. 43, lines 21-23) and the statement of Henry Dunnewald that Theodore Dunnewald's body was seen off Dryer's Point (Case, p. 40, lines 11-14) was pure hearsay. On the same day (April 29, 1913) the body of Theodore Dunnewald was taken from the waters of the Kill von Kull off Port Richmond in Staten Island (Case, p. 39, lines 25-31), about five miles from the bridge at which the piledriver where Dunnewald had formerly been employed was anchored on the date of the alleged accident (Case, p. 40, lines 8-11). The distance from Dryer's Point to Port Richmond renders it improbable that the body seen by the boatman was that of Theodore Dunnewald.

The brief for appellant frequently repeats three statements that are misleading, and are not supported by the evidence: that Dunnewald died as the result of an accident; that he had reached the immediate vicinity of his employment, or the bridge; and that his body was found near the place of his employment. There is no evidence in the case to warrant any of these statements. There is nothing to show the time, place or manner of Dunnewald's death. As to the statement that his body was found near the place of employment, it has already been pointed out that the evidence shows that it was found off Port Richmond, Staten Island, *five or six miles from the place of employment.*

There was considerable evidence in the case as to the manner in which the men employed on the pile driver could reach it. Mr. Coleman, the foreman,

said it was necessary to walk across the railroad bridge and go from it to the pile driver in a small boat (Case, p. 29, lines 18-40; Case, p. 30, lines 1-2) and that all of the men who went out that night went over in a small boat (Case, p. 30, lines 1-2, 24-26) and Mr. Foulk, the only other witness who was employed upon the pile driver, testified to the same effect (Case, p. 50, lines 2-40). All of this evidence was irrelevant, as there was no evidence at all to show that Theodore Dunnewald ever reached the vicinity of the bridge after leaving his home at 9 o'clock on the evening of April 13th. Moreover, the bridge over which the men had to walk was the property of the Central Railroad Company and was maintained by it (Case, p. 52, lines 28-35). Even if it had been shown that Dunnewald fell from the bridge, the appellant would not be liable. A workman who is injured while on his way to work and while in a place or on a structure not owned or maintained by his employer is not entitled to compensation from him. Thus in *Hewitt* v. *Owners of the Ship "Duchess"* (1910), 1 K. B. 772, the master of a ship who had been on shore came down to the quay and hailed his ship to send him a boat. Before the boat reached him he fell from the quay side and was drowned. It was proved that he had a perfect right to be on the quay and might have been there in discharge of his duty. The Court denied compensation to his widow on the ground that it did not appear that the accident arose out of and in the course of his employment. And in *Kitchenham* v. *Owners of S. S. "Johannesburg" infra*, the Court denied compensation on the ground that the evideuce failed to negative the possibility that a sailor fell from the dock instead of from his ship.

Upon this evidence the Court of Common Pleas made its findings above referred to and entered judgment against the respondent. It is submitted that as the Court of Common Pleas did not find as a fact that Dunnewald's death was the result of an acci-

dent arising out of and in the course of his employment, its judgment was properly reversed by the Supreme Court. Assuming for the sake of argument, however, that the Court of Common Pleas had found that Dunnewald met his death by accident arising out of and in the course of his employment, it is apparent that there is no evidence to support such a finding. The judgment could be sustained, therefore, only if the inference that his death was caused by an accident arising out of and in the course of his employment could legitimately be drawn from the facts proved. The respondent submits that it cannot.

In *Marshall* v. *Owners of the Steamship Wild Rose* (1910) A. C. 486, the facts proved were as follows: Marshall was employed upon the steam trawler "Wild Rose" and on the day of his death came aboard and went below. It was a very hot night and he subsequntly came out of his berth saying he would go on deck for fresh air. The crew always sat on the starboard quarter against the fish board. His body was found next morning just underneath where the crew usually sat. The Court held that no facts were shown from which it could be legitimately inferred that Marshall was killed by an accident arising out of and in the course of his employment. Lord Atkinson, speaking for the House of Lords, said (p. 491):

> "His body was found next morning floating in the water just underneath a place on the starboard side of the vessel, where either the crew or the deceased and his companion, whichever it be—the word 'we' alone is used—usually sat. That is all. There is nothing to show that he did not deliberately jump or throw himself into the water beyond the greater probability of accident as compared with suicide."

Lord Shaw said (p. 494):

> "But in the present case, my Lords, the name of inference may be apt to be given to what is pure conjecture. What did the sailor Mar-

shall do when he left his berth and went on deck? Nobody knows. All is conjecture. Did he jump overboard, walk overboard or fall overboard? One can infer nothing, all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate? No doubt the occurrence took place during the period of his engagement but did it take place in the course of his employment, or, as Sir Robert Finlay justly argued, in the course of some occupation grafted on to his employment but in no way part of it, necessary to it, or usual in it? There can be, in my view, nothing dignified with the name of an inference on this subject, but again only conjecture.
* * *

"The statute provides that 'if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall * * * be liable to pay compensation,' in respect of the workman's death. I do not see my way to hold that this is equivalent to saying the employer is liable to pay compensation in respect of the death of any workman should the death occur during the period and at the place, of his service. To do so would, in my opinion, be to interpret a language setting up definite conditions and canons of liability as if it were really a life insurance. It is settled law that a claimant, in invoking the statute, must establish that the conditions and canons of liability which it sets up have been satisfied. But the interpretation argued for by the appellant would wipe those conditions and canons out."

In *Bender* vs. *Owners of Steamship Zent* (1909), 2 K. B., 41, a ship's cook disappeared during the voyage. He was seen on board at 5:35 A. M.; at 6:20 when he was wanted he could not be found. He was never seen again by any one. The Master of the Rolls said (p. 43):

"This is a case which may be said to be near the line, but it seems to me to be one in which we are bound to uphold the proposition which has been repeatedly laid down in this court,

that it is for the applicant to prove that the accident arose out of and in the course of the employment, and that that rule applies none the less although, by reason of the death of the workman, it may be that a greater burden is thrown on the dependents of the deceased. * * * Nobody knows how the accident happened. We know within a little the time at which it happened, but, notwithstanding all the inquiries that were made and all the searches that were made, we get no further. Under those circumstances, is there any justification for inferring that the death, which I assume arose 'in the course of' employment, arose 'out of' the employment? I am bound to say I think there is no ground. There are many contingencies, any one of which is almost as probable as the other. Although he was chief cook and baker, it is conceivable that he might have been engaged on some ship's work, or something incident to the employment on deck, at that early hour. It is conceivable that he may have been out there amusing himself, or, to use the word which has been frequently used, larking. It is conceivable that he may have been guilty of suicide. Under those circumstances, it seems to me that there is nothing whatever in the circumstances of this case which justified the county court judge in inferring that which he did infer."

To the same effect see *Kitchenham* vs. *Owners of S. S. Johannesburg* (1911), 1 K. B. 523. The evidence showed that a seaman while returning to his ship fell into the dock. The access to the ship was by a gangway which was well lighted. There was no evidence as to whether or not the deceased had ever reached the gangway when he fell into the water. Fletcher Moulton, *L. J.*, speaking for the King's Bench, said (p. 528):

"In my opinion this is not sufficient to negative the possibility that the accident was due to an accidental slip on the wharf or to the sailor having gone to the edge of the wharf for his own purposes (perhaps to look over in order to see the state of the tide) and fallen

over. It is not the duty of the court to speculate on such matters. It is for the applicant to prove that the accident arose 'out of' the employment, and if the evidence is not sufficient to establish this the claim fails. I am of opinion that the evidence in this case falls short of what is necessary, and though one may think it possible, and even probable, that he was going on to the gangway when the accident occurred, this is not established with that reasonable certainty which the Court requires from a plaintiff in the proof of his case. I am therefore of opinion that this appeal must be allowed, with costs."

The *Kitchenham* case was affirmed by the House of Lords (1911) A. C. 417.

In *Gilbert* v. *Owners of Steam Trawler Nizam* (1910), 2 K. B. 555, an engineer on a ship which was lying in dry dock, after completing his morning's work of getting stores on board, went home to his dinner, and on his return fell into the dry dock, where his dead body was found. The Court held that there was no evidence that the accident arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906, and that his dependents were not entitled to compensation.

The Master of the Rolls said, on pages 557 and 558:

"The deceased man was second engineer on a steam trawler which was lying in dry dock, and in conjunction with the chief engineer he had the duty of getting certain stores on board the trawler. He was engaged on that duty till 12:30. After that he had no more work on shore to do. Then the deceased man, who lived at Grimsby, went home to dinner. He was not wanted back very speedily, and on his way back he met the chief engineer at a street corner. That was about 1:30. Then the chief engineer says: 'We got to the side of the dry dock and some young man came up and spoke to Gilbert. I did not know him. I left them and went aboard and never saw him alive again.'

And then his dead body was found in the dry dock. That is all we know. Under these circumstances it seems to me that if this decision is to stand every workman in any employment will be entitled to claim the benefits of the Act if an accident happens to him on his way from his own home to the factory or ship or other place of employment. I decline to say that a ship for this purpose is in any different position from a factory. This is a simple case where a man has been to his own home and has met with an accident on his way back. This question has been decided not once but again and again by this Court. * * * The decisions of this Court have been numerous and unvarying that it is for the applicant to prove that the accident arose out of and in the course of the employment. I do not mean by that that there must necessarily be direct evidence of that fact; it is sufficient if there is evidence which will justify the county court judge in drawing that inference without any direct evidence. But when we know nothing more than that this man's body was found in the dry dock, that he had gone home to get his dinner and that he had been seen talking to somebody on his way back before the accident, in my opinion there is not a particle of evidence to justify the Court in inferring that this accident arose out of and in the course of his employment."

Farewell, *L. J.*, said on page 558:

"I am of the same opinion. I think that the case is concluded by the statement of facts. The workman has to prove that the accident arose out of as well as in the course of his employment. * * * Unless the words 'out of his employment' are struck out of the Act, this claim cannot stand. If any authority were needed it is to be found in *Bender* v. *Owners of Steamship Zent*, and *Marshall* v. *Owners of Steamship Wild Rose*, recently affirmed in the House of Lords, which, in my opinion, completely cover this case," with which Kennedy, *L. J.*, agreed.

In *Webber* v. *The Wansborough Paper Co., Ltd.* (1913) 3 K. B. 615, the applicant, a seaman, who

had been employed in unloading respondent's ship while it was lying in harbor, left the ship to go to his home ashore, after his duties for the day were over. In doing so he had to cross a plank, one end of which rested on the deck, the other end being placed upon a rung of a ladder which was permanently fixed to and formed part of the quay. He crossed the plank in safety, but when he had ascended a few steps of the ladder he slipped and fell from it, sustaining an injury in respect of which the county court judge awarded him compensation under the Workmen's Compensation Act, 1906:

On appeal it was held that the sphere of the applicant's employment was the ship and not the quay, and that as he was injured while he was ascending the fixed ladder attached to the quay the accident did not arise out of and in the course of the employment. The Master of the Rolls said on page 617:

> "Employment does not continue during the whole time occupied by going to or from the workman's home from or to the actual place of work. For example, a sailor meets with an accident on the high road or on the quay, he not being there on ship's business, but for his own purposes. It can make no difference whether he was going from the ship or returning to the ship."

And on pages 618 and 619:

> "The facts in the present case have been very clearly stated by his Honour Judge Lindley and are not in dispute. Webber was employed on a ketch which was lying in Watchet Harbour. He had been assisting in unloading the ship, and when that was finished he put on the hatches. His home was at Watchet, and the work being finished he was going home, for he was not living on board. He crossed a plank belonging to the ketch, one end of which rested on a fixed ladder, and he got a few steps on this fixed ladder when he slipped and fell between the ketch and the quay and was injured. In these circumstances the learned county court

judge has held that the accident arose out of and in the course of his employment. I have read his very careful judgment with attention. He seems to consider it sufficient that the ladder was the means of access to the ship, and was the proper means of access. But in my opinion this is not sufficient; the quay itself is the proper and necessary means of access, and no one would suggest that an accident on the surface of the quay by falling over some ropes would be within the Act. This is precisely the case put by Lord Gorrell in the passage which I have read. That passage is consistent with what was said by all the noble Lords and it is consistent with several decisions in this Court, some of which were cited with approval in the House of Lords.

In my opinion there was no evidence to justify the finding that the accident happened in the course of the employment, and the appeal must be allowed."

In *Holness* v. *Mackay & Davis* (1899), 2 Q. B. 319, a firm of contractors, under a contract with a railway company for the widening of their line, were ballasting a siding which was separated from the main line by several lines of rail. The siding could only be reached by walking for a considerable distance through the premises of the railway company, and the workmen were advised by the contractors, with the authority of the railway company, to enter the premises by a gate, from which a path led by the side of the railway to the siding which was being ballasted; it was not necessary, while following this route, to go upon the main line. On a foggy morning, seven minutes before the hour for the commencement of the day's work, a workman in the employ of the contractors, while on his way to his work at the siding, was run over and killed on the main line 150 yards from the locality of his work:—The Court held that it was no part of the contract of employment that the employment should include the time taken in getting to and from the work, that under the circumstances the contractors

owed no duty to the workman while proceeding to his work, and that therefore the accident did not arise out of and in the course of the employment of the workman within the meaning of the act.

Smith, *L. J*, held that a workman who is injured in a place not under his employer's control while going to or returning from his work is not within the provisions of the Workmen's Compensation Act, 1897, and said, at page 322:

> "This case raises a question of considerable importance—whether an employer is liable under the Workmen's Compensation Act for injuries received by a workman while going to or returning from his work. I do not think that the counsel for the respondent has been able successfully to maintain the affirmative of this proposition—that is, that in such a case the workman's injuries arise out of or in the course of his employment."

And on pages 323 and 324:

> "It has been urged on behalf of the respondent that the case is like that of a man who is employed in a large quarry and who is killed in the quarry while going to his work in a particular portion of it, or that of a man who, while going to his work on the upper floor of a large factory, is killed in a lower floor of the factory while on his way to his work. But those are very different cases; there the employer has the control over the whole quarry or factory, and I am not prepared to say that an accident happening in a downstairs room to a man on his way to his work in an upstairs room would not be within the Act, but I do not decide it; I leave this open. With all respect to the learned counsel's argument, those cases are very different; in the case of a quarry or a factory the employer has the control over the whole of the premises; here the appellants had no control over the railway premises except that part where the work under their contract was being actually performed, for the mere license to use the premises to get to the locality of the work gave the contractors no right of control over the portion

along which they passed or over the trains running thereon. The present case seems to me like the case of a man who meets with an accident while passing along a highway or any other way in order to get to his work. I do not think that it was part of the contract of employment that the employment should extend till the deceased got to the place where his work was, or rather should include the time taken in getting to that place, nor can I hold that he had in contemplation of law begun his work when he had not got to the place where his work lay and the time for commencing work had not arrived. It is true that the accident happened only seven minutes before his work was to commence; but if the shortness of the time is an element for our consideration, where is the line to be drawn? There can be only one line which can be safely drawn, one test which can be safely applied, and that is that unless the injury arises out of and in the course of the workman's employment and happens on the locality where he is employed he does not come within the terms of this Act."

In *McDonald* v. *Owners of the Steamship Banana* (1908). 2 K. B. 926, the Master of the Rolls, speaking for the Court of Appeal, said at page 928:

"In my opinion this award cannot stand. Nothing more has been proved than that the man fell on his way back to the ship. * * * In this case, as in all similar cases, it is for the applicant to prove affirmatively that the accident arose out of and in the course of the employment. There is no presumption in favor of the applicant. If the only evidence is equally consistent with either view the applicant fails."

And Kennedy, *L. J.*, said at page 929:

"The onus of proof is on the claimant; it is not enough for her to prove that the deceased was in the employment of the defendants and that the accident happened during such employment. She must shew affirmatively that the accident arose out of or in the course of his employment, and this point is clearly raised by the employers in their defence. Now the only

evidence is the entry in the log. The county court judge has said that 'the entry leaves it so that a conclusion can be drawn either that the man met his death by an accident arising out of his employment or otherwise' and I agree with him. The man was not on board the ship, but on the gangway; he was returning, but had not reached his destination. He may have gone ashore on a spree without leave, he may have gone ashore with leave for his own purposes, or he may have gone ashore on some errand connected with the ship. The entry is equally consistent with either of the first two alternatives, but perhaps less so with the third, as if that had been the case one would have expected it to be stated in the log. Now in the two first alternatives the employer would not be liable, and in the third he would be liable. * * * the onus in the present case is upon the applicant to shew that the accident arose out of, as well as in the course of, the employment of the deceased.' I think that it would be very unfortunate, and would add much to the difficulties of county court judges in administering the Act, if we attempted to draw subtle distinctions in order to avoid a well settled rule of universal application, that it is for the plaintiff to prove his case."

In *Pomfret* v. *Lancashire Railway Co.* (1903), 2 K. B. 719, the Court of Appeal upon an application for compensation under the English Workmen's Compensation Act held that the burden was upon the applicant to show that the accident arose "out of" as well as "in the course of" the employment of the injured workman; that although the fact that the accident happened in the course of the employment might be admitted, the burden is not discharged, as the manner in which the accident happened is left wholly unexplained and as the evidence is equally consistent with the view that it happened in consequence of something which did not arise out of the employment.

The facts in all of the cases above cited were more favorable to the claimant than the facts in the case at bar.

In the *Bender* case the deceased was seen at 5:35 upon the ship where he was employed and was missing at 6:20, less than an hour later. In the *Kitchenham* case there was evidence that the deceased came upon the wharf near which his ship was moored and was walking toward the gangway, but there was no evidence as to whether or not he actually reached it. In the *Marshall* case the deceased was seen upon the ship on which he was employed in the evening and the following morning his body was found floating in the water directly under the spot where he had been accustomed to sit. In the *Gilbert* case the body of the deceased workman was found in the dry dock where his ship was moored. In all of these cases, except the *Marshall* case, the time of the death is fixed within an hour and the place is definitely established. In the *Gilbert*, *Webber* and *Holness* cases all of the circumstances surrounding the the accident were shown. In the present case, however, the evidence does not go so far. The deceased was last seen at the corner of Clinton and Second Streets in Hoboken. The pile driver upon which he was employed was located in the Hackensack River between West End Avenue and Passaic Street, Jersey City. There is no evidence that he ever came any nearer to it than the place where he was last seen in Hoboken. His body was not found until sixteen days afterwards and five miles from the place where he had been employed. As in the *Marshall* case there was nothing to show that he did not deliberately jump or throw himself into the water, except the greater probability of accident as compared with suicide. It was held in the *Marshall*, *Bender* and *Kitchenham* cases above cited that there could be no legitimate inference as to what caused the death of the deceased; that at best there could be only conjecture, and in the *Gilbert* case it was held that there was no evidence to justify the court from inferring that the accident arose out of and in the course of the employ-

ment; and in the *Gilbert*, *Webber* and *Holness* cases it was held that an accident occurring while the employee was going to or returning from the place of his employment could not entitle him to compensation. The same ruling should be applied here. The evidence shows that Dunnewald never reported for duty or reached the pile driver on which he had been employed after leaving his home in the evening of April 13, 1912. There is nothing to show that he ever came near the place of his employment. There is not even definite evidence as to the date of his death. It may have occurred any time between April 13 and April 29. Nor is the place of the alleged accident shown any more definitely. Dunnewald was last seen in Hoboken. His body was found in the Kill von Kull off Port Richmond, Staten Island. The place where the pile driver upon which he had been employed was moored was several miles from both the spot where he was last seen alive and the spot where the body was found. There is absolutely nothing to show that on the night of his disappearance he ever came near the place where he had been employed. There is nothing in the case upon which an inference as defined in the above cases can be based. At best there can be only speculation and conjecture.

It is well established that where the evidence is equally consistent with liability or with no liability judgment must be against the claimant. A leading case on this point is *Wakelin* vs. *The London & Southwestern Railway Company* (1886), 12 A. C. 41, where Lord Chancellor Halsbury, speaking for the House of Lords, said (p. 45):

> "If, in the absence of direct proof, the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendant, the plaintiff fails for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition. * * * In this case I am unable to see any evidence of how this un-

fortunate calamity occurred. One may surmise and it is but surmise and not evidence that the unfortunate man was knocked down by a passing train while on the level crossing, but assuming in the plaintiff's favor that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train? * * * I do not know what facts the jury are supposed to have found, nor is it, perhaps, very material to inquire, because if they have found that the defendant's negligence caused the death of the plaintiff's husband, they have found it without a fragment of evidence to justify such a finding."

The same rule is recognized in New Jersey, and it has frequently been held that the claimant must exclude any possible explanation which may be inconsistent with liability on the part of the defendant. Thus in *Suburban Electric Co.* vs. *Nugent*, 29 Vr. 658, the Court of Errors held that:

> "In an action for personal injury, the plaintiff, in order to recover damages, must do more than show the possible responsibility of the defendant for the injury. In the absence of direct evidence he must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant and exclude the idea that it was due to a cause with which the defendant was unconnected."

In *Kennedy* vs. *Netherlands-American Steam Navigation Co.*, 47 Vr. 618, 622, the Court of Errors said:

> "In order to support her contention that the death of her decedent was due to a failure on the part of the defendant company of a duty which it owed to him as his employer, the burden rested upon her to do more than show the possible responsibility of the defendant therefor. In the absence of direct evidence, the law requires that she must show the existence of such circumstances as would justify the inference that his death resulted from a neglect of duty

by his employer, and *exclude the idea that it was due to a cause for which the company was not responsible. Suburban Electric Co.* vs. *Nugent*, 29 *id.*, 658. This burden she has not sustained."

And in *Cass* vs. *Sanger*, 48 Vr. 412, the Court said, at page 414:

> " Where negligence is alleged and the proofs of it are circumstantial and not direct the evidence must be such as to exclude all theories of accounting for the accident which would be inconsistent with the defendant's negligence" (*Suburban Electric Co.* vs. *Nugent*, *supra*).

See also

Paynter vs. *Bridgeton, etc., Traction Co.* (Ct. of Err., 1902), 38 Vr. 619, 625;
Hummer vs. *Lehigh Valley R. R. Co.* (Ct. of Err., 1907), 46 Vr. 703, 706;
Chester vs. *Cape May Real Estate Co.* (Sup. Ct., 1909), 49 Vr. 131, 133.

In *Rhobovsky* vs. *N. J. Worsted Co.* (Ct. of Err., 1908), 47 Vr. 543, 546, the Court of Errors said:

> " There was no direct evidence as to what caused the injury, and the plaintiff, by failing to exclude other possible causes for which the master would not be responsible, has simply left it to be conjectured by the jury that the defendant was responsible."

In *Reimers* v. *Proctor Publishing Company*, 85 N. J. L. 441, the Court in construing the act here in question held that the burden of proving that the death was caused by accident arising out of and in the course of his employment was upon the petitioner. In that case the testimony of the surgeon showed that death might have resulted from indigestion (which had nothing to do with the accident there in question) or from an injury to the head which was caused by accident arising out of and in the course of the man's employment, but the physi-

cian refused to state positively that death resulted from the accident. The Court of Common Pleas awarded compensation and the Supreme Court reversed the judgment holding that under the circumstances shown it was not proper for the trial Court to infer that death was caused by the accident. The Court said at page 443:

> "The burden of proof is in accordance with the ordinary rule upon the petitioner. That the legislature did not mean to shift it to the defendant in a case like the present is shown by the fact that in the very same paragraph (section 2, placitum 7) it expressly enacted that the burden of proof that injury or death was intentionally self-inflicted, or that intoxication was the natural and proximate cause of the injury shall be upon the employer. *Expressio unius est exclusio alterius.*"

See also *Bryant* v. *Fissell*, 84 N. J. L. 72, where the Court held that the burden of furnishing evidence from which the inference might legitimately be drawn that the death of the employee was caused "by an accident arising out of and in the course of employment" rests upon the claimant.

In *McDonald* vs. *Owners of S. S. Banana* (1908), K. B. 926, the rule above referred to was applied in an action for compensation under the English Workmen's Compensation Act. The Master of the Rolls said, at page 929:

> "In this case, as in all similar cases, it is for the applicant to prove affirmatively that the accident arose out of and in the course of the employment. There is no presumption in favor of the applicant. If the only inference is equally consistent with either view, the application fails."

And, on page 931:

> "I think it would be very unfortunate and would add much to the difficulties of county court judges in administering the act, if we attempt to draw subtle distinctions in order to avoid a well settled rule of universal application that it is for the plaintiff to prove his case."

In *Promfret* vs. *Lancashire & Yorkshire Railway* (1903), 2 K. B. 718, the Court said, on page 721:

> "The burden and the whole burden of proving conditions essential to the obtaining an award of compensation, rests upon the applicant and upon nobody else, and if he leaves the case in doubt as to whether those conditions are fulfilled or not, where the known facts are equally consistent with their having been fulfilled or not fulfilled, he has not discharged the onus which lies upon him."

See also

Marshall vs. *Owners of S. S. Wild Rose* (1910), A. C., 486;
Bender vs. *Owners of S. S. Zent* (1909), 2 K. B., 41.

The claimant has failed to bring her case within the rules of law above stated. She has failed to produce evidence to justify an inference that her husband was killed by an accident arising out of and in the course of his employment. She has failed to exclude the possibility that he met his death under circumstances where there would be no liability on the part of the prosecutor.

As the Court said, in *Houston* vs. *Traphagen*, 18 Vr., 23, at page 27:

> "A verdict founded on this evidence would seem to be rather a result of guess or speculation than a deduction from proved facts."

For the reasons stated, it is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

JOHN W. BISHOP, Jr.,
KINSLEY TWINING,
Of Counsel with Defendant-Respondent.

June Term, 1916.

(6628T)

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Notice of Appeal.

New Jersey Supreme Court

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LENA DUNNEWALD, as Administratrix of THEODORE DUNNEWALD, deceased, Petitioner and Defendant, vs. HENRY STEERS, Incorporated, Defendant and Prosecutor.	On Appeal.

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To Messrs. Lindabury, Depue & Faulks, attorneys of Defendant and Prosecutor:

Sirs:

TAKE NOTICE THAT the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

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1. Because the Court committed error in saying, "There is no finding (by the Hudson County Court of Common Pleas) that the death of the decedent was by accident, nor that it arose out of and in the course of his employment;" that the Court below did find, "The deceased was engaged in the employment of the defendant company at the time of his death, and was drowned while engaged in such employment."

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2. Because the Court committed error in saying, "That the learned Judge (of the Hudson County Court of Common Pleas) did not even find how decedent met his death, he said he was warranted in finding that it was either by falling through the trestle, or from the derrick on his way from the mainland to the work. He does not determine which;" that the Court below did find, "The deceased was engaged in the employment of the defendant company at the time of his death, and was drowned while engaged in such employment."

Yours, etc.,

SAMUEL A. BESSON,
Attorney for Appellant.

Order for Judgment.

NEW JERSEY SUPREME COURT.

HENRY STEERS, Incorporated, Prosecutor, vs. THE COURT OF COMMON PLEAS in and for the County of Hudson, and JOHN F. CROSBY, Clerk of said Court of Common Pleas, and LENA DUNNEWALD, as Administratrix of Theodore Dunnewald, deceased, Defendants.	On Certiorari. Order for Judgment.

The above cause coming on to be heard at the November Term of this Court in the presence of

John W. Bishop, Jr., and Kinsley Twining, of counsel with prosecutor, and Samuel A. Besson, of counsel with defendant Lena Dunnewald, and the Court being of the opinion that the judgment of the Hudson County Court of Common Pleas brought up by the writ of certiorari heretofore issued in the said cause is erroneous. 10

It is on this eighteenth day of March, A. D. 1914, Ordered that the said judgment of the said Hudson County Court of Common Pleas be, and the same is hereby reversed, set aside and for nothing holden, without costs to either party as against the other, and said record is hereby remitted to the Court below to be proceeded with in accordance to law and practice of said Court.

Rule actually entered March 18, 1914. 20

On motion of

Lindabury, Depue & Faulks,
Attorneys for Prosecutors.

A true copy.

WM. C. GEBHARDT,
Clerk. 30

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Order to Certify Facts, Etc.

NEW JERSEY SUPREME COURT.

HENRY STEERS, INC., Prosecutor, vs. THE COURT OF COMMON PLEAS in and for the County of Hudson, and JOHN F. CROSBY, Clerk of said Court of Common Pleas, and LENA DUNNEWALD, as Administratrix of Theodore Dunnewald, deceased, Defendants.	On Certiorari Order.

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Application having been made on behalf of the Prosecutor of the Writ of Certiorari heretofore issued in the above entitled cause for an Order that a Transcript of the testimony taken at the hearing before the Court of Common Pleas in and for the County of Hudson, be certified and returned with the said Writ.

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IT IS, on this 21st day of July, 1913, ORDERED, that a Transcript of the testimony taken at the hearing before the said Court of Common Pleas in and for the County of Hudson upon the petition of Lena Dunnewald, as Administratrix of Theodore Dunnewald, deceased, against Henry Steers, Inc., be certified and returned into this court, together with the determination and statement of facts and the order, and all other proceedings for the making of the same, which are returned into court in accordance with the command of the said Writ of Certiorari.

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JAMES F. MINTURN,
J. S. C.

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Entered July 30, 1913, on motion of Lindabury, Depue & Faulks, Attys.

Petition.

HUDSON COUNTY COURT OF COMMON PLEAS.

LENA DUNNEWALD, as Administratrix of THEODORE DUNNEWALD, deceased, Petitioner, vs. HENRY STEERS, incorporated, a corporation of the State of New York, Defendant.	On Petition for Compensation under the Employers' Liability Act of 1911. Petition.

To the Honorable Robert Carey, Judge of the Hudson County Court of Common Pleas:

The petition of Lena Dunnewald, as Administratrix of Theodore Dunnewald, deceased, respectfully shows:

1. That she resides at No. 318 Clinton Street, in the City of Hoboken, in the County of Hudson and State of New Jersey.

2. That she was appointed Administratrix of said Theodore Dunnewald, deceased, on the ninth day of May, Nineteen Hundred and Twelve, by order of John P. Egan, Surrogate of the County of Hudson.

3. That on the thirteenth day of April, Nineteen Hundred and Twelve, said Theodore Dunnewald

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was in the employ of Henry Steers, Incorporated, a corporation of the State of New York, as a dock builder and was working on Central Railroad of New Jersey bridge crossing the Hackensack River; that he received the sum of twenty-one dollars a week for his services.

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4. That on the thirteenth day of April, Nineteen Hundred and Twelve, said Theodore Dunnewald left his home in said City of Hoboken at about nine o'clock in the evening to go to his work on said railroad bridge; that he was due at his work at eleven o'clock the same evening; that in order to get to his work he had to walk across an unprotected railroad trestle for a distance of about three hundred feet, and then cross a scow and walk across two

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twelve by twelve beams to the pile-driver on which he was to work; that the said night of the thirteenth day of April, Nineteen Hundred and Twelve, was very dark and foggy and said railroad trestle and scow and twelve by twelve beams were not lighted in any way until eleven o'clock on said night; that said Theodore Dunnewald in walking from the shore across the railroad trestle, scow and twelve by twelve beams to his work fell into the Hackensack River and was drowned.

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5. That on the twelfth day of July, Nineteen Hundred and Twelve, notice was served upon Ernest Coleman, the foreman on the work above mentioned for Henry Steers, Incorporated, that a personal injury which resulted in death was received by the said Theodore Dunnewald while in the employ of said Henry Steers, Incorporated, and that compensation would be claimed therefor.

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6. That said Theodore Dunnewald left him surviving your petitioner, his widow, Henry Dunnewald, a son, Edward Dunnewald, a son, Mary Dunnewald, a daughter, and Elizabeth Meehan, a daughter; that all of said children are over the age of twenty-one years. 10

Your petitioner therefore prays that an order may be made by this Honorable Court fixing a time and place for a hearing on your petitioner's petition, and that your petitioner may be allowed a compensation of ten dollars a week for a period of three hundred weeks, and that said compensation may be commuted to a lump sum, according to the statute in such case made and provided.

And your petitioner will ever pray, etc.

LENA DUNNEWALD, 20
Petitioner.

State of New Jersey, }
County of Hudson, } ss.:

Lena Dunnewald, being duly sworn according to law, upon her oath deposes and says that she is the petitioner named in the foregoing petition, and that the matters and things therein set forth are true to the best of her knowledge, memory and belief. 30

LENA DUNNEWALD.

Subscribed and sworn to before me, this
twentieth day of March, A. D. 1913.

JOHN RICKENS,
Notary Public of New Jersey.
(L. S.)

Filed, Clerk's Office,
Mar. 25, 1913.
Hudson County, N. J. 40
JOHN F. CROSBY, Clerk.

Clifford Stephenson, being duly sworn according to law on his oath deposes and says that he served a copy of the petition heretofore filed and a certified copy of the order fixing the time and place for hearing heretofore allowed in the above entitled cause, upon the above named defendant, on the 10 twenty-sixth day of March, 1913, at twenty minutes past eleven in the forenoon, by leaving said papers at the principal office of said defendant in New Jersey, at No. 165 First Street, Bayonne, New Jersey, with Estella McInenly, the person in charge thereof at that time.

CLIFFORD STEPHENSON.

Subscribed and sworn to before me this
20 twenty-sixth day of March, A. D. 1913.
George A. Conklin,
Notary Public of New Jersey.

Order Fixing Time for Hearing.

A duly verified petition having been filed in this cause by the petitioner, praying that compensation 30 be allowed for the death of Theodore Dunnewald, and that the same be commuted to a lump sum to be paid by the defendant to the petitioner;

It is, on the application of Samuel A. Besson, Attorney for the Petitioner, on this 22nd day of March, A. D. Nineteen hundred and thirteen, ORDERED, that the hearing of the above entitled matter be and hereby is set down for the 16th day of April, Nineteen Hundred and Thirteen, at the Court House, in the City of Jersey City, at ten

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o'clock in the forenoon or as soon thereafter as Counsel can be heard;

And it is further ordered that a true copy of this order, which may be certified by the Attorney of the Petitioner together with a copy of the petition upon which this order is based, be served upon the defendant within five days from the date of this order. 10

ROBERT CAREY,
Judge of the Hudson County
Court of Common Pleas.

Filed, Clerk's Office,
Mar. 25, 1913.

Hudson County, N. J. 20
JOHN F. CROSBY, Clerk.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, that the defendant's time to answer the petition heretofore filed by the petitioner in the said cause be 30 extended until April 12, 1913.

S. A. BESSON,
Attorney of Petitioner.

Filed, Clerk's Office,
April 12, 1913.
Hudson County, N. J.
JOHN F. CROSBY, Clerk.

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New Jersey State Library

Answer.

The answer of Henry Steers, Incorporated, to the petition of Lena Dunnewald, as Administratrix of Theodore Dunnewald, deceased.

1. Defendant has no knowledge as to the matters and things alleged in the first paragraph of the said petition and leaves the petitioner to make such proof thereof as she may be advised.

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2. Defendant neither admits nor denies the matters and things alleged in the second paragraph of the said petition but leaves the petitioner to make such proof thereof as she may be advised.

3. Defendant denies that on the 13th day of April, 1912, the said Theodore Dunnewald was in its employ as a dock builder or otherwise, or that on said date he was working on the bridge of the Central Railroad of New Jersey, crossing the Hackensack River. It denies that said Theodore Dunnewald received the sum of $21.00 a week for his services while in its employ. It alleges that the average weekly wages of the said Theodore Dunnewald, while in its employ, amounted to the sum of $19.62 per week.

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4. Defendant has no knowledge as to whether or not said Theodore Dunnewald left his home in the City of Hoboken on the evening of the 13th day of April, 1912, to go to his work. It says that the said Theodore Dunnewald did not report to it for duty on the evening of the said 13th day of April, 1912. Defendant is informed and believes that the said Theodore Dunnewald was drowned; it has no knowledge as to when and where he was drowned. Defendant denies that

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the death of the said Theodore Dunnewald was caused by accident arising out of and in the course of his employment by it.

5. Defendant admits the allegations of the fifth paragraph of the said petition.

6. Defendant has no knowledge as to the matters and things alleged in the sixth paragraph of the said petition, and leaves the petitioner to make such proof thereof as she may be advised. 10

7. Defendant denies that under and by virtue of the provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination and liability for compensation thereunder," approved April 4th, 1911, and the acts amendatory thereof and supplemental thereto, the petitioner is entitled to receive any compensation from it, by reason of the death of the said Theodore Dunnewald. Defendant denies that it is in the interest of justice that any compensation to which the petitioner may be entitled be commuted into one lump sum payment. 20 30

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

State of New York,
County of New York, } ss.:

J. H. Berry, of full age, being duly sworn according to law, on his oath says, that he is the Ass't 40

Sec'y of Henry Steers, Incorporated, the defendant in the foregoing answer named; that he has read the said answer and that so far as the same relates to the acts of the defendant it is true, and that so far as it relates to the acts of others he believes it to be true.

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J. H. BERRY, L. S.

Sworn and subscribed to
before me this 11th day
of April, A. D. 1913.

WM. J. BEROM,
Notary Public,
New York Co., No. 374,
New York Reg. No. 5255.

Filed,
Clerk's Office,
Apr. 12, 1913,
Hudson County, N. J.

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JOHN F. CROSBY,
Clerk.

Conclusions.

I find the facts in this case as follows: The petitioner, Lena Dunnewald, is the wife and administratrix of Theodore Dunnewald, deceased. On the thirteenth day of April, nineteen hundred and twelve, Dunnewald was employed by Henry Steers, Inc., the defendant, in the reconstruction of a draw-bridge over the Hackensack River. The work was peculiarly hazardous. In order to approach the place where the deceased was employed it became necessary to walk over a trestle running out into the Hackensack River, and it became necessary to pass over a derrick and some other tem-

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porary constructions. The deceased worked all day on the thirteenth day of April. The work was so far advanced that it was planned to shift an old draw-bridge and place the new draw-bridge construction in position during that night. The employes were instructed to return to work at eleven o'clock that night. Dunnewald lived in Hoboken; he left his house to go to work at nine o'clock that night. The time-keeper's book and the testimony shows that he did not render actual service for the company after leaving his house. He did not return home after leaving his house and was not seen alive again by anyone. That he reached the immediate vicinity of his employment is unquestioned, as his body was found in the Newark Bay, into which the Hackensack River runs, a few days after. One witness testified that he saw a body in the river being carried by the tide toward the Newark Bay shortly after the accident, and from his description of the body it appears to have been the body of Mr. Dunnewald.

The Court is warranted in the finding of the fact, from the evidence, that Dunnewald met his death, either by falling from the trestle, the approach to the new construction work or from the derrick on his way from the mainland to the work. On the night in question the weather was bad; there was a thick fog prevailing. One of the timekeepers, McInenly, engaged on the work, was produced and stated that the deceased had not reported for work that night, and another timekeeper engaged on the work, was not produced to testify. It appears that the other time-keeper was drowned in the river that night while engaged on the work. The fact whether or not the other timekeeper was drowned is a matter of no consideration, but that fact explains his non-presence in Court at the hearing of the case.

The deceased left surviving him several children and a widow, the petitioner. His earning capacity at the time of his death was $19.62 per week. If the petitioner is entitled to recover in the cause, she would therefore be entitled to recover compensation at the rate of Five dollars per week
10 for a period of three hundred weeks. Taking all the facts presented into consideration, I have reached these determinations and conclusions.

FIRST.—The deceased was engaged in the employment of the defendant company at the time of his death and was drowned while engaged in such employment; that the company had notice of the drowning of the deceased and that the liability of the defendant is the liability created by the Second Section of the act under which this proceed-
20 ing is brought.

I find that the petitioner is entitled to recover compensation at the rate of Five dollars per week for a period of three hundred weeks, and in addition is entitled to the costs of this action. Application has been made to the Court for a commutation of payments, and I think the facts are such that I am warranted in granting commutation. I will commute the compensation, the commuted to be the present value of the weekly compensation
30 awarded. Costs will be allowed.

Judgment may be entered accordingly.

ROBERT CAREY,
Judge of the Court of Common Pleas,
County of Hudson.

Filed, Clerk's Office, May 5, 1913.
Hudson County, N. J.

JOHN F. CROSBY,
40 Clerk.

Determination.

It appearing that the petitioner herein has duly filed her petition, and the defendant its answer, and that this matter has been duly heard in the above-entitled court, by the Hon. Robert Carey, Judge of said Court, and it further appearing that the following facts have been found in this case as appears from the findings of fact filed herein by said Judge on the fifteenth day of May, 1913, as follows:

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I find the facts in this case as follows:

The petitioner, Lena Dunnewald, is the wife and administratrix of Theodore Dunnewald, deceased. On the thirteenth day of April, Nineteen hundred and twelve, Dunnewald was employed by Henry Steers, Inc., the defendant, in the reconstruction of a draw-bridge over the Hackensack River. The work was peculiarly hazardous. In order to approach the place where the deceased was employed it became necessary to walk over a trestle running out into the Hackensack River, and it became necessary to pass over a derrick and some other temporary constructions. The deceased worked all day on the thirteenth day of April. The work was so far advanced that it was planned to shift an old draw-bridge and place the new draw-bridge construction in position during that night. The employees were instructed to return to work at eleven o'clock that night. Dunnewald lived in Hoboken; he left his house to go to work at nine o'clock that night. The timekeeper's book and the testimony shows that he did not render actual service for the company after leaving his house. He did not return home after leaving his house and was not seen alive again by anyone. That he reached the immediate vicinity of his employment is unquestioned, as his body was found

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in the Newark Bay, into which the Hackensack River runs, a few days after. One witness testified that he saw a body in the river being carried by the tide toward the Newark Bay shortly after the accident, and from his description of the body it appears to have been the body of Mr. Dunnewald.

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The Court is warranted in the finding of the fact, from the evidence, that Dunnewald met nis death, either by falling from the trestle, the approach to the new construction work or from the derrick on his way from the mainland to the work. On the night in question the weather was bad; there was a thick fog prevailing. One of the timekeepers, McInenly, engaged on the work, was produced and stated that the deceased had not reported for work that night, and another timekeeper engaged on the work, was not produced to testify. It appears that the other timekeeper was drowned in the river that night while engaged on the work. The fact whether or not the other timekeeper was drowned is a matter of no consideration, but that fact explains his non-presence in Court at the hearing of the case.

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The deceased left surviving him several children and a widow, the petitioner. His earning capacity at the time of his death was $19.62 per week. If the petitioner is entitled to recover in the cause, she would therefore be entitld to recover compensation at the rate of Five Dollars per week for a period of three hundred weeks. Taking all the fact presented into consideration, I have reached these determinations and conclusions:

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First.—(The deceased was engaged in the employment of the defendant company at the time of his death and was drowned while engaged in such employment;) that the company had notice of the

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drowning of the deceased and that the liability of the defendant is the liability created by the second section of the act under which this proceeding is brought.

I find that the petitioner is entitled to recover compensation at the rate of Five Dollars per week for a period of three hundred weeks, and in addition is entitled to the costs of this action. Application has been made to the Court for a commutation of payments, and I think the facts are such that I am warranted in granting commutation. I will commute the compensation, the commuted to be the present value of the weekly compensation awarded. Costs will be allowed.

Judgment may be entered accordingly.

ROBERT CAREY,
Judge of the Court of Common Pleas,
County of Hudson.

Filed May 5, 1913.

Rule for Judgment.

IT IS thereupon on this 16th day of June, in the year 1913, on motion of Samuel A. Besson, attorney for said petitioner, ORDERED AND ADJUDGED that the defendant, Henry Steers, Incorporated, a corporation of the State of New York, do pay to the said petitioner, Lena Dunnewald, deceased, the sum of $5 per week for a period of three hundred weeks, commencing with the 27th day of April, A. D. 1912, to be paid as hereinafter stated. An application to commute the compensation hereinabove fixed for a period of three hundred weeks into a lump sum having been made to the Court, and the

argument of the counsel of the respective parties having been heard thereon,

It is, on the 16th day of June, A. D. 1913, Further Ordered that said compensation be and the same hereby is commuted into a lump fixed sum, and said lump sum is hereby fixed and determined at the sum of $1,240.50 and is hereby adjudged to the said petitioner and against the said defendant.

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And it is further ordered and adjudged that the said petitioner Lena Dunnewald, as administratrix of Theodore Dunnewald, deceased, be allowed the costs of this proceeding to be taxed as provided by law.

And it is further ordered that judgment final be and the same is hereby entered in favor of the petitioner and against the said defendant for the sum of $1,240.50 with costs of this suit to be taxed.

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On motion of Samuel A. Besson, Attorney for Petitioner.

GEORGE G. TENNANT,
Judge.

Filed, Clerk's Office, June 21, 1913, Hudson County, N. J.

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JOHN F. CROSBY,
Clerk.

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Testimony.

APPEARANCES:

SAMUEL A. BESSON, Esq., for the Petitioner;
LINDABURY, DEPUE & FAULKS, Esqs. (Mr. Bishop), for the Respondent. 10

GEO. P. KELLEY,
Official Stenographer,
Eighth Judicial Dist. of N. J.
Court House,
Jersey City, N. J.

LENA DUNNEWALD, sworn. 20

Direct Examination by Mr. Besson:

Q. What is your name? A. Lena Dunnewald.
Q. Where do you live? A. 318 Clinton Street.
Q. What city? A. Hoboken.
Q. What state? A. New Jersey.
Q. What was your husband's name? A. Theodore Dunnewald.
Q. And is he living or dead? A. Dead.
Q. When did he die? A. 13th of April. 30
Q. Of what year? A. 1912.
Q. What was he doing at that time?

Mr. Bishop: I object to that.
The Court: I will allow it. What was he doing generally, you mean, of course.
Mr. Besson: Yes.

A. He used to work by the Steers Company and have to work at night. By 9 o'clock he goes away 40

from the house. As far as I could see it was terribly foggy—on a Wednesday night. That is so far as I saw him. He bid us good bye, and that is all you seen of him.

Q. What corner do you refer to? A. Corner of Second Street and Clinton.

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Q. Which street was he going away on? A. Clinton, right straight out towards the Jackson Avenue car.

Q. Do you know anything further about it? A. No, I don't.

Cross Examination by Mr. Bishop:

Q. That was the last you saw of your husband? A. That is the last I saw. At my door he bid us good bye and that is all he said.

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Q. You say he is dead; when did you see his body? A. The story come around the next morning, you see, that he was dead. That is all. My son went around—

Q. That is, he didn't come home the next morning? A. No, he did not. That was on Saturday night.

Q. When was his body found, do you remember? A. No, my son—

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By the Court:

Q. Let me see; when your husband left you, you were his wife, weren't you? A. Yes.

By the Court:

Q. What children did he leave? A. Four children, two I had home and two are married.

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By the Court:

Q. How old are the children? A. My oldest is thirty-two and the next is thirty—

By Mr. Bishop:

Q. They are all over sixteen? A. The youngest is twenty-two.

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By the Court:

Q. All over the age of twenty-one years, and two are living with you and two are married? A. Yes.

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JOSEPH E. SNELL, sworn.

Direct Examination by Mr. Besson:

Q. Where are you employed, Mr. Snell? A. 17 Battery Place, New York City.

Q. By whom? A. Henry Steers, Incorporated.

Q. That is the respondent in this case? A. Yes.

Q. What position do you hold under that company? A. I am their general superintendent.

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Q. Did you know this Theodore Dunnewald in his lifetime? A. Yes.

Q. He was working for the company last at what time? A. I think April—I don't know—April 12th, I think, 1912.

Q. Was he at work at any time on the 13th? A. Not to my knowledge.

Q. Was he expected to go there to work on the 13th? A. I believe he had orders when he left his

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work—I don't know whether—I don't know. It was bridge movement, and I don't know really—I don't get down to those details—I don't really—He was at work on the 12th and went home on the 12th to return at night on the 11th—to return the night of the 12th—or whether he worked on the morning of the 12th to return the same night, I don't recall that.

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By the Court:

Q. Was he doing night work at that time? A. It was the movement of that Hackensack bridge on the Central Railroad.

By the Court:

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Q. Not a Sunday? A. Not a Sunday.

Q. Very urgent work? A. When it was once started it had to be finished.

Q. Do you know whether the men that were working there were told when they quit work and went home that night, the night of the 13th, that all trains would stop on the bridge after 9 o'clock in the evening?

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Mr. Bishop: I object to that; I think it is entirely irrelevant.

The Court: I will allow it.

A. There was a stoppage of traffic, but the time that traffic was to stop I don't recall just now.

Q. Do you know the time the men were to go to work that night? A. I don't know what orders were given. I gave the general order to have certain men out, that is, to the superintendent. What time he told them to come out I don't know.

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Q. Was it 11 o'clock? A. I couldn't tell you, sir.

Q. Do you know whether the men were told they could come on any train and get out of the train on the bridge at the point where they were at work?

> Mr. Bishop: I object to that on the ground that it has no bearing.
>
> The Court: I will allow it in the case. I don't know whether it is going to have any bearing at all yet? If it does not have, if it is not connected, I will not consider it.

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A. As I recall, there was some train which would make its last run from New York, and the men were told the time the train would leave New York, or Jersey City.

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By the Court:

Q. Was it arranged for that train to stop at a given place on the bridge? A. Yes, sir.

Q. Wasn't it a fact that they weren't told that night? A. I don't know.

Q. Do you know Henry Dunnewald, the son of— A. I met his son subsequent to his father's death.

Q. He is right behind you, standing up there? A. Yes, he came to my place.

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Q. Didn't you tell him soon after the death of his father that the men that were working there had not been told when they quit work and went home at 5 o'clock that day, that this train would stop on the bridge at 9 p. m.?

> Mr. Bishop: This, your Honor, is all subject to the same objection.

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The Court: I don't see how that is material, anyhow; I don't think it is competent testimony.

Mr. Besson: Well, it is material in this way, this man—

10 The Court: I will let you have your exception; I am going to overrule it.

Q. Mr. Snell, did you visit the bridge about the 13th of April when it was in course of construction? A. I was there from the time the bridge was prepared for moving until it was moved. I personally took charge of the work.

Q. Do you know at what point this man Theodore Dunnewald was working? A. The particular location where he was working? On a piledriver

20 adjacent to the bridge which we were about to move.

Q. Now, the bridge had in it somewhere a drawbridge for the passage of vessels, did it not? A. It was a drawbridge that we moved; it swings to permit vessels to go through.

Q. That was the part of the bridge that you moved? A. That was the draw; the draw span.

Q. Now, which side of the passageway for the vessels going through the drawbridge was this; was

30 it a scow? A. Piledriver.

Q. Piledriver? A. I don't recall—there was four or five of them derricks there. I don't know which side the one Dunnewald worked on was located, whether north or south.

Q. There were some on each side? A. On each side and about six in the operation I guess, that is, about six derricks and piledrivers.

By the Court:

40 Q. That is midway between Elizabethport and Bergen Point? A. That would be practically be-

tween—on the Hackensack River between West End Avenue and Passaic—that would be. It is over the Hackensack River about that neighborhood on the Newark Branch.

By the Court:

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Q. About the center of the river? A. Yes, sir.

Q. And workmen like Mr. Dunnewald going to work on the bridge, would be obliged to travel over that to get there?

Mr. Bishop: I object.

A. Ties—

The Court: I will allow it.

Mr. Bishop: Exception.

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—spaced about at the most six inches apart with guardrails; double-tracked so that if a train is coming on one track he could cross over to the other.

Q. Until he got to the drawbridge? A. Until he got to the drawbridge, yes.

Q. There was an open space? A. After we moved the bridge.

Q. Yes, after you moved the bridge. Well, this night, the 13th of April, the bridge had been moved, had it not? A. The 13th of April was on Sat— what date was it? The bridge was moved on Sunday and I think it was moved on the 14th. The bridge wasn't moved until Sunday, the 14th.

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By the Court:

Q. What do you mean, Sunday? A. I think we picked it up—we picked it up at daylight—made

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preparation for picking it up at night—picked it up at daylight and, as I recall, we moved the bridge in about fifty minutes.

Q. April 13th was a Saturday according to the calendar? A. Yes.

10 Q. A workman working on the side towards Essex County, how would he get there?

> Mr. Bishop: I object to that; it is irrelevant. It does not appear that Dunnewald was working on the side towards Essex County.
>
> The Court: I will allow it.
>
> (Exception noted for Respondent.)

A. I would like to ask, do you mean living on

20 the Essex County side of the bridge?

Q. I mean living in Hoboken, going to work there, how would a man living in Hoboken get there? A. He would walk over this roadbed I spoke of.

Q. Across the bridge? A. When he crossed the bridge he was on the Essex County side of the bridge.

Q. After he got on that side, how would he get to this piledriver supposed to be moored on the

30 north side of the bridge? A. He would probably walk out on the center pier, and get aboard of the machine from the center pier.

Q. What would he have to walk on? A. A pile walk that was put there for the purpose of the employees.

Q. What kind? A. Plank walk I should say, about twenty-four inches wide.

Q. Wasn't it a single plank? A. I don't know in that case. I am speaking of what is customary.

40 I don't know what was there.

Q. You didn't observe? A. No.

Q. You are not testifying from actual knowledge? A. No.

Q. Who had personal charge of arranging those walks for the workmen? A. It was the old flatiron or center pier, and that had been done by the Central Railroad. I don't know who had charge of it. 10

Q. I say, who had charge this night of arranging these footwalks for the men to go out to the piledriver? A. I presume the superintendent in the field.

Q. Who was he? A. A man by the name of Macomb.

Q. Is he here to-day? A. No, sir; I have not seen him.

Q. What do you know of the disappearance of Mr. Theodore Dunnewald? A. Nothing, excepting 20 that it was reported to me by somebody that he had not reported for work, and the next day, which was Monday, in the afternoon his son came in to see me accompanied by another gentleman—

Q. Before the son came when was the first information you had of his disappearance? A. I believe it was the following morning, Monday morning. As soon as the bridge was moved and on its new seat I went home. I didn't stay to hear any particulars. I went home at once, because I had 30 been up all night. I think the first intimation I had of his disappearance—no, I believe the first intimation I had of his disappearance was when his son came in the office.

Q. You didn't hear of it all day Sunday? A. No, because I didn't know then that he had not been home. That is my first recollection of hearing of it.

(No cross-examination.)

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ERNEST COLEMAN, sworn:

Direct Examination by Mr. Besson:

Q. Where do you live? A. Hoboken.

Q. By whom are you employed? A. Well, I have been employed by Mr. Steers for several years.

Q. Were you so employed on the 12th and 13th of April last? A. Yes.

Q. Of 1912? A. Yes.

Q. What position did you hold at that time? A. Foreman.

Q. Did you know Theodore Dunnewald? A. Yes, I had the gentleman working for me.

Q. When was he last working there? A. He worked that Saturday afternoon with me and went home with me that night.

Q. Saturday night? A. Yes, sir.

Q. And do you know whether he was to come back? A. Yes, sir, I gave him orders to come back.

Q. That was the 13th of April? A. Yes.

Q. And did you see him again that night? A. I have not seen him from that day to this.

Q. Do you know anything about the trains running out there that night stopping—

Mr. Bishop: I object.

A. I couldn't tell you anything about that at all. I went out there early.

Q. Was any announcement made to the men when Dunnewald went home about taking trains to go out?

Mr. Bishop: Objection.

The Court: I will allow it.

A. No, sir.

Q. Do you know what part of the bridge Theodore Dunnewald was working on? A. He was working on the piledriver with me.

Q. Where was that piledriver located? A. Stationed alongside of the bridge.

Q. On the Essex County side or on the Hudson County side? A. On the north side of the bridge.

Q. North side of the bridge? There is a division in the bridge where the drawbridge is? A. She was over on the north side.

Q. Was this driver on the Essex County side, west, or was it on the— A. It was on the west side.

Q. On the west side. Now, a man like Mr. Dunnewald living in Hoboken and coming there to go to work, what means did he have of getting over there? A. He could have went over in the small boat if he had been there the same as the other men.

Q. Where did you keep the small boat? A. At No. 8 machine.

Q. Where was that? A. Lying in close to the drawbridge.

Q. How could he get out to the drawbridge? A. Well, he would have to walk out the trestle to the draw and then go over in the small boat to our machine where he was working.

Q. He would have to start on the Hudson County shore and walk out over the trestle work until he came to the drawbridge? A. Yes, sir.

Q. And from there how would he get further? A. He would have to take the small boat the same as we took.

Q. Small boat. And where would he land from that point? A. He would land on the piledriver.

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Q. Didn't they walk around and go over— A. We didn't, no, sir; we went over in a small boat.

Q. Always? A. Well, not always, but that night.

Q. That night? A. Yes, sir.

Q. Well, that afternoon before he went home, how did they get there that day? A. Well, before we came from where the piledriver was—

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Q. That morning when he went to work, how did he get in there then? A. Well, we was on the North River and we towed over that Saturday; we was on the North River then and we towed over that afternoon.

Q. Did the men use the small boat that morning in getting to their work? A. No, sir; they didn't need to; it wasn't in the morning when he was lost at all.

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Q. I know; but I am just asking you how they got there. Now, during the night the method of getting there was changed? A. Yes.

Q. And to get across the gap where the drawbridge was located it was necessary to use a small boat? A. Yes.

Q. Now, the trains, didn't they stop there that night to let the men off? A. I couldn't say about that; I walked out.

30

Q. Didn't you tell Mr. Henry Dunnewald here— A. No, I never did.

Q. H'm? A. No, sir.

Q. Did you tell him about the method of getting onto the piledriver?

Mr. Bishop: I object to that.
The Court: I will allow it.
(Exception noted for respondent.)

A. I don't remember telling him about it.

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Cross Examination by Mr. Bishop:

Q. You say that Mr. Dunnewald worked with you on the afternoon of the 13th? A. Yes, sir.

Q. And that he went home with you? A. Yes, sir; came in on the trolley car.

Q. That you told him at that time to report for duty again that night? A. That night. 10

Q. Did he report? A. No, sir; I never seen him since.

By the Court:

Q. Who kept the time books? A. McInenly, this gentleman right here.

Q. He kept the time books? A. Yes, sir.

Q. What was your practice, enter a man's name as soon as he appeared on the job? A. Yes, sir. 20

Q. Did you pay your men by the hour or by the day? A. I didn't have the settlement of the gentleman's wages at all. It was up to Mr. Snell and Mr. McInenly.

Q. Who gave them their instructions when they went to work as to what they should do? A. I did.

Q. Suppose he should arrive there and you were not there, what should he do? A. The next man to me would tell him. 30

Q. Suppose the next man to you wasn't there? A. They would have had to tie up the machine, I suppose.

Q. Wouldn't he have known what to do in his capacity there as an employee without orders? A. He would have knowed, I suppose; he is an old hand in the business.

Q. Who gives the orders there to the men? A. Well, that night Mr. Snell give orders.

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Q. Himself personally? A. Yes.

Q. He was there on the job? A. He was on the bridge.

Q. Everybody took orders from him? A. Well I was the one that got orders from him.

Q. And you would give them to the men under you? A. And I would give them to the man under me.

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Q. And the deceased, was he also under you? A. Yes.

Q. He didn't appear there to get any orders? A. No, sir; he wasn't there.

By Mr. Bishop:

Q. Were you there all that night while these men were at work? A. Yes, sir.

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By Mr. Besson:

Q. Did you see his body after he was dead? A. No, sir, I didn't; I didn't see him at all.

Q. When did you first miss him? A. I missed him about ten o'clock that night when I commenced to get ready to tie up the machine.

Q. Did you make any search for him? A. Search for him that night? It was so dark and thick you couldn't do very much searching.

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HENRY DUNNEWALD, sworn:

Direct Examination by Mr. Besson:

Q. Where do you live? A. Jersey City.

Q. You are a son of Theodore Dunnewald? A. Yes, sir.

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Q. What do you know about your father's death? A. Well, what I know of it, on the night of the accident which we believe my father he came home at around half-past six that evening, on April 13th, and he told us that he had to go to work. I was down there for supper at that very night, but leaving—I left a little bit earlier; so he told us that he had to leave the house at 9 o'clock in order to report down there for work which they were ordered out at 11 o'clock, and Sunday morning he was to come up to my house which I live in, 6340 Webster Avenue, Jersey City Heights, but he failed to come and I went down looking for mother to make inquiries. Mother had went to my married sister to Oyster Bay; so there was nobody home in my father's and mother's home but me. So I waited; I waited until 12 o'clock. No signs of him coming. Then I got worried, made inquiries, and I went to Mr. Coleman's house, and he then told me that he didn't see my father—

Q. That was in Hoboken? A. That was in Hoboken; that was on Sunday night, April the 14th. Then on Monday morning, April the 15th, I had went down, before 7 o'clock, down on the job where the men were supposed to go to work, and when I got there I met Mr. Coleman on the way down on the car going down, and Mr. Seeman and other workmen that was in the employ of the company, and when I got there, why, Mr. Coleman had told me, "this is the way your father had to get down," he says he had to get down along the old trestle across the drawbridge—

> Mr. Bishop: Just a minute. I object, your Honor, to any testimony as to how he had to get to his work. I don't think it is material.

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The Court: I will allow it. I will consider its materiality in determining the whole matter.

(Exception noted for respondent.)

10 —and he had to go along the old drawbridge as far as the Essex County side of the bridge—of the draw—and there these here dolphins or fenders—I call them dolphins, I don't know just what they are; they are sort of a fender to protect the bridge from being hit by boats as they pass through. Well, he had to get down on these dolphins, across a number four derrick which lay catercornered across the space from the old trestle to the new trestle.

20 Mr. Bishop: Just a minute. You are speaking of what you found on Monday morning?

The Witness: I am speaking of facts that they told me on the Monday morning that I got there.

Mr. Bishop: That is hearsay.

By the Court:

30 Q. Who told you? A. Mr. Coleman and other workmen that was there.

The Court: That may be stricken out.

(Exception noted for petitioner.)

Q. Well, what took place then? A. Well, the following morning—this was on a Tuesday, the 16th—I went over—

Q. How long did you stay there on the 16th?

40 A. On the 16th?

Q. Yes. A. Well, I wasn't down on the job at all on the 16th, on the 15th.

Q. How long did you stay there on the 15th? A. Well, on the 15th I was down there until 7:30, it might have been 7:45. Then I went home.

Q. In the evening? A. In the morning. They start to work at seven. At that time they started to work at seven.

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By the Court:

Q. Was that Tuesday morning? A. Monday morning on the 15th day—

Q. When did you get there on Monday morning? A. Before seven.

Q. And you stayed there until 7:30? A. About 7:45.

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Q. What were they doing? A. Well, the men were working in different positions and they started to shift their different machines. Then I went home to mother's and reported this all to mother, and I went down later on, went down to the job again and hunted around, and from there I started hunting around hospitals. I was around there for about until 12 o'clock, 12 or 1 o'clock, and I started —after that I started hunting hospitals and one thing or another, being nobody seemed to know anything about it, nobody had seen anything of my father and I wasn't quite sure whether he had fallen overboard or if he was really in a hospital or struck by anything, see, so I went hunting the hospitals all through the county, to no avail; I found nothing. I came home that night; it was quite late—no, I was in Newark that night at 6:30 and I telephoned down to the Hack—from Newark I telephoned down to the Hackensack bridge and

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they give me information there that a body was found.

Mr. Bishop: Pardon me, when was this?

A. On the 15th day of April. I inquired who the body was, and they told me it was the body of the timekeeper, Mr. McInenly. It was his body that they found, and it was at 5:30 when they found his body and it was 6:30 when I telephoned down there. Then the next thing I came back from Newark and went home. The next morning I went to Mr. Steers' office in 17 Battery Place, and I inquired there of—asked Mr. Snell if they would still continue dragging the river. The information he gave me—he went to the telephone—he says, Yes, he thought they would still continue, and he then went to the telephone and he called up the Passaic and by calling up Passaic he asked them if they were still dragging for the body, and I believe the answer must have come back yes, and Mr. Snell told them to go in closer to shore where the water was shallower, probably they would find the body in there. So I thanked Mr. Snell and I came on home, but before that when I was leaving Mr. Snell had told me that all the trains was to stop on that bridge that night—

Mr. Bishop: I object.
The Court: I will allow it.
(Exception noted for respondent.)

A. Mr. Snell told me that all the trains was to stop on that bridge that night after 9 o'clock, "but we didn't notify the men when they went home for supper to that effect that the trains would stop," and he told me that he himself went down by the

way of the train. So, from that on why we still kept, at least Steers' people they dragged the river back and forth until the 29th day of April, when the body was seen by a young man that is in back there, was seen floating down the river, and he made some kind of a report of it and word was sent to my brother and he chased down there and went out in a launch to look for it, but they couldn't find the body. 10

Q. What is this young man's name that saw the body? A. Mr. Sappah, that is right here.

Q. Go on, what further took place? A. Well, of course, they went hunting for the body in Steers' launch, my brother was into it, and they hunted all day until in the evening towards 5 o'clock, I believe, and to no avail. They didn't see nothing, but in the meantime, why, this other gentleman 20 here he had picked up a body off the Staten Island shore. He is a tugboat man and he had picked up a body off the Staten Island shore which answered the description which the police had sent out, and I went down to identify it, and I seen it in the morgue.

Q. Whose body was it? A. It was my father's.

Q. What do you know about the ground approaching the river from the Hudson County side? 30 Could any man get into the river from the Hudson County side without going over this railroad where your father was at work and be found in the river where your father was found?

> Mr. Bishop: I object to that on two grounds. In the first place, I think it is immaterial and in the second place it calls for a conclusion. I think it might be proper for him to describe the situation.

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The Court: Oh, yes, he can describe the situation.

Q. Well, describe the situation, the character of the ground on the Hudson County side of the river. A. On the Hudson County side, why, when you are coming from the West Side Avenue station and along the railroad track you first come to the Morris and Essex Canal. That is the first waterway you have to cross. Then, we will say, about five hundred feet from there you strike this trestle crossing the Newark Bay which the Central Railroad uses for their trains. You have to go along this here trestle work in order to get down to the bridge. There is no other way of getting down to where this bridge is. Both sides of the railroad tracks to this five hundred point line there is nothing but swamps on both sides. So, there is no man can walk through them swamps without having some mishap, especially at night, but I went through them swamps and up and down and in and around some of them creeks, hunting for the body with boots on, to no avail. I went in up to my knees, and as people around the neighborhood around there had told me, "You had better keep out of there or you will lose your life," and that was Mr. Herrick from Herrick's boat-house; he was the man that told me such. He says, "You had better keep out of it"—

Q. Never mind what he told you. Go on now and describe the location. How far does that character of ground extend north of the Central Railroad tracks, and how far to the south? A. Well, it extends to a place that they call Dryer's Point, beyond it, and then to the north it extends as far as the Turnpike—the Plank Road bridge; beyond

that again is swamp, so both sides of the river at that point are very swampy and there is no way of getting to it unless you go into the swamp and you run danger of falling in and drowning yourself, as there is creeks running through there.

Q. Do you know anything further about the matter than you have already testified? A. Nothing further. 10

Q. I mean of your own personal knowledge? A. Nothing any more than how the danger of the place was in order to get down to the work and as they had explained it to me that Monday morning when I got there.

Cross Examination by Mr. Bishop:

Q. I want to know the date upon which you say your father's body was found? A. On the 29th day of April, at half past 4 in the evening. 20

Q. That was the day you saw it? A. That was the day I saw it; I saw it at 11 o'clock in the evening.

Q. Where was it found? A. It was found—I can't mention the pier, because this gentleman here behind me can tell you, but it was found off Port Richmond.

Q. That is in Staten Island? A. Staten Island, off the shore there. 30

By the Court:

Q. You say the Newark Bay runs south towards Staten Island? A. Yes.

By the Court:

Q. Running into the Kill von Kull? A. Yes. 40

By the Court:

Q. Which then runs into New York Bay? A. Just opposite that location.

Q. Do you know how far it is from this bridge to Port Richmond? A. Oh, well, that is a definite
10 fact. I couldn't tell you. I should judge about five miles. But Dryer's Point, that is about two thousand feet from the bridge which this here other gentleman had seen the body floating, but he was afraid to pick it up.

Q. He had seen the body, but did not identify it, did he? A. Well, he give a description to me which agreed— But he went up to the bridge to notify the superintendent on the bridge about it and they sent a launch after it. They sent for my
20 brother to come down and he was in the launch with them.

Q. They didn't find anything? A. No, they did not.

By the Court:

Q. Dryer's Point was how far below the point where the bridge construction was being done? A. About two thousand feet, two thousand two hundred feet, something in that neighborhood.

30 Q. It is that point jutting out into the water there with some kind of chemical plant on? A. It is at the foot of Danforth Avenue.

JOHN SAPPAH, sworn.

Direct Examination by Mr. Besson:

Q. Where do you live, Mr. Sappah ? A. 314 Wakefield Avenue, Jersey City.

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Q. What is your employment? A. Boatman.

Q. Did you know this Mr. Theodore Dunnewald? A. No, sir.

Q. What were you doing on the 29th of April? A. I was crossing the bay about 10 o'clock in the morning to get lumber to go over to the Hackensack River. About 500 feet, between 500 feet and 1,000 feet off Dryers' Point there my oar struck something I thought was a log, and didn't pay no attention. When the boat passed, why, I seen the figure of a man with dark clothes and bald headed. So, I seen I had no room in the boat and I seen it was too much to lift up, and the boat was small—might swamp her, so I runs over to the Hackensack Bridge, Steers' works, and asked a man there, at the dock there, told him I seen a man down there. So they sent me over to the office over on the Passaic side. I went over there. Well, about three-quarters of an hour by that time when I seen the body before they got the launch out. Well, there is quite an ingoing tide, you know, between the—yes, it leaves the Lehigh Valley Bridge and the other Central Bridge. So, when we got back with the launch we hunts all over. I know that the body couldn't go much further than the bridge, but the intide must have took it, and we went searching for it with the launch around 11 or 12 o'clock, that Steers' launch.

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By the Court:

Q. At night or day? A. In the day time, morning.

Q. What hour was it when you saw the body first? A. Well, I should judge between half past 9 or 10 o'clock, something like that.

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Q. In the morning, forenoon? A. Yes.

Q. And what condition was the tide at that time? A. The tide was running out.

Q. What they call ebb tide? A. Running out towards Staten Island, yes, sir. Outgoing tide; it had been running out I should judge about an hour.

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Q. Before you saw the body? A. Yes.

Q. And how long a time was it after you saw the body before they got around in the launch to look for it? A. I should judge about three-quarters of an hour.

Q. By that time it had moved which direction? A. Down towards the Lehigh Valley trestle.

Q. The Lehigh Valley trestle, does that run parallel with the Central Railroad? A. Yes.

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Q. How near it? A. Well, I couldn't tell you. They both run across the bay.

Q. Side by side? A. Not side by side, no. A great deal of distance—

Q. How much about? A. Oh, I should judge something like a mile and a half from the Lehigh Valley to the Hackensack side of the Central, and on the Passaic side it is only about a mile and a quarter.

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Q. Now, whereabouts was the body when you saw it? A. About 500 feet off what they call Dryer's Point on the Hackensack shore.

Q. That is north of the Central Railroad, up the river above the Central Railroad? A. No, it is down below the Central.

Q. Below the Lehigh Valley? A. Below the Lehigh Valley.

Q. Well, now, which way had the body moved by the time the launch got there? A. It moved down towards the Lehigh Valley.

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By the Court:

Q. You say you were below the Lehigh Valley; you mean you were above, don't you, when you saw the body? A. Above, this way.

By Mr. Bishop: 10

Q. You were between the Lehigh Valley and the Central? A. Between the Lehigh Valley and the Hackensack Central; the Greenville section up there.

Q. And it came down towards the Lehigh Valley? A. It came down with the tide towards the Lehigh Valley, the outgoing tide.

Cross Examination by Mr. Bishop: 20

Q. Did you say you had never seen Mr. Dunnewald? A. I never seen him, no.

Q. Never saw him? A. No, sir.

JOSEPH E. SNELL, recalled.

By the Court:

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Q. Did you have charge of the pay of these men, that is, regulating their salaries? A. Yes, sir.

Q. How did you pay this man? A. He was paid at the rate of $3.50 a day.

Q. Not by the hour; so much per day? A. Why, as a rule if a man shows up for work in the morning, unless it rains, he gets his day's pay.

Q. No matter how long he works? A. Well, no, no. We hold him down; we pay the scale; we have got to hold him down to the hours. 40

Q. I mean, you pay him by the day; not by the hour? A. By the day; that would be a little under fifty cents an hour.

Q. Now, how many hours? A. At present they are working eight; at that time they were working nine.

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Q. Where would the—for instance, you were to give them a piece of work, where would these men go to perform their work? A. Well, that is around town or down south, or—

Q. For instance, around town here? A. Why, the men—it depends on what location they were working on.

Q. Say down the North River, where would the men go, down to work or to your office? A. To start the day?

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Q. Yes. A. Always to the work.

Q. You send them to the work to save time? A. You mean to get their pay?

Q. No, to do their work? A. Always go to the work.

Q. Direct to the work? A. Yes. It is construction work; they have got to go from one job to another, wherever we may send them.

Q. You do bridge construction work generally, don't you? A. Dock work, railroad building, all classes of heavy construction work.

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By Mr. Bishop:

Q. A man's day commences, does it not, when he reports for duty? A. Yes.

(Adjourned until Tuesday, April 22, 1913.)

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Tuesday, April 22, 1913.

Mr. Besson offers maps illustrating the location of the construction work on which the deceased was employed.

Mr. Bishop objects to the offer of the maps as being irrelevant and not proved. 10

The Court: They cannot be admitted in evidence unless they are properly proved.

JOHN HIRSCHMAN, sworn.

Direct Examination by Mr. Besson:

Q. Where do you live? A. 663 President Street, Brooklyn, New York. 20

Q. How are you employed? A. At present a student.

Q. In what line? A. Well, I am going to preparatory school, preparing for civil engineering—DeWitt School, New York.

Q. And you have studied drafting? A. I have.

Q. And you understand scales and distances? A. Yes, sir.

Q. Did you make this sketch? A. I did. 30

Q. When did you make that? A. It was made on January 7th, that was when the sketch was made, but the measurements in that particular map were made January 5th.

Q. Is that a mathematically accurate map? A. Well, I cannot say; I had no survey to make it.

Q. How did you estimate your distances? A. Pacing, and by the eye—distances that I couldn't pace.

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Q. Is that a reasonably correct outline? A. It is.

Q. Of the shore, Newark Bay, the bridge? A. It is.

Q. And the bridge from the land end? A. Yes.

10 Q. What is this "B" here intended for? A. This here drawbridge here was forced to be removed from over there to the new bridge, and I inserted it.

The Court: That may be stricken out.

By the Court:

Q. What is it? A. That is the drawbridge.

Q. That is where it was and this (indicating) 20 is where it is now? A. That is where it was and this is where it is, or was at January 5th; I don't know where it is at the present date.

By the Court:

Q. January 5th is the time you made this map? A. That is a mistake.

Q. What is this figure here (indicating)? A. That is supposed to be the scow. That was put 30 in the wrong place, and that is why the map was made, that is why this map was made.

Q. Did you make this map (indicating) too? A. I did.

Q. The outlines of the land and water are about the same? A. About the same.

Q. And this (indicating) is the railroad? A. That is the railroad; that is the old one and that is the new one.

Q. And that is the scow that you made a mis-

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take in locating on the other one? A. Correct.

Q. And the red line shows? A. The line of transit.

Q. To get to that scow?

> Mr. Bishop: I object to that.
>
> The Court: I don't think he can testify to anything. 10
>
> Mr. Bishop: What he found there.
>
> The Court: What he found, but you must not testify, Mr. Besson.

Q. The red line, what is that intended to show? A. The line of transit to get to the—

Q. For persons? A. Walking there from the Jersey City side to the piledriver.

Q. That comes along this track (indicating)? 20 A. The embankment, along the bridge, across here, across the scow, along this here (indicating), along some twelve by twelve beams, down to there.

By the Court:

Q. Was the scow there when you made your map? A. It wasn't.

By the Court: 30

Q. You have put that scow there out of your— A. This is the way it was supposed to be that night from the sketch I made.

By the Court:

Q. You mean supposed to be from what some one has told you? A. Correct.

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By the Court:

Q. You didn't see any scow there? A. At the time I was there I did not.

10 Mr. Besson: I can prove by other witnesses—

The Court: Never mind what you can prove by other witnesses; we have got to take them one at a time.

Cross Examination by Mr. Bishop:

Q. At the time you made your measurements or examinations for making this map, was there any span in place in that bridge? A. This here trestle

20 was entirely away, except for a short distance of about fifty feet on this side, and the same on this side.

Q. The only trestle existing at the time you made that map was this one. As a matter of fact at the time you made your examination it would have been impossible for any one to have followed the course you have made in red there? A. This here?

Q. At the time you made the map; at the time

30 you made your observations? A. That wasn't there.

By the Court:

Q. In other words, that map is not a reproduction of what you found there? A. Reproduction of the sketch I made this tracing of.

Q. I say, at the time you made your observations from which you made that sketch? A. At the

40 time I looked at this myself it wasn't the way it is

at present, but this here map was made from a sketch and I just went down there to see the lay of the land so I could do a little better.

Q. Who made the sketch? A. Mr. Dunnewald.

Q. You made this from a sketch Mr. Dunnewald furnished you? A. I made the sketch and also looked at the lay of the land. 10

Q. But this bridge is put in from the sketch that was furnished you by Mr. Dunnewald? A. Correct,

Q. The only thing you saw when you went down there was this bridge and— A. Just a small part of this.

Q. So that anybody who wanted to get to this end of the draw—was there a piledriver here at the time you saw this bridge? A. No, I said that that map was made from a sketch. 20

Q. Just answer the question: there was no piledriver there? A. No, not the day I was there.

The Court: I will not allow the maps in evidence.

(Maps offered for identification and marked P-1 and P-2 for identification.)

RICHARD G. FOULK, sworn. 30

Direct Examination by Mr. Besson:

Q. Where were you on the 13th of April? A. Do you mean from the time I started from my home?

Q. Yes. A. Well, I worked for Henry Steers that night, and I came out on an early train. The men were supposed to come out on a train that

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they ran purposely for them to stop there. I came out on a train earlier, and I got off at the draw-bridge and to get to where my machine was, there was two piers there, two trestles there, the old and the temporary one—that is the one they are using now, I believe. I had to walk this drawbridge to
10
the abutment or where the fender racks are underneath, and walk across this rack to No. 4 derrick, which was tied up between there, and then get into our boat and pull myself over to my machine.

Q. What did you have to walk on? A. Why, I had the top of the rack.

Q. And what was that composed of? A. Why, piles which are driven into the fenders on the outside, sheet piling on the outside, and a deck of twelve by twelve timbers on the outside designed
20
to stiffen them up.

Q. How did you get across from the Hudson County side to the—

Objected to as irrelevant. Objection sustained.

(Exception noted for petitioner.)

A. Well, this rack is a continuation; it is a fender so the boats don't strike into the abutments.
30
And I had to walk across the top of that on that timber, which we do in our kind of work. And then when I got to this point, this end, we had a plank up from the cluster of piles down to the machine, and I went down the plank, across this No. 4 derrick, jumped into our rowboat which we had tied onto a rope from No. 4 derrick underneath this other trestle to our own machine and pulled myself over with the rope.

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By the Court:

Q. Did everybody go over that way? A. I don't know how the others got there; I was there first.

Q. What happened? A. I couldn't tell you anything what happened. I got there early; I live out in Flatbush, and I got there early. So, I don't know what happened to the others any more than they came to our machine about, well, near 11 o'clock.

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Q. You had to walk along the trestle from the center of the trestle where the train stopped? A. It stopped at the drawbridge to let us off.

By the Court:

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Q. How far did you have to walk? A. The length of the draw.

Q. How far was the length of the draw? A. Well, I am not much of a judge; maybe seventy-five foot.

Q. Was that on a trestle? A. That was on the trestle, yes.

Q. What did you have to walk on? A. Why, I walked on the ties, on the trestle.

Q. What was on either side of the trestle? A. Why, the iron sides of the bridge, the stanchions of the bridge.

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Q. How high are they? A. I guess they must be twenty-five foot high.

Q. You couldn't fall off the side then, could you? A. Well—

Q. What are they, criss-cross ironwork? A. Yes.

Q. You could fall off, then? A. I don't know;

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I don't remember whether there was a guardrail up then or not.

Q. Were the openings between the ties wide enough to go through? A. Well, I guess the ties are laid about eighteen inches apart.

Q. And nothing under them except water, was there; that is, you could look right through them to the water? A. Oh, yes, you could look right through; just like the trestle lies there to-day. You can look right through the ties any time.

Q. After you got through walking on the ties, what did you walk on? A. Then I jumped down off of this track piece onto the rack that faces the front of it; there is a fender for the boat, so that it wouldn't strike it; then walked across that to the boat.

Q. What was the rack made of? A. Piles and timber, fastened together.

Q. And was there any guardrail or anything? A. There was no guardrail on any racks. That is one thing about our kind of work. Why, that is a chance we take crossing over all of these things to get to our work. That is done any day in any kind of construction work.

Q. Who put that rack there? A. I couldn't tell you that.

Q. I mean was it put there by your company? A. I believe the new one was put there by our company, but I don't know who have put the other one there.

Q. Was that a permanent construction? A. That was the Jersey Central's.

Q. They had maintained it there for some time. And in doing your work you had to walk over things of that sort? A. Yes.

Q. Otherwise you couldn't get to your business? A. No, sir.

Q. How did you get down from the rack? A. Climbed down to anything you could find.

Q. How did you get down from there to the derrick? A. We had a plank there.

Q. How high above the water was that? A. Well, from the top of the cluster of piles it must have been, maybe—that depended on the tide—maybe six or seven feet. 10

Q. Then you went down to the deck of the pile-driver? A. The deck of the scow.

Q. A few feet above the water? A. Yes, sir.

Q. Then you went from the pile-driver too? A. That was the derrick; I went across the deck and jumped into our boat.

Q. Did you see any other way of getting over to your place of work? A. Yes.

Q. How? A. By walking all the way over this long trestle and coming all the way out on the other one. 20

Q. What do you mean by that? A. When I get off the train to get to where our machine was, there was no bridge here; I would have to walk all the way out towards the Bergen Point, and over this trestle and then come all the way back onto this other one, on the new trestle to get to my machine.

Q. Of course, you couldn't cross to the Jersey City side on the new trestle at that time, because there was no connecting draw? A. No, sir. 30

Q. Your idea was to take the bridge from the old trestle, the centre piece from the old trestle, and make that the center of the new bridge, the new trestle; you were going to take the draw from the old trestle and put it to the new trestle? A. That is right.

Q. So you couldn't walk over the new trestle

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then because there was a space in the center the width of the draw that was open? A. Yes.

Q. So you could have gone over the old trestle straight? A. Yes, sir.

Q. All the way out; then come around back on the new trestle to where your boat was located?
10 A. And that would have been a great deal longer walk and a great deal more tedious for us to go around.

Q. You would have had to cross the old trestle to get there and come out on the new trestle to get there, to the point where your machine was? A. All the way out the old and back on the new to get here.

Q. "To here" doesn't mean anything in describing a thing, you just put your thumb on the table,
20 that doesn't mean anything; you know what you mean by "to here," but I don't know. A. We were speaking about the way the trestle was situated. The old trestle was connected up with a drawbridge and to get from West Side Avenue over to the other side to which we were tied up, on the west side of the river, we would have to walk all the way in on this trestle, which was a great long trestle, and then go all the way back again on the new trestle. There was no connecting link between
30 one bridge and the other; that is, across.

Q. What was the distance between the two bridges? A. Well, about 150 foot, maybe; just room for the derrick to lay in between the two bridges, end to.

By Mr. Besson:

Q. Did you see Mr. Dunnewald that night? A. No, sir; I didn't see him.

40 Q. Did you see him that day? A. Yes, sir, he

worked there that day.

Q. Until what time? A. Well, now, I can't just recollect. I don't know whether it was five or six o'clock we worked there.

Q. On this night? A. Yes.

Q. Did you go home together? A. No, I went home all by myself; all the men left at the same time when we worked on the machine, we all walked together up the trestle. 10

Q. You say you got back there first that night? A. Yes, sir.

Q. What time did you get there? A. Well, I will have to guess at that; it must have been about half past 9 or quarter to 10.

Q. What time were you going to work that night? A. 11 o'clock.

Q. Do you remember what kind of a night it was? A. Oh, yes, it was a rainy night. 20

Q. And was there any fog that night? A. Oh, yes.

> Mr. Bishop: Object.
>
> The Court: It is a little leading; it is answered though.

Q. Do you remember more particularly about the atmosphere conditions that night? 30

> Mr. Bishop: I object to that.
>
> The Court: I will allow it.
>
> (Exception noted for respondent.)

Q. Well, it was foggy and dark; that is all I can say about it. It was a fine rain, partly mist, you know.

Q. How far could a man see in front of him there?

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Mr. Bishop: I object.

The Court: How far could a man see? I think I will sustain the objection.

Q. How far could you see?

10 Mr. Bishop: I object.

The Court: I will allow it.

A. Well, I could see ten or twelve foot ahead of me easily.

Q. Do you remember seeing Mrs. Dunnewald after—A. Yes, sir.

Q. The wife of the deceased? A. Yes.

Q. When did you see her? A. I don't know what date it was.

20 Q. And where? A. At her house; I went over to sympathize with her.

Q. Did you tell her there that the night you got off of the train to go to work on that 13th of April at the bridge you had to walk to the end of the bridge and came near slipping, so that you had to crawl on your hands and knees on twelve by twelve timbers and called to a watchman and told him for God's sake to give you a light to see what you were doing?

30 Mr. Bishop: I object to that.

The Court: I will sustain the objection.

Q. What did you tell Mrs. Dunnewald that night?

Mr. Bishop: Object.

The Court: Objection sustained.

Mr. Besson: Give me an exception to the ruling on both of them?

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The Court: I don't think you are required under the statute to take an appeal; I think your remedy is by certiorari.

Q. Was anything said that night about Dunnewald not being around there?

Mr. Bishop: I object.

The Court: I will allow it.

A. Yes.

Q. What time in the night? A. 11 o'clock.

Q. Who spoke of it? A. Me, the first one.

Q. What did you say?

The Court: I do not think what he said is material.

Q. Who did you speak to? A. Oh, just to the foreman, I says it was funny he didn't show up.

The Court: Never mind what you said to him.

Q. That is Mr. Coleman? A. Yes.

The Court: What he said will be stricken out.

Q. What did Mr. Coleman say in reply?

Mr. Bishop: I object to that.

The Court: I do not see how it is material what Mr. Coleman said. I will overrule it. You may have your exception noted.

Q. Was any effort to find Mr. Dunnewald made that night?

Mr. Bishop: I object.

The Court: I will allow it.

A. Nobody knew what happened to him that night.

Q. Did you see any effort made afterwards to
10 find him? A. Oh, yes.

Q. By whom? A. By the firm of Henry Steers.

Q. How did they go about it? A. Well, they had boats and grappling hooks and men out dragging the river, working up and down dragging up and down trying to find him, if he was there.

Mr. Bishop: I move that that be stricken out. I don't think it is at all relevant.

The Court: Well, it cannot do any injury.

20 Q. Have you any knowledge when the first traces of him were discovered?

Mr. Bishop: Object to that as immaterial.

The Court: I do not see how it is material. I will overrule it.

(Exception noted for petitioner.)

Q. Were you there when the body was found? A. No, sir.

30 Q. You didn't see it? A. No, sir.

Q. Was any officer of the company in charge of the efforts made to find the body?

Mr. Bishop: I object to that.

The Court: I don't think it is material at all whether they were or not. I will hold that it is not. I will overrule it. You may have your exception.

(No cross-examination.)

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MARTIN F. DREWES, sworn.

Direct-examination by Mr. Besson:

Q. Where do you live? A. East Orange.

Q. New Jersey? A. Yes, sir.

Q. Did you know Mr. Dunnewald? A. Yes, sir. 10

Q. Did you know him at the time, just previous to his death, April 13th, 14th and 15th, 1912? A. Yes, sir.

Q. Do you know anything about the circumstances of his death? A. Why, I don't know anything up till the 16th I went over to the Steers Construction Company with Mr. Henry Dunnewald.

Mr. Bishop: I object to anything that happened on the 16th. 20

The Court: I don't know what he is getting at yet.

Q. Where was that place of the Steers Construction Company? A. I think it is No. 17 Battery Place.

Q. And you say you went there with Mr. Henry Dunnewald, the son of the deceased? A. Yes.

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Mr. Bishop: I object to that. The witness did not say anything of the sort.

The Court: I will allow it.

Q. Who did you find or see there? A. Mr. Snell.

Mr. Bishop: I object to that.

The Court: I will allow it.

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Q. Did you have any conversation with Mr. Snell there? A. No, sir, I did not have no conversation with Mr. Snell, Mr. Dunnewald did.

Q. You heard it? A. I was in his presence, yes, sir; only a few remarks I made to Mr. Snell in regards to the case.

10 Q. State what the coversation was there between Henry Dunnewald and Mr. Snell.

Mr. Bishop: I object to that.

The Court: Objection sustained.

Mr. Besson: If Mr. Snell made an admission there, your honor, that would be admissible evidence and material evidence.

The Court: In what respect?

20 Mr. Besson: He was superintendent of the company in sole charge of the work that night.

The Court: I think I will hear it. I may strike it out if I think it is not relevant.

Mr. Bishop: Mr. Snell was here; it would be—

The Court: I am going to allow it.

Mr. Bishop: There is no opportunity now to produce Mr. Snell. We thought they were through with him

30 The Court: What you thought is one thing. The question is whether I will allow this evidence. Now, I will.

A. I went over to Steer's office and Mr. Dunnewald asked for Mr. Snell and Mr. Snell was ushered out, and he says to Mr. Snell, "Father has been missing." "So," he says, "I hear," and Mr. Snell says, "I am sorry for your mother and the family, but," he says, "I am afraid he must have

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met with the same fate as the timekeeper." Then Henry says to him, "Are you going to keep on grappling for him?" and he says, "Yes, we will do everything in our power to try to get him." With that he went to the telephone and he instructed the men to go closer to the shore to grapple, that perhaps he had fell in there or he was near shore. Then we went on, Henry spoke to him in regards to the night and he said that he was sorry that he hadn't been informed to get off with the rest of the men as those men coming from Brooklyn and all were ordered to get on the trains, as all trains stopped after 9 o'clock there and the most of them went out that way. Then he turned around and spoke about the weather and he says, "My God," he says, "I can't understand how a man got over there safe," that there wasn't more loss of lives. He says, "I had to stop and call for a light or" he says, "I don't know how I would have got over myself," as the night was awfully dark. Then Mr. Dunnewald asked him if he would continue on with the grappling and he says they would do anything in their power.

Q. Have you stated the whole conversation? A. I have stated the conversation I heard.

Q. That is all you know about this case? A. Yes.

(No cross-examination.)

Mr. Bishop: I move to strike the testimony out as irrelevant and immaterial.

The Court: I will not grant the motion to strike out at this time. I may strike it out before the case is disposed of.

HENRY DUNNEWALD, recalled.

Direct Examination by Mr. Besson:

Mr. Besson: Your Honor will recollect that the man that took Mr. Dunnewald's body out, or that took him up out of the water said that he was a stout man, that he did not personally know him. I want to connect that.

Q. Just describe your father's personal appearance. A. Well, my father in personal looks he resembles a whole lot like yourself, carried a bald head about the same manner, and no hair on the top of his head at all, and he was a little bit taller than you, and that night when he left the house in order to go to work he had an overcoat on of sort of a brownish material and black, rather sort of tan color more, and he had a shirt on, a black and white striped shirt, which is used more as a work shirt.

Q. Did he belong to any fraternal organization? A. Yes, sir, he belonged to the Odd Fellows.

Q. Did he have any cards or papers in his pocket? A. Yes.

The Court: Is there any question about his identification? There isn't any question about the identification as far as the proofs are concerned.

Q. Now, the night of the 13th of April, 1912, do you remember what kind of a night that was? A. Yes, it was a very bad night, raining, fog—a very heavy fog, and about in the neighborhood of that time of from between 9 and 11 o'clock it was very

thick, and by going way out here on the street myself I couldn't no more than see about hardly ten feet ahead of you. I was out here on the avenue in the neighborhood of 10 o'clock something like that, out shopping with my wife.

(No cross-examination.) 10

Mr. Bishop: I move, if your Honor please, to dismiss the petition in this case upon the ground that there is no evidence in the case to show that Mr. Dunnewald met his death by an accident arising out of and in the course of his employment; the burden of proving that fact is on the petitioner, and I submit to your Honor that the burden has not been sustained. 20

Motion denied.

(Petitioner rests.)

Mr. Bishop: You asked me to produce the timekeeper so as to show whether the record showed that Dunnewald reported for duty on April the 13th.

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THOMAS McINENLY, sworn.

Direct Examination by Mr. Bishop:

Q. You were employed where on the night of the 13th of April, 1912? A. On the Hackensack River.

Q. By the Henry Steers Company? A. Yes.

Q. You were acquainted with Mr. Dunnewald? A. Yes. 40

Q. In what capacity were you employed there; what was your position there? A. Timekeeper.

Q. As such you kept a record of the hours that the men worked?

Mr. Besson: I object to it as a leading question.

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The Court: I will allow it.

Q. What were your duties as timekeeper? A. To keep the time the men made; the hours they worked.

Q. Have you your records with you of that period? A. Yes.

Q. And will you consult those records and tell me what hours Mr. Dunnewald worked on the 13th of April, 1912? A. Nine hours.

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Q. From what time until what time? A. 7 o'clock until half-past 4.

Q. Did he report for duty that day? A. No, sir.

Cross Examination by Mr. Besson:

Q. That book you have in your hand that you referred to, is that made by you yourself? A. No, sir.

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Q. Whose writing is that? A. My assistant's.

Q. Whose? A. The assistant timekeeper's.

Q. What is his name? A. Owens.

Mr. Besson: Then I object to the testimony.

By the Court:

Q. Who gave him the data to put down in the book? A. I did.

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By the Court:

Q. Did you look over the book afterwards immediately to see that it was all right? A. Yes, sir, the next day—well, that is, I didn't give him the time until the following day; the time for Saturday I would give him Sunday, if we were there; if not, on a Monday. It often happens to be a change in the time. 10

By the Court:

Q. You see the book then afterward immediately; you go over the book regularly to see that it is right? A. Every week, yes, sir.

The Court: I think I will allow him to testify from it. 20

Q. Now, there was something said here about a timekeeper having disappeared too, who was that?

Mr. Bishop: I object to that.

The Court: It is not cross-examination; you make him your own witness.

Mr. Bishop: It has no possible bearing in this case.

Mr. Besson: Whether he was the timekeeper that kept the time that night or whether it was some other that might have gotten drowned. 30

The Court: I don't think it is any advantage to you to endeavor to prove that fact. You may ask whether there was another timekeeper.

Q. Was there any other timekeeper there? A. Yes, sir.

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Q. Who was he? A. His name was McInenly, from Greenville.

Q. The same name as you? A. Yes.

Q. What was his first name? A. Harry.

Q. What became of him? A. He was drowned.

10 Q. That night? A. Yes.

Q. Was he keeping the time of Mr. Dunnewald? A. No, sir.

Q. Why not? A. He wasn't one of his men.

By the Court:

Q. He was working that night, the other timekeeper, wasn't it? A. Yes, sir, he had men of his own from Greenville, a separate gang on the same job who came from Greenville.

20 Q. Then you were really the timekeeper who kept the time of Mr. Dunnewald, deceased, that night? A. Yes, sir.

The Court: On the question of commutation, provided the Court will determine that there is a right of recovery, I think I will hear the widow now, if there is no objection.

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LENA DUNNEWALD, recalled.

Direct Examination by Mr. Besson:

Q. How old was your husband at the time of his death? A. Fifty-five years and six months, or seven months, I can't tell you, the 13th of April he was fifty-six—

Q. You are his widow? A. Yes.

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Q. How many children did he have? A. Four.

Q. What are their names? A. Henry—

Mr. Bishop: Just a minute, if your Honor please, this has all been testified to before, the names and ages of the children.

The Court: I will hear this again. 10

A. Henry, Elizabeth, Edward and Mary.

Q. Are they all over twenty-one years of age? A. Yes.

By the Court:

Q. Who supports you now? A. The two children home.

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By the Court:

Q. Which two are home? A. Mary and Edward.

By the Court:

Q. How old is Mary? A. Twenty-two.

Q. How old is Edward? A. Twenty-five.

Q. And they are both working? A. Yes, sir.

Q. And they support your home? A. Yes, sir. 30

Q. Have you any other means of support? A. No.

Q. Have you got any money of your own? A. No.

Q. No property? A. No.

Q. No insurance from your husband? A. Well, a little bit what covered the insurance to bury him.

Q. That is about all? A. Yes.

Q. The other children are married living with their own families, are they? A. Yes.

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Q. And the two children you have home will get married some time? (No answer.)

Q. You cannot tell. And you have no means of support then otherwise? A. No.

Q. And they are all over the age of sixteen,—the children? A. Yes.

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Q. Well, now, if you were to get compensation from this company, would you like it all at once or in weekly installments? A. I would like it at once.

Q. Why? A. Well, I have a little—for my husband I would fix the grave up a little bit, a stone like that, so I want to fix that up.

Q. What would you do with the rest of it? A. Put it away and save it for me old days. You can't support on your children when they get married.

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Mr. Bishop: I would like to call your Honor's attention to a statute passed by this legislature which provides that compensation shall not be commuted because the petitioner desires to pay doctors, lawyers—

The Court: I hold under a proper construction of the act that that is a matter which is entirely within the discretion of the Court, in the exercise of proper judgment, of course.

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Order.

NEW JERSEY SUPREME COURT.

HENRY STEERS, INC., Prosecutor, vs. THE COURT OF COMMON PLEAS in and for the County of Hudson, and JOHN F. CROSBY, Clerk of said Court of Common Pleas, and LENA DUNNEWALD, as Administratrix of Theodore Dunnewald, deceased, Defendants.	On Certiorari Order.

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Application having been made on behalf of the Prosecutor of the Writ of Certiorari heretofore issued in the above entitled cause for an Order that a Transcript of the testimony taken at the hearing before the Court of Common Pleas in and for the County of Hudson, be certified and returned with the said Writ.

IT IS on this 21st day of July, 1913, ORDERED that a Transcript of the testimony taken at the hearing before the said Court of Common Pleas in and for the County of Hudson upon the petition of Lena Dunnewald, as Administratrix of Theodore Dunnewald, deceased, against Henry Steers, Inc., be certified and returned into this court, together with the determination and statement of facts and the order, and all other proceedings for the making of the same, which are returned into

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court in accordance with the command of the said Writ of Certiorari.

JAMES F. MINTURN,
J. S. C.

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Entered July 30, 1913, on motion of Lindabury, Depue & Faulks, Attys.

Writ of Certiorari.

New Jersey, ss.:

The State of New Jersey to the Court of Common Pleas in and for the County of Hudson, and John F. Crosby, Esq., Clerk of said Court of Common Pleas, and Lena Dunnewald, as Administratrix of Theodore Dunnewald, deceased.

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(Seal)

GREETING:

We being willing for certain reasons to be certified of and concerning a certain determination, statement of facts and order rendered on the 16th day of June, A. D. 1913, by George G. Tennant, Esquire, one of the Judges of the said Court of Common Pleas in and for the County of Hudson, in certain proceedings brought on behalf of Lena Dunnewald, as administratrix of Theodore Dunnewald, deceased, petitioner, against Henry Steers, Incorporated, defendant, for the determination and recovery of compensation under an act of the

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Legislature of the State of New Jersey, 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 procedure for the determination of liability and compensation thereunder," approved April 4, 1911, do command you that the said determination and statement of facts and order, together with all proceedings for the making of the same, and all things touching and concerning the same as fully and entirely as before you they remain or are in your custody or control you do certify and send, together with this writ, to our Justice of our Supreme Court of Judicature at Trenton, on the 15th day of August, 1913, that therein may be caused to be done what of right and according to law ought to be done.

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WITNESS, Honorable William S. Gummere, Chief Justice of our said Supreme Court, at Trenton, this 31st day of July, 1913.

WM. C. GEBHARDT,
Clerk.

LINDABURY, DEPUE & FAULKS,
Attorneys.

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Endorsement to Writ.

(Endorsed)

NEW JERSEY SUPREME COURT.

HENRY STEERS, Incorporated, Prosecutor, vs. THE COURT OF COMMON PLEAS in and for the County of Hudson, and JOHN F. CROSBY, Clerk of said Court of Common Pleas, and LENA DUNNEWALD, as Administratrix of Theodore Dunnewald, deceased, Defendants.	On Certiorari.

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WRIT OF CERTIORARI.

LINDABURY, DEPUE & FAULKS,
Attorneys of Prosecutor.

I allow this writ. Let it be sealed.

JAMES F. MINTURN,
J. S. C.

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Service of a copy of the within writ on me acknowledged this 31st day of August, A. D. 1913.

SAMUEL A. BESSON,
Attorney of Lena Dunnewald,
as Administratrix of Theodore Dunnewald,
deceased.

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Filed Aug. 13, 1913.

Return.

The answer of George C. Tennant, Esq., Judge of the Court of Common Pleas holden in and for the County of Hudson, and within named the record and proceedings of the plaint whereof mentioned is within made, with all things touching the same, I certify and send 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 I am commanded.

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GEORGE C. TENNANT,
Judge.

(L. S.)

Attest:

JOHN F. CROSBY,
Clerk.

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Filed Aug. 13, 1913.

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Reasons.

NEW JERSEY SUPREME COURT.

HENRY STEERS, Incorporated, Prosecutor, vs. THE COURT OF COMMON PLEAS in and for the County of Hudson, and JOHN F. CROSBY, Clerk of said Court of Common Pleas, and LENA DUNNEWALD, as Administratrix of Theodore Dunnewald, deceased, Defendants.	On Certiorari. Reasons.

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And now comes the prosecutor in the above-entitled writ and assigns reasons for the setting aside of the determination, statement of facts and order and the judgment entered thereon, and the other proceedings brought up by the writ of certiorari allowed in the above-entitled cause.

1. Because in the said determination, statement of facts and order it was ordered that judgment be entered in favor of the defendant, Lena Dunnewald, and against the said prosecutor with costs; whereas it should have been ordered that judgment be entered in favor of the said prosecutor and against the said Lena Dunnewald.

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2. Because in the said determination, statement of facts and order it was ordered that the defendant, Lena Dunnewald, was entitled to recover compensation for a period of 300 weeks at the rate of $5 per week from the prosecutor, by virtue of

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the provisions of an act of the Legislature entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder." Approved April 4, 1911; whereas the said defendant, Lena Dunnewald, is not entitled to recover any compensation from the said prosecutor under and by virtue of the provisions of said act.

3. Because by the said determination, statement of facts and order it was ordered that the said prosecutor pay to the said defendant, Lena Dunnewald, the sum of $5 per week for a period of 300 weeks commencing with the 27th day of April, A. D. 1912; whereas the said defendant, Lena Dunnewald, is not entitled to recover any compensation from the said prosecutor.

4. Because by the said determination statement of facts and order, it was ordered that judgment be entered in favor of the defendant, Lena Dunnewald, and against the prosecutor for the sum of $1,240.50 with costs of suit; whereas judgment should have been entered in favor of the prosecutor and against the said Lena Dunnewald.

5. Because by the said determination, statement of facts and order it was determined that the said Theodore Dunnewald was engaged in the employment of the prosecutor at the time of his death; whereas there was no evidence that the said Theodore Dunnewald was engaged in the employment of the prosecutor at the time of his death.

6. Because by the said determination, statement of facts and order, it was determined that the said Theodore Dunnewald was drowned while engaged in the employment of the prosecutor; whereas there is no evidence that the said Theodore Dunnewald was drowned while engaged in the employment of
10 the prosecutor.

7. Because by the said determination, statement of facts and order, it was determined that the prosecutor was liable to pay compensation to the defendant, Lena Dunnewald, under the second section of an Act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of
20 compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1914; whereas it appears by the said determination, statement of facts and order that the said Theodore Dunnewald after leaving his home on the night of April 13, 1912, did not render actual service to the prosecutor.

8. Because by the said determination, statement of facts and order, it was determined that the said
30 Theodore Dunnewald was engaged in the employment of the prosecutor at the time of his death; whereas there is no evidence as to when the said Theodore Dunnewald met with his death.

9. Because by the said determination, statement of facts and order, it was determined that the said Theodore Dunnewald was drowned while engaged in the employment of the prosecutor; whereas there is no evidence as to when the said Theodore
40 Dunnewald met with his death.

10. Because by the said determination, statement of facts and order, it was determined that the said Theodore Dunnewald was engaged in the employment of the prosecutor at the time of his death; whereas there was no evidence as to what caused the death of the said Theodore Dunnewald. 10

11. Because by the said determination, statement of facts and order, it was determined that the said Theodore Dunnewald was drowned while engaged in the employment of the prosecutor; whereas there was no evidence as to what caused the death of the said Theodore Dunnewald.

12. Because by the said determination, statement of facts and order, it was determined that the said Theodore Dunnewald was engaged in the employment of the prosecutor at the time of his death; whereas there was no evidence as to where the said Theodore Dunnewald met with his death. 20

13. Because by the said determination, statement of facts and order, it was determined that the said Theodore Dunnewald was drowned while engaged in the employment of the prosecutor; whereas there was no evidence as to where the said Theodore Dunnewald met with his death. 30

14. Because by the said determination, statement of facts and order, it was determined that the defendant, Lena Dunnewald, was entitled to recover compensation from the prosecutor under an act of the Legislature entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective

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schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911; whereas it appears by the said determination, statement of facts and order, that the death of the said Theodore Dunnewald was not caused by accident arising out of and in the course of his employment by the prosecutor.

15. Because by the said determination, statement of facts and order, it was determined that the defendant, Lena Dunnewald, was entitled to receive compensation from the prosecutor under an act of the Legislature entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911; whereas it appears by the said determination, statement of facts and order, that the said Theodore Dunnewald was not at the time of his death in the employment of the prosecutor.

16. Because by the said determination, statement of facts and order, it was determined that the defendant, Lena Dunnewald, was entitled to receive compensation from the prosecutor under an act of the Legislature entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911;

whereas it appears by the determination, statement of facts and order, that at the time of his death the said Theodore Dunnewald had not entered upon the performance of any employment for the prosecutor.

17. Because by the said determination, statement of facts and order, it was determined that the defendant, Lena Dunnewald, was entitled to receive compensation from the prosecutor under an act of the Legislature entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911; whereas it appears from the said determination, statement of facts and order, that at the time of his death the said Theodore Dunnewald was not performing any act of service for the prosecutor.

18. Because by the said determination, statement of facts and order, it was determined that the defendant, Lena Dunnewald, was entitled to receive compensation from the prosecutor under an act of the Legislature entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911; whereas there is no evidence that the said Theodore Dunnewald's death was caused by accident arising out of and in the course of his employment by the prosecutor.

19. Because the said determination, statement of facts and order is in other respects illegal and void.

LINDABURY, DEPUE & FAULKS,
Attorneys of Prosecutor.

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Filed, Aug. 20, 1913.

Opinion of New Jersey Supreme Court.

NEW JERSEY SUPREME COURT.

20 November Term, 1913.

HENRY STEERS, Incorporated,
vs.
LENA DUNNEWALD, Administratrix.

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Submitted November term, 1913.

Decided February 24, 1914.

A workman employed in building a bridge over a river near its outlet in a bay was last seen alive at his home some miles from the place of work, two hours before he was to return to his work. His body was afterwards found in the bay. There was no evidence as to how he met his death; *HELD* that it might properly be inferred that he came to

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his death by accident, but not that the accident arose out of his employment.

On Certiorari to Hudson Pleas.

Before Justices Swayze and Bergen.

Samuel A. Besson for petitioner. 10

John W. Bishop and Kinsley Twining for prosecutor-defendant.

The facts are thus stated in the findings of the trial judge:

"On the thirteenth day of April, nineteen hundred and twelve, Dunnewald was employed by Henry Steers, Inc., the defendant, in the 20 reconstruction of a draw-bridge over the Hackensack River. The work was peculiarly hazardous.

In order to approach the place where the deceased was employed it became necessary to walk over a trestle running out into the Hackensack River, and it became necessary to pass over a derrick and some other temporary constructions. The deceased worked all day on the thirteenth day of April. The 30 work was so far advanced that it was planned to shift an old draw-bridge and place the new draw-bridge construction in position during that night. The employees were instructed to return to work at eleven o'clock that night. Dunnewald lived in Hoboken; he left his house to go to work at nine o'clock that night. The timekeeper's book

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and the testimony shows that he did not render actual service for the company after leaving his house. He did not return home after leaving his house and was not seen alive again by anyone. That he reached the immediate vicinity of his employment is unquestioned, as his body was found in the Newark Bay, into which the Hackensack River runs, a few days after. One witness testified that he saw a body in the river being carried by the tide toward the Newark Bay shortly after the accident, and from his description of the body it appears to have been the body of Mr. Dunnewald.

The Court is warranted in the finding of the fact, from the evidence, that Dunnewald met his death, either by falling from the trestle, the approach to the new construction work or from the derrick on his way from the mainland to work. On the night in question the weather was bad; there was a thick fog prevailing. Taking all the facts presented into consideration, I have reached these determinations and conclusions:

First: The deceased was engaged in the employment of the defendant company at the time of his death and was drowned while engaged in such employment; that the company had notice of the drowning of the deceased and that the liability of the defendant is the liability created by the second section of the act under which this proceeding is brought."

The opinion of the Court was delivered by Swayze, J.

There is no finding that the death of the decedent was by accident, nor that it arose out of and in

the course of his employment. All these facts are essential to recovery, P. L. 1911, 136, sec. II, Pl. 7.

The learned judge did not even find how decedent met his death; he said he was warranted in finding that it was either by falling through the trestle, the approach to the new construction work, or from the derrick on his way from the mainland to the work. He does not determine which. 10

We do not, however, desire to deprive the plaintiff of any right she may have merely because the findings are insufficient and we have therefore examined the evidence with a view to determining whether it would be possible for the trial judge to find therefrom the facts necessary to support the judgment. We think he might properly find that the decedent came to his death by accident. It must have been either accident, suicide or murder. 20 Suicide and murder involve criminal acts and crime is not to be presumed. The only alternative is accident. Accident may indeed result from intoxication, but the statute places the burden of proof of intoxication on the defendant. The question whether the accident arose out of and in the course of employment is more difficult. How difficult it may sometimes be is shown by the differences of opinion expressed in the House of Lords in Marshall vs. Owners of S. S. Wild Rose (1910), A. C., 30 486; Swansea Vale (Owners) vs. Rice (1912), A. C., 238. In this case the petitioner was last seen alive at his home in Hoboken, two hours before he was to return to his work and some miles from the place of work. The accident may have happened at some other point in the river, from the decedent having mistaken other railroad trestles for that of the Central Railroad, from his getting in the swamp where his son afterward sought for his body, or at 40

best for the petitioner's case on the trestle or racks at the Central Railroad bridge which he had to cross to reach his work. If we assume the latter as the more probable, it is a conjecture or likely guess, no more. It does not reach the certainty of a logical inference. But even if such were the fact, the best that could be said would be that the accident arose in the course of employment, and there would still be a failure of proof that it arose out of the employment. The decedent had gone to his home for his own purposes, not for the defendants; he was returning to his place of work but had not yet reached it. Apparently it was necessary for the workmen to take a boat provided by defendants to reach their work. Up to the time they took the boat, they were on the property of the railroad company which the defendants did not control; trains were stopped by the railroad company on the trestle at the draw-bridge for some of the workmen; whether for petitioner or not does not appear. Whatever accident happened to the petitioner under such circumstances arose not out of his employment but out of the character of the road to his work. If the defendant is to be held for accident due to the dangers of the trestle or the rack, it would logically be liable for injuries happening from the dangers incident to the transportation of workmen by the railroad company. The case differs in that respect from Cremins vs. Guest, Keen & Nettlefolds, Ltd. (1908), 1 K. B., 469, where the train was furnished by the employers under an implied term of the contract of service that the men should have the right to travel to and fro without charge.

It more nearly resembles Edwards vs. Winghams Agricultural Implement Company, Limited (1913),

3 K. B., 596, where the accident happened while the workman was going home after work had ended on a bicycle furnished by his employers, and Nolan vs. Porter & Sons, cited in that case by Swinfen-Eady, L. J. The question seems pretty well at rest in the English courts, where most of the discussion is to be found owing to the fact that their statute antedates our American statutes. 10

Naturally the cases most frequently arise where sailors have been drowned. In Moore vs. Manchester Liners (1910), A. C., 498, a majority of the law lords held, reversing a majority in the Court of Appeals, that the employer was liable where a seaman on returning to his ship at midnight, while climbing a ladder insecurely fixed between the quay and the ship (the only means of communication), fell into the water and was drowned. The following year two cases arose which as Fletcher Moulton, L. J., said, raised the issue in a sharp and clear way. In one a seaman returning to his ship had reached the gangway provided to furnish access thereto; the employer was held liable. In the other there was no proof whether he had or had not reached the gangway; the employer was held not liable. Kitchenham vs. Owners of S. S. Johannesburg. 20

Leach vs. Oakley Street & Co. (1911), 1 K. B., 523. 30

The principle is thus stated by Fletcher-Moulton, L. J., at page 527.

"The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he

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has to do something specifically connected with his employment on the ship. Thus if the risk is one due to the means of access to the ship, as in Moore vs. Manchester Lines, Ltd., the accident is rightly said to arise out of his employment; but if the accident is shown to arise from something not specifically connected with the ship it cannot be said to arise out of his employment. I do not think that the dividing line is when he actually touches the ship or the special means of access thereto."

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One of the cases was appealed to the House of Lords, Kitchenham vs. Owners of S. S. Johannesburg (1911), A. C., 417, and Lord Loreburn expressed their approval of Fletcher-Moulton, L. J.'s statement of the decision in Moore vs. Manchester Lines. In Fletcher vs. Owners of Ship Duchess (1911), A. C., 671, the master of a ship went ashore, returned to the pier and hailed his ship to send a boat. Before the boat reached him he fell off the pier and was drowned. It was held that the accident did not arise out of his employment. The most recent case was much stronger for the petitioner, yet he was denied recovery.

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Webber vs. Wannsborough Paper Co., Limited (1913), 3 K. B., 615.

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A seaman in order to reach his home from his ship had to cross a plank, one end of which rested on the dock, the other end upon the rung of a ladder, which was permanently fixed to and formed part of a quay. He crossed the plank in safety, but when he had ascended a few steps of the lad-

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der slipped and fell. The court held that the sphere of his employment was the ship and not the quay, and that as he was injured while he was ascending the fixed ladder attached to the quay, the accident did not arise out of and in the course of the employment.

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See also Ann. Cas., 1913, C. I., where the cases are collected in an elaborate note.

We think that the evidence in the present case would not have justified a finding that the accident arose out of the employment. The judgment must be reversed, but it will be without costs.

Filed, Feb. 24, 1914.

WM. C. GEBHARDT,
Clerk.

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Stipulation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

LENA DUNNEWALD, as administratrix of THEODORE DUNNEWALD, deceased, Petitioner and Defendant-Appellant, vs. HENRY STEERS, Incorporated, Defendant and Prosecutor-Respondent.	On Appeal From Judgment of Supreme Court, on Certiorari.

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It is hereby Stipulated that the Petitioner and defendant-appellant shall have until the first day of April, nineteen hundred and fifteen, within which to print and serve the printed books of the above entitled cause, upon appeal and shall have until the twenty-first day of April, nineteen hundred and fifteen, within which to prepare, print and serve her points, and that the defendant and prosecutor respondent, shall have until the twelfth day of May, nineteen hundred and fifteen within which to prepare, print and serve its points in reply.

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Dated, Feb. 25, 1915.

SAMUEL A. BESSON,
Attorney for Petitioner and
Defendant-Appellant.

LINDABURY, DEPUE & FAULKS,
Attorneys for Respondent-Appellee.

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