

INDEX

	PAGE
Notice and Grounds of Appeal	1
Rule Reversing Judgment and Remittitur.	3
Opinion of Supreme Court	4
Reasons	7
Affidavit for Writ of Certiorari	9
Writ of Certiorari	14
Endorsement of Writ	16
Return to Writ	17
Dependent's Claim Petition for Compensation	18
Respondent's Answer to Dependent's Claim Petition	24
Order fixing date of hearing	28
Opinion of Commissioner Stubbs	64
Determination of Facts and Rule for Judgment of Commissioner Stubbs	69

TESTIMONY BEFORE COMPENSATION COMMISSIONER

Testimony for the Petitioner.

Clara G. Soden,		
direct examination		30
cross "		31
re-direct "		32
Charles R. Guyer,		
direct examination		33
cross "		34
re-direct "		37, 38
re-cross "		38
Curtis L. Clark,		
direct examination		38
cross "		42

Testimony for the Respondent.

Curtis L. Clark,		
direct examination		51
cross "		53

	PAGE
John McFayden,	
direct examination	54
cross “	56
re-direct “	58
Frank A. Gillespie,	
direct examination	59

PROCEEDINGS IN COURT OF COMMON PLEAS.

Notice of Appeal to Common Pleas	72
Order Fixing Date of Hearing	74
Opinion of John P. Kirkpatrick, <i>J.</i>	78
Finding of Facts, Determination and Order	82

NOTICE AND GROUNDS OF APPEAL.

Filed November 26, 1926.

New Jersey Supreme Court

CLARA G. SODEN,
Petitioner-Appellee,
vs.
PUBLIC SERVICE TRANSPORTA-
TION COMPANY, a corporation,
Respondent-Appellant.

On Certiorari.
On Appeal
from New
Jersey
Supreme
Court.

10

To Joseph H. Edgar, Esq., attorney of peti-
tioner-appellee.

20

SIR:

TAKE NOTICE, that the respondent appeals to
the New Jersey Court of Errors and Appeals
from the whole of the judgment entered in the
New Jersey Supreme Court in the above-entitled
cause reversing the judgment of the Middlesex
County Court of Common Pleas, and affirming
the award of the Workmen's Compensation Bu-
reau, on the following grounds:

30

1. Because the New Jersey Supreme Court
in reversing the judgment of the Middlesex
County Court of Common Pleas and affirming
the award of the Workmen's Compensation Bu-
reau for the petitioner and against the respond-
ent in giving judgment of reversal for the peti-
tioner and against the respondent, when such
court should have affirmed the judgment of the
Middlesex County Court of Common Pleas and

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Notice and Grounds of Appeal.

have given judgment for the respondent instead
of for the petitioner.

Dated, November 23, 1926.

Yours truly,

JAMES O. BOYD,

10 Attorney of Respondent-Appellant.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

ROBERT HIGGINS, being duly sworn according
to law, on his oath says: I served a copy of
the within notice and grounds of appeal on
Joseph H. Edgar, attorney of the petitioner-
appellee, at his office, 40 Paterson St., New
20 Brunswick, N. J., on Nov. 24, 1926, between
the hours of ten A. M. and four P. M., by leav-
ing said copy with Mildred K. Fisher, the per-
son in charge.

ROBERT HIGGINS.

Sworn and subscribed before me
this 24th day of November, 1926.

30 THOMAS SMITH,
Notary Public of N. J.

Rule Reversing Judgment and Remittitur.

**RULE REVERSING JUDGMENT AND
REMITTITUR.**

NEW JERSEY SUPREME COURT.

<p>CLARA G. SODEN, <i>Petitioner-Prosecutor,</i> <i>On Certiorari,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <i>Respondent-Defendant,</i> <i>On Certiorari.</i></p>	}	<p>10</p> <p><i>On Certiorari.</i></p>
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The Court having inspected the record and proceedings of the Court of Common Pleas in and for the County of Middlesex, returned with the writ of certiorari in this cause, and the reasons for reversing the judgment below, and heard the arguments of counsel therein, and having duly considered the same: 20

IT IS ORDERED that all judgment of the Court of Common Pleas in and for the County of Middlesex aforesaid be reversed, set aside, made void and for nothing holden, and that the record be remitted to the Court of Common Pleas in and for the County of Middlesex to be proceeded with according to law and the practice of said court. 30

Entered November 17, 1926.

On motion of

JOSEPH H. EDGAR,
Attorney and of Counsel for Prosecutor.

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Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed September 30, 1926.

NEW JERSEY SUPREME COURT.

No. 268, May Term, 1926.

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CLARA G. SODEN,
Petitioner-Prosecutor,

vs.

PUBLIC SERVICE TRANSPORTA-
TION COMPANY, a corporation,
Respondent-Defendant.

20 Submitted May 14, 1926; decided October 5,
1926.

Certiorari to Middlesex Pleas, which reversed the finding of the Commissioner for claimant in a workmen's compensation case.

Before Justices Parker, Black and Campbell.

For the petitioner-prosecutor, Joseph H. Edgar.

For the respondent-defendant, James O. Boyd.

30 PER CURIAM:

The plaintiff's intestate, Raymond Soden, was one of four drivers of Public Service busses, who were required to report to the night station-master, named Guyer, shortly before six in the morning, for duty, and were then put into a touring car driven by another employee named Moller to be taken to the garage, where they were themselves to take charge of their several busses and start out at their scheduled times.

40 On the morning in question the men were as-

Opinion of Supreme Court.

sembled and the touring car started for the garage. It never arrived there to discharge its passengers. Someone in the party seems to have suggested that there was time enough to go on beyond the garage, cross the railroad tracks and go a mile or so further to look at the scene of an accident that had occurred the day before; so the car under charge of Moller went on to the place of the accident, turned around and was crossing the railroad tracks on its return when it was struck by a train and all the occupants with the exception of a man named Clark, and including Soden, were killed.

10

Several defenses were made, including one that Soden's employment had not begun because his time had not begun to run; but the Commissioner properly brushed this aside. The real point of the case was whether under the circumstances the accident was one arising out of and in the course of the employment. If the widow of Moller were suing in this case, it might be proper to hold that the divergence from his course for a purely private errand would bar the claim. That, of course, is not before us. When we come to the passive occupants of the car, the question arises whether they are also barred because without their participation, and perhaps against their protest, a fellow servant undertook to take them somewhere not contemplated in the employment. The Commissioner was justified on the testimony of Clark in finding that Soden at least had nothing to do with the deviation, though he was riding on the front seat with Moller. Clark said, in effect, that "someone in front" suggested going there, that he, Clark, said it would be no use because the thing had all been cleared up, but that Moller

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Opinion of Supreme Court.

went on, and no one else said anything. We do not think that this misconduct of a fellow servant should bar the petitioner as a deviation.

As the Commissioner was entitled to find, Moller wished to go see the accident; he was entrusted with the driving of the car, and it was
10 not for the others except in an extreme case to interfere with him for fear of themselves bringing on an accident.

Our conclusion is that the judgment of the Pleas should be reversed and the award of the Commissioner affirmed.

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Reasons.

REASONS.

Filed November 7, 1925.

NEW JERSEY SUPREME COURT.

CLARA G. SODEN, <i>Petitioner-Prosecutor,</i> <i>vs.</i> PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <i>Respondent-Defendant.</i>	}	10 <i>On Certiorari.</i> <i>Reasons.</i>
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1. Because, in the said determination of facts and rule for judgment, it was ordered that the award for the death of Raymond Soden, deceased husband of the prosecutor, made in favor of the prosecutor by William E. Stubbs, Deputy Commissioner of the Workmen's Compensation Bureau, be set aside and judgment entered in favor of the defendant, The Public Service Transportation Company, and against the said prosecutor, whereas it should be ordered that judgment be entered in favor of the said prosecutor and against the said Public Service Transportation Company. 20

2. Because, in the said determination of facts and rule for judgment the award of William E. Stubbs, Deputy Commissioner of the Workmen's Compensation Bureau, allowing compensation at the rate of \$16.38 per week to the prosecutor for a period of three hundred weeks commencing August 7, 1924, and after the expiration of three hundred weeks' compensation to the prosecutor for the benefit of the prosecutor's son at the rate of \$14.33 per week until he reaches the age 40

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 49 1.460

Reasons.

of sixteen years on May 14, 1940, and also allowing the sum of \$150 to be paid the prosecutor on account of burial expenses and also ordering the defendant to pay the sum of \$300 to the prosecutor's attorney as counsel fee was disallowed, whereas the said award should be allowed.

10 3. Because, by the said determination of facts and rule for judgment it was determined that the said Raymond Soden died as a result of an accident which did not arise in the course of his employment, whereas the injuries causing the death of Raymond Soden did arise in the course of his employment.

4. Because, by the said determination of facts and rule for judgment, it was determined that the said Raymond Soden died as the result of an accident which did not arise out of his employment, whereas the injuries causing the death of Raymond Soden did arise out of his employment.

20 5. Because the Middlesex County Court of Common Pleas erroneously found on the uncontroverted facts of the within cause that the accident which caused the death of the deceased was not an accident arising out of or in the course of his employment.

30 6. Because the Middlesex County Court of Common Pleas in its determination and judgment, although it accepted the facts as fixed and determined by William E. Stubbs, Deputy Commissioner of the Workmen's Compensation Bureau, erroneously held that on these facts the death of the deceased did not result from an accident arising out of or in the course of his employment.

JOSEPH H. EDGAR,
Attorney of Prosecutor.

40 Dated, November 7, 1925.

Affidavit for Writ of Certiorari.

AFFIDAVIT FOR WRIT OF CERTIORARI.

Filed October 14, 1925.

NEW JERSEY SUPREME COURT.

<p>CLARA G. SODEN, <i>Prosecutor,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <i>Defendant.</i></p>	}	<p>10</p> <p><i>On Certiorari.</i></p> <p><i>Affidavit.</i></p>
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STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } *ss.*

CLARA G. SODEN, being duly sworn on her 20
oath, according to law, deposes and says:

1. That she resides in the Borough of High-
land Park, County of Middlesex and State of
New Jersey.

2. That she filed a petition for compensation
with the Workmen's Compensation Bureau in
behalf of herself and her minor son, John Ed-
ward Soden, against the Public Service Trans-
portation Company as a result of the death of
her husband, Raymond Soden, a former em- 30
ployee of the said Public Service Transportation
Company.

3. That a hearing held in the Court House at
New Brunswick, N. J., on the 8th day of April,
1925, before William E. Stubbs, Deputy Commis-
sioner, found that the decedent, Raymond Soden,
was in the employ of the Public Service Trans-
portation Company at the time of the accident
and that the decedent met his death from an acci-
dent which arose out of and in the course of his 40

Affidavit for Writ of Certiorari.

employment and the said injury was neither intentionally self-inflicted nor had for its proximate cause intoxication. As a result of this finding an award was made in accordance with the statute.

10 4. The Public Service Transportation Company appealed from the determination of William E. Stubbs, Deputy Commissioner, to the Middlesex County Court of Common Pleas. The Middlesex County Court of Common Pleas reversed the opinion of the Deputy Commissioner and held that while the decedent died as the result of the accident occurring during his employment, nevertheless, the decedent did not die of an accident which arose out of or in the course of the employment, which judgment was entered on July 14, 1925.

20 5. Deponent says that she is advised that the decision of law as laid down by the Middlesex County Court of Common Pleas was not in accordance with the decision of law which should have been made from the facts that were determined by the Middlesex County Court of Common Pleas.

30 6. Deponent further says that she has no remedy in the nature of an appeal from a decision of the Middlesex County Court of Common Pleas but is prepared to show that the Middlesex County Court of Common Pleas erred in its conclusion of law that the accident did not arise in the course of or out of the employment, and this she bases on the reasons attached hereto, marked Schedule A.

CLARA G. SODEN.

Sworn and subscribed to before me
this 5th day of August, 1925.

40 CHARLES W. SEDAM,
Notary Public of New Jersey.

Affidavit for Writ of Certiorari.

SCHEDULE A.

The Middlesex County Court of Common Pleas affirmatively stated five findings of facts which re-establish five similar findings of facts by the Deputy Commissioner, all of which were pertinent to the successful proof of the deponents' case, but none of these findings of facts given by the Middlesex County Court of Common Pleas touched on proof on which the questions of law set forth above were described. 10

These findings of facts are the first five set forth in the finding of facts and determination and order of the Middlesex County Court of Common Pleas, of which the following is a true copy:

CLARA G. SODEN, <i>Petitioner-Appellee,</i> vs. PUBLIC SERVICE TRANSPORTA- TION COMPANY, <i>Respondent-Appellant.</i>	}	On Appeal. Finding of Facts. Determina- tion and Order.	20
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This matter coming on to be heard before me 30
 is on appeal from a determination awarding
 compensation to the petitioner-appellee against
 the respondent-appellant, made by William E.
 Stubbs, Deputy Commissioner of Compensation,
 under an act entitled, "An act prescribing the
 liability of an employer to make compensation
 for injuries received by an employee in the
 course of employment, establishing an elective
 schedule of compensation and regulating pro-
 cedure for the determination of liability and 40

Affidavit for Writ of Certiorari.

compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto.

The cause came on for trial at the Middlesex County Court House, in the City of New Brunswick, on June 19, 1925, the petitioner-appellee
10 being represented by Attorney Joseph H. Edgar and respondent-appellant by Attorney James O. Boyd.

After careful consideration of the transcript of the record of the case, the testimony taken before the Deputy Commissioner, the argument of counsel, and having read over the briefs submitted by counsel, I determine and find as follows:

First. That the decedent met his death on August 7, 1924, and was at the time of his death
20 in the employ of the Public Service Transportation Company, the respondent-appellant, as a bus driver and that such employment was subject to the Compensation Section of Chapter 95, Laws of 1911.

Second. That on the aforesaid date the petitioner's decedent met his death from an accident that was not an injury self-inflicted nor was intoxication the proximate cause of said accident.

30 Third. That the respondent herein had knowledge of said accident within the time prescribed in paragraph 15 of the aforesaid act.

Fourth. That the wages of the decedent at the time of his death were \$40.95 per week.

Fifth. That the decedent left surviving him his wife, Clara G. Soden, and a son, John Edward Soden, born May 14, 1924.

40 Sixth. That the accident resulting in the death of the petitioner's decedent did not arise out of

Affidavit for Writ of Certiorari.

nor in the course of his employment with the respondent.

Seventh. That the petition should be dismissed.

IT IS, THEREFORE, on the 14th day of July, 1925, ORDERED that judgment final be entered in favor of the Public Service Transportation Company, the respondent-appellant, and against Clara G. Soden, the petitioner-appellee, and that the petition be dismissed and the prayers of the petitioner-appellee denied. 10

JOHN P. KIRKPATRICK,
Judge of Middlesex County Court of
Common Pleas.

Dated, July 14, 1925.

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Writ of Certiorari.

WRIT OF CERTIORARI.

CLARA G. SODEN, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> 10 PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <div style="text-align: right;"><i>Respondent.</i></div>	}	<i>On Certiorari.</i> <i>Writ.</i>
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NEW JERSEY, *ss.*

The State of New Jersey to the
 Court of Common Pleas in and for the
 (L. S.) County of Middlesex, and F. William
 Hilker, Clerk of said Court, and Pub-
 lic Service Transportation Company,

20 a corporation, GREETING:

We being willing for certain reasons to be
 certified of and concerning a certain determina-
 tion and judgment rendered on the 14th day of
 July, 1925, by the Honorable John P. Kirk-
 patrick, Judge of the Court of Common Pleas,
 in and for the said County of Middlesex, in cer-
 tain proceedings brought on behalf of Clara G.
 Soden, petitioner, against Public Service Trans-
 30 portation Company, a corporation, respondent,
 for the determination and recovery of compensa-
 tion under an act of the Legislature of the
 State of New Jersey entitled, "An Act pre-
 scribing the liability of an employer to make
 compensation for injuries received by an em-
 ployee in the course of employment, establishing
 an elective schedule of compensation and regu-
 lating procedure for the determination of lia-
 bility and compensation thereunder," approved
 40 April 4th, 1911, and the acts amendatory thereof

Writ of Certiorari.

and supplemental thereto, we command you that the said determination and judgment, 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 and control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature at Trenton on the 30th day of October, 1925, that therein may be caused to be done what of right and according to law ought to be done. 10

Witness, the Honorable William S. Gummere, Chief Justice of our said Supreme Court at Trenton, this 15th day of October, 1925.

EDWARD J. KELLEHER,
Clerk. 20

JOSEPH H. EDGAR,
Counsel for Petitioner.

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Endorsement of Writ.

Writ of Certiorari.

Endorsement to Writ.

NEW JERSEY SUPREME COURT.

10	CLARA G. SODEN, <div style="text-align: right; padding-right: 20px;"><i>Petitioner,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Respondent.</i></div>	}	<i>On Certiorari.</i> <i>Writ.</i>
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Allocatur: October 10, 1925.

20

SAMUEL KALISCH,
J. S. C.

Joseph H. Edgar,
 Counsellor at Law,
 40 Paterson Street, New Brunswick, N. J.

Service of a true copy of the within original writ is hereby acknowledged this 17th day of October, 1925.

30

F. WM. HILKER,
Clerk.

Service of a true copy of the within original writ is hereby acknowledged this 17th day of October, 1925.

JOHN P. KIRKPATRICK.

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Return to Writ.

Service of a true copy of the within original writ is hereby acknowledged this 24th day of October, 1925.

PUBLIC SERVICE TRANSPORTA-
TION COMPANY,

JAMES O. BOYD,
Attorney. 10

RETURN TO WRIT.

To the Honorable the Justices of the Supreme Court of Judicature of New Jersey:

In obedience to the command of this writ directed to the Court of Common Pleas, and F. William Hilker, Clerk to the Honorable Justices of the Supreme Court of Judicature of New Jersey, the judgment, order and proceedings in the said Court of Common Pleas in a certain plaint or proceedings against the Public Service Transportation Company at the suit of Clara G. Soden, together with all papers touching and appertaining to the same as fully and entirely as they remain as is commanded. 20

JOHN P. KIRKPATRICK,
Judge. 30

F. WILLIAM HILKER,
Clerk.

*Dependent's Claim Petition.***DEPENDENT'S CLAIM PETITION FOR
COMPENSATION.**

Form No. 24.

10 NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU,
TRENTON, N. J.

CLARA G. SODEN,

*Petitioner,**vs.*

PUBLIC SERVICE TRANSPORTA-
TION COMPANY, a corporation,
Respondent.

*Claim Peti-
tion No.**January 20,
1925.*

20

Attorney for petitioner, Joseph H. Edgar, 40
Paterson street, New Brunswick, N. J.

To the Workmen's Compensation Bureau of
New Jersey:

The claimant respectfully alleges the following
facts:

30

1. What was the full name of the decedent?
Raymond Soden.
2. Where did decedent live? 103 Senior Street,
New Brunswick, New Jersey.
3. Sex of decedent Male.
4. Date of birth of decedent? March.
5. Give below, in reference to each person
claimed to be dependent upon the deceased
at the time of accident or death:
Name of Each Dependent. Clara G. Soden,
John Edward Soden.

40

Age at Last Birthday 18.

Dependent's Claim Petition.

Date of Birthday. March 7, 1906.

May 14, 1924.

Relation to Decedent. Wife, Son.

6. By whom was decedent employed at the time of accident? (Give name and business address). Public Service Railway Co., a corporation, New Brunswick, New Jersey. 10
7. What was the business of the employer, Common Carrier.
8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him? No.
9. Did he receive such notice from the employer? No.
10. Did the employer have knowledge of this accident? Yes. 20
11. Did you notify the employer of this accident? No.
12. If so, on what date?
13. Have you made claim to the employer for compensation? No.
14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Driver for buses owned and operated by respondent. Was being transported to bus garage to obtain bus to drive and was being transported in an automobile owned by the respondent and driven by an employee of the respondent who was directed to take decedent and several employees to this bus garage. 30
15. When did the accident happen? August 7, 1924, about 6 A. M. 40

Dependent's Claim Petition.

16. Where did the accident happen? On road leading from New Brunswick to Franklin Park near Voorhees Station.
17. What was the nature of the accident, and how did it happen? An automobile owned by the respondent and operated by the respondent's servant carrying the decedent and other employees of the respondent's was struck by an engine owned and operated by the Pennsylvania Railroad, which engine was running on the railroad tracks leading from Voorhees Crossing to New Brunswick.
18. Did deceased work any after the accident? No.
19. If so, give date he was compelled to stop work.
20. 20. Give date of death. August 7, 1924.
21. Were his wages fixed by piece work? No.
22. If so, what was his average weekly wage?
23. If wages were fixed by the hour, state rate per hour. Sixty-two (62) cents.
24. Give number of hours in an ordinary working day. Eight.
25. Give number of days in an ordinary working week. Seven.
- 30 26. State the amount of weekly wages. \$34.02.
27. How much money have you received from the employer as compensation (not medical aid) since the accident?
28. Has the employer promised to pay you any compensation? No.
29. If so, how much?
30. Was medical aid required? Yes.
31. If so, was this service furnished by the employer? No.
- 40

Dependent's Claim Petition.

32. What other sum did you expend for medical, surgical or hospital service? \$8.00.
33. Give name and address of physician and hospital. Dr. Frederick W. Scott, 74 Bayard street, New Brunswick, N. J. Middlesex General Hospital, Somerset street, New Brunswick, N. J. 10
34. What other facts are there which you believe important? Decedent died within ten hours after the accident. Decedent was instructed to accompany the employee of the respondent who was driving the respondent's car and had no alternative but to remain in the car when the respondent's employee finally decided to start towards the bus garage where the decedent had been instructed to go and where the respondent's agent, driving the respondent's car, had been instructed to take the decedent. 20
35. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? Yes.

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this 40

Dependent's Claim Petition.

proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

CLARA G. SODEN,
Petitioner.

215 Raritan ave., Highland Park, N. J.

10

STATE OF NEW JERSEY, }
COUNTY OF MIDDLESEX. } ss.

CLARA G. SODEN, being duly sworn according to law, on her oath deposes and says: That she is the petitioner named in the foregoing petition; that she has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of her knowledge and belief.

20

CLARA G. SODEN,
Petitioner.

Subscribed and sworn to before me,
this twenty-sixth day of January,
1925, at Highland Park, New Jersey.

B. F. GEBHARDT,
Notary Public of New Jersey.

30

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

40

Dependent's Claim Petition.

TO THE RESPONDENT.

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall, within ten days from the receipt of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts. 10

WORKMEN'S COMPENSATION BUREAU,

W. E. Stubbs,
Secretary. 20

I, W. E. STUBBS, Secretary of the New Jersey Workmen's Compensation Bureau, hereby certify the foregoing to be a true and correct copy of the Dependent's Claim Petition for Compensation as filed with this Bureau.

W. E. STUBBS.

30

40

Respondent's Answer to Claim.

Form No. 25.

**RESPONDENT'S ANSWER TO
DEPENDENT'S CLAIM PETITION.**

Filed February 28, 1925.

10 NEW JERSEY DEPARTMENT OF LABOR
WORKMEN'S COMPENSATION BUREAU
TRENTON, N. J.

<p>CLARA G. SODEN, <i>Petitioner,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <i>Respondent.</i></p>	}	<p><i>Claim Petition No. 3639. February 27, 1925.</i></p>
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Attorney for respondent, James O. Boyd, 80
Park Place, Newark, N. J.

In answer to Claim Petition filed in this cause.

1. What was decedent's name? Raymond Soden.
 - 30 2. Where did decedent reside? 103 Senior street, New Brunswick, N. J.
 5. Do you question the dependency, age or relation of any of the persons named in question No. 5 of the Claim Petition? If so, specify. The respondent has no knowledge concerning the matter.
 6. Was the decedent in your employ at the time of the accident? See answer to 34.
 7. State your business. Auto bus transportation.
- 40

Respondent's Answer to Claim.

8. Did you receive written notice from the decedent at the time of hiring, or later, that the Compensation Law was not to apply to him? No.
9. Did you give such notice to him? No.
10. When did you first have knowledge of this accident? See answer to 17. 10
11. Did you receive notice of this accident from the Petitioner? No.
12. If so, on what date?
13. Has any claim for compensation been made? None prior to the petition in this case.
14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? See answer to 34.
15. When did the accident happen? The respondent has been informed that the decedent suffered an accident on August 7, 1924, at the crossing of the Millstone Branch of the Penn. R. R. with the Lincoln Highway, about two miles south of New Brunswick, N. J. 20
16. Where did the accident happen? See answer to 15.
17. What was the nature of the accident, and how did it happen? The respondent has been informed that the decedent, after leaving the employ of the respondent, was riding in an automobile that was struck by a train, thereby receiving injuries from which he died. 30
18. Did the decedent work any after the accident? No.
19. If so, give date he stopped work? 40

Respondent's Answer to Claim.

20. Give date of death. The respondent does not know.
21. Were his wages fixed by piece-work? No.
22. If so, what was his average weekly wage?
23. If wages were fixed by the hour, state rate per hour. Sixty-five cents.
- 10 24. Give number of hours in an ordinary working day.
25. Give number of days in an ordinary working week. Seven.
26. State the amount of weekly wages—
27. How much have you paid as compensation (not medical aid) since the accident? Nothing.
28. Have you promised to pay compensation? No.
- 20 29. If so, how much?
30. Was medical aid required? Respondent does not know.
31. If so, did you furnish all the medical, surgical, or hospital services, or other expense of last sickness?
32. Between what dates was service rendered?
33. Give name and address of physician and hospital rendering service at your direction?
- 30 34. What other facts are there which you believe important?

If you deny compensation is payable in this case, explain fully your reason for this conclusion. The decedent had been in the employ of the respondent, but shortly before the accident referred to had left such employment. The accident did not arise either

Respondent's Answer to Claim.

out of or in the course of the employment
of the decedent by the respondent.

PUBLIC SERVICE TRANSPORTATION CO.
(Respondent.)

80 Park Place, Newark, N. J.
(Address.)

10

By JAMES O. BOYD,
Attorney.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

ERNEST W. HEILIG, of full age, being duly
sworn according to law, on his oath deposes and
says: That he is the agent of the respondent
named in the foregoing answer to claim petition;
that he has read the same and is familiar with
the contents thereof; and that the matters and
things therein set forth are true according to the
best of his knowledge and belief.

20

ERNEST W. HEILIG,
Respondent.

Subscribed and sworn to before me,
this twenty-seventh day of Feb-
ruary, 1925, at Newark, N. J.

30

KENNETH W. INGALLS,
Notary Public of New Jersey.

(This affidavit may be sworn to before a
Deputy Commissioner or a Compensation Ref-
eree, or any other person authorized to ad-
minister an oath.)

40

Order Fixing Date of Hearing.

ORDER FIXING DATE OF HEARING.

Filed.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY.

10 WORKMEN'S COMPENSATION BUREAU.

CLARA G. SODEN,
Petitioner,

vs.

PUBLIC SERVICE TRANSPORTA-
TION COMPANY, a corporation,
Respondent.

20

It appearing that Clara G. Soden has filed claim petition with the Secretary of the Workmen's Compensation Bureau; and,

It appearing that the case has been assigned by the Secretary to me, a Deputy Commissioner of Compensation, for hearing,

30 It is on this 9th day of March, 1925, ORDERED that the day of the hearing be fixed for Wednesday, April 8, 1925, at 10:30 A. M., Court House, New Brunswick.

W. E. STUBBS,
Deputy Commissioner of Workmen's
Compensation.

40

Opening.

DEPARTMENT OF LABOR
WORKMAN'S COMPENSATION
COMMISSION.

CLARA G. SODEN,

Petitioner,

vs.

PUBLIC SERVICE TRANSPORTA-
TION COMPANY, a corporation,
Defendant.

10

Transcript.

Transcript of testimony taken in the above-en-
titled cause before William E. Stubbs, Deputy
Commissioner, at the Court House, New Brun-
swick, New Jersey, on Wednesday, the 8th day of 20
April, A. D. 1925.

Appearances:

James O. Boyd, Esq., and Leonard J. Tynan,
Esq., for respondent.

Joseph H. Edgar, Esq., for petitioner.

John F. Trainor, stenographer.

Mr. Tynan: The respondent admits that Ray-
mond Soden, petitioner-decedent, was killed on 30
the 7th day of August, 1924, at the crossing of
the Millstone Branch of the Pennsylvania Rail-
road with the Lincoln Highway, known as the
Voorhees Crossing. At the time of the accident
in which he was killed, he was in an automobile,
the accident resulting from the automobile being
struck by a train. We further admit that he re-
ceived injuries and was taken to a hospital and
remained unconscious from the time of the injury
until his death and died during the same day. 40

Clara G. Soden, direct.

10 The respondent further admits that on the day before this accident the said Raymond Soden was employed by the Public Service Transportation Company, a corporation, the respondent in this case, as a bus driver at a wage that amounted to sixty-five cents (65c.) an hour and that he worked a seven-day week, but that he was an extra man and his actual earnings were, therefore, somewhat uncertain. It is further admitted that the Public Service Transportation Company owned the automobile in which the said Raymond Soden was riding at the time of his death but we don't admit that the Public Service Transportation Company controlled or had authority over the said automobile at that time.

20 Mr. Edgar: I don't admit the sixty-five cent (65c.) rate or anything along that line such that would be interpreted to show that this deceased was not working at the time of his death or was not in the employ of the Public Service Transportation Corporation. I do admit it to the extent of showing the rate of salary.

CLARA G. SODEN, the petitioner sworn.

Direct examination by Mr. Edgar.

30 Q Mrs. Soden, what relation are you to the Raymond Soden who was killed on August 7, 1924? A His wife.

Q Did you and Raymond Soden have any children? A Yes.

Q How many? A One.

Q What is the name of the child? A John Edward.

40 Q How old is he? A He will be eleven months the fourteenth of this month.

Clara G. Soden, cross.

Q Fourteenth of April? A Yes, sir.

Q You are Clara G. Soden, the petitioner in this claim? A Yes.

Q When were you born, Mrs. Soden? A March 7, 1906.

Q Did you see your husband prior to this accident? Did you see your husband on August 7, 1924? A Yes. 10

Q Where did you see him? A At home.

Q What time did he leave home? A Between 5 and 5:15.

Q Do you know where he was going? A He was going to work.

Q Where was he going to work? A At the Public Service.

Q Where? A I think at the garage.

Q Not what you think, if you know. Do you know where he was going to work? A No, I don't know. 20

Q Did you notice how Mr. Soden was dressed that morning? A He was wearing a cap.

Q What kind of a cap? A Public Service cap and he was wearing a blue sweater and light trousers.

Mr. Edgar: Cross examine.

Cross examination by Mr. Tynan.

30

Q Where were you married, Mrs. Soden? A In the Stelton Baptist Church.

Q What city? A Stelton, New Jersey.

Q When were you married? A June 9, 1923.

Q This cap that you speak of, why do you speak of it as a Public Service cap? A Well, it was part of the Public Service equipment.

Q How do you know? A Well, he was assigned to work by the Public Service. 40

Clara G. Soden, re-direct.

Q How do you know? You know just what he told you? A I know from what he told me and it had Public Service numbers on the cap.

Q What were the numbers? A I don't know.

Q Why do you think they were Public Service numbers. You didn't know they were Public Service numbers, did you? A No.

10

Mr. Tynan: That's all.

Re-direct examination by Mr. Edgar.

Q How long had your husband worked for the Public Service prior to August 7th? A As long as the Public Service had had the busses.

Q How long was that? A They took it over August 1st, I think.

20 Q Mr. Soden, did he wear this cap other mornings previous to August 7th, going to work? A Yes.

Q You have seen Public Service drivers driving busses, have you not? A Yes.

Q Do they wear a distinctive hat? A Yes.

Q Was this hat the same as the hat they wear? A It was the same.

Q Is the name Public Service on the hat?

30

Mr. Tynan: That is rather leading.

A No.

Q Have you ever ridden in busses that your husband drove? A No.

Q Did you ever see your husband driving a bus? A Yes.

Q Working for the Public Service? A Yes.

Q Did he have the same hat on that he had on when he left the morning of August 7th? A

40

Yes.

Charles R. Guyer, direct.

CHARLES R. GUYER, sworn for the petitioner.

Direct examination by Mr. Edgar.

Q Mr. Guyer, on the morning of August 7, 1924, by whom were you employed? A Public Service Transportation Company.

Q What was your position? A Station Master, night. 10

Q Where were you stationed? A Scuyler street garage.

Q What were your duties at that time? A To assign in the morning, the various men and busses out to their runs. The regular men they know what lines to cover, the extra men I assigned duties to them.

Q On the morning of August 7th, did you assign Raymond Soden to duty? A I assigned him to go to the French street garage to get a bus and come back to Scuyler street. 20

Q Did you send him with anyone else? A Three other drivers and the night mechanic.

Q What did you send those three other drivers and mechanic in? A Twin-six Packard Touring car.

Q Was this automobile used by the Public Service? A Yes, sir, it was used as a service car. 30

Q Did you see the car go out that morning? A Yes, sir.

Q Who was driving the car? A Tom Mellor.

Q Is he employed by the Public Service? A He was, as night mechanic.

Q You directed Mr. Mellor to take these men up to the— A French street garage.

Q Who all were in the car? A Curtis Clark, John Sheska, Roy Gold, Raymond Soden and the driver, Thomas Mellor. 40

Charles R. Guyer, cross.

Q Do you hire and fire? A No, sir.

Q Did you at that time? A No, sir.

10 Q Was it your custom at that time to report violations of orders? A. Why, that all depended what the violations were. If they disobeyed orders in the garage, if I assigned work to a man and he disobeyed orders, naturally, I reported him to the Supervisor. Things that happened on the road were out of my power because I wouldn't see them.

Mr. Edgar: Take the witness.

Cross examination by Mr. Tynan.

Q What time did you go on duty at this garage? A Six P. M. August 6th.

20 Q What hour did your duty end? A At 6 A. M. August 7th.

Q These four men, including Mr. Soden, come into this Scuyler street garage while you were there? A The drivers that reported in the morning, yes.

Q About what time did they get there? A At various times, as the men reports.

30 Q I was thinking of this particular morning and these particular men. A That would be hard for me to say for every man comes there at a different time; of course, when I get enough men to go I send them up to the other garage.

Q This man, Tom Mellor, what was his duty there? A He is a mechanic, nights.

Q When did he go to work? A The same time I did.

Q He was through at 6 A. M.? A Six A. M. in the morning.

40 Q That was when his duties ceased? A That was when his duties ended.

Charles R. Guyer, cross.

Q How far away is it from the Scuyler street garage to the French street garage, approximately? A It is about half a mile, more or less.

Q Who did you give your directions to about going out on this trip? A On that morning the car was in front of the garage in the street, and as the drivers reported of course, I gathered them together and put them in the car and Mellor was in the garage working and I told him to drive these men up to the Front street garage. 10

Q They were together in the machine? A Three of them and the fourth driver came along and I put him into it.

Q Did you tell these men what to do when they got to the French street garage? A I told them each to get a bus and come back to Scuyler street. 20

Q Had you assigned a particular route to Mr. Soden? A Not at that time, he was to be assigned when he came back with the bus.

Q Where did those busses leave daily? A At the bus stand at the Pennsylvania Railroad Station.

Q How far is that from the Scuyler street garage? A It is a matter of four city blocks. 30

Q What time did the first of those busses that those men were to run, go out? A 5:55.

Q What time did the next one go out? A The next one would be about five after.

Q The first one about five minutes to six and the next one five after? A Of course, I don't just recall what the tripper schedule was.

Q One of those men was to take out the bus that was to leave the Pennsylvania Railroad Station bus stand at 5:55? A Yes, sir. 40

Charles R. Guyer, cross.

Q And they were to go to French street garage to get their bus, you gave them orders to that effect? A Yes, sir.

Q They all had the same orders and they all understood those orders? A Yes, sir.

10 Q And they were to get busses from the French street garage and bring them back to the Scuyler street garage? A Yes, sir.

Q Tom Mellor was the driver of the touring car? A Yes, sir.

Q You told him to take them to the French street garage? A I did.

Q Are you familiar with the question of when the pay of these men would begin? A The starting of the week, you mean?

Q No. A The day?

20 Q Yes. A I think—

Mr. Edgar: Do you know, Mr. Guyer?

A I think it was—

Mr. Edgar: Not what you think. Do you know?

A Yes, from the time they were allowed five minutes to get their bus before their schedule.

30 Q That is, they were paid for that five minutes? A Yes.

Q And Soden had not been assigned to any run? A No, not yet.

Q Not yet? A No.

Q Therefore, the question when his pay would begin was an open question until later when he would be assigned? A When he would return with his bus he would be assigned and—

40 Q Allowed five minutes? A Five or ten minutes.

Charles R. Guyer, re-direct.

Q At the time he left the Scuyler street garage to go to the French street garage he had not been assigned to any route? A No.

Q And, therefore, the question of when his pay should begin was not settled? A No.

Mr. Tynan: That's all.

10

Re-direct examination by Mr. Edgar.

Q Mr. Guyer, this was the usual custom every morning to come to the Scuyler street garage and to be directed by you? A Yes, sir.

Q As I understand you, you say they were to get their bus and come back to your place and there would be directed on a run? A Yes.

Q Did you fill out the time sheets for these drivers? A Not for the day men.

20

Q Then you don't know, as a matter of fact, when any one of these five men filled out their time sheets and started to work, do you? A The only man that would have any time going in would be Mellor, he had worked all night.

Q The other men, you had nothing to do with their time sheets? A No, sir.

Q As a matter of fact you don't know when they started to fill their time sheets? A No, I wouldn't know.

30

Q You said something about they were to be back within five or ten minutes. You mean you sent them out early enough so they would be allowed this five or ten minutes to get back to start their run? A They were sent out at eighteen minutes to six which allowed them thirteen minutes to get there and get back with the first bus going out.

Mr. Edgar: That's all.

40

Curtis L. Clark, direct.

Re-cross examination by Mr. Tynan.

Q One question. Who was to take out the 5:55 bus that morning? A That had not been assigned to any man yet.

Q Not assigned yet? A No, sir.

10 Q Had any of the busses been assigned to any of these men? A There was one man there that was a regular driver, he had a regular run.

Q So the 5:55 bus depended on the— A On the first man getting back from the other garage.

Q Of whom Soden was one? A Soden was one of them.

Q Which man was the regular driver? A Curtis Clark.

20 Q What time was his bus to go out? A Six twenty.

Q So he wasn't in so much of a hurry as the other ones? A No, he happened to be there and I sent him along with the other ones.

Mr. Tynan: I think that is all.

Re-direct examination by Mr. Edgar.

30 Q Who did you say the first man to be sent out was? A One of the three extra men. Whoever was the first to get back would be the man to go out on the first tripper.

CURTIS L. CLARK, sworn for the petitioner.

Direct examination by Mr. Edgar.

40 Q Mr. Clark, for whom do you work? A Public Service Transportation Company.

Curtis L. Clark, direct.

Q Are you here under subpoena? A Yes, sir.

Q On August 7, 1924, for whom were you working? A Public Service Transportation Company.

Q Where did you first report that morning?

A To the garage on Scuyler street, number 3 Scuyler street. 10

Q Were you directed to go anywhere else from there? A I was directed to go to the garage where they keep part of their equipment, that morning.

Q Who directed you to go there? A The night station master.

Q Who was that? A Charlie Guyer.

Q The man that testified before you? A Yes. 20

Q Anyone else ordered out with you at that time? A Three men besides me.

Q Who was that? A Raymond Soden, Le-Roy Gold and John Sheska.

Q Did you know Tom Mellor? A Yes, he was supposed to take us up.

Q Take you up how? A In the service car.

Q Did you leave the Scuyler street station?

A Yes, sir.

Q And who was driving the car? A Thomas Mellor. 30

Q And the other three men that you mentioned were in the car? A Yes, sir.

Q Who sat in the front seat? A The driver and Raymond Soden.

Q Was Mr. Soden sitting alongside of you?

A No, he was in the front seat.

Q Do you know who Mr. Soden is? A Yes, sir.

Q Do you know Mr. Soden? A Yes, I was personally acquainted with him. 40

Curtis L. Clark, direct.

Q You talked with me before about this? A Yes.

Q Didn't you tell me before that Mr. Sheska—

Mr. Tynan: Counsel is evidently looking for some statement. I believe some man has gone to look for a statement.

10

Mr. Edgar: Yes, he has.

Mr. Tynan: If counsel wants to go on now on the ground of surprise, he may go on. I will withdraw my objection, if that is so.

Q Where was Mr. Gold sitting? A Mr. Gold was in the back seat right by the side of me.

Q Where were you sitting? A I was on the right-hand side in the rear seat.

20

Q How many people were in the back seat?

A Two.

Q Besides you? A Only two.

Q How many were in the front seat? A Two.

Q How many people were in the car? A Five.

Q Where was this fifth man? A The fifth man was in the center; it was a seven-passenger car.

30

Q Who was that man? A John Sheska.

Q Then you proceeded out from Scuyler street? A Yes, sir.

Q And you went out towards French street, where your busses are located? A Yes, sir.

Q When did you first notice anything unusual on your way to your work? A When the driver passed the place where we were supposed to get off at.

40 Q How far is the French street station, this garage where you barn your busses, from the be-

Curtis L. Clark, direct.

ginning of the highway by the cemetery there?

A It is about 100 feet.

Q How near were you to the highway when you noticed that you were by the garage? A Only a few feet passed the garage, we knew that we weren't stopping there.

Q Do you drive a car? A Yes. 10

Q You are acquainted with rates of speed? A I have been driving long enough, I am a very good judge of speed.

Q How fast was this car going at this point? A At the rate of about thirty or thirty-five miles an hour, as we passed the garage.

Q Did the car continue to go along? A Yes, sir.

Q Did the car cross the tracks of the Pennsylvania Railroad on the highway? A Yes, sir. 20

Q In what direction were you proceeding at that time? A Proceeding south.

Q Were you proceeding toward Newark or toward Trenton? A Towards Trenton.

Q Did you stop at the crossing? A No.

Q Where did you go? A We went about a half mile beyond the crossing.

Q What did you do then? A Pulled in a lane and turned around. 30

Q What did you do after you turned around? A Started back towards New Brunswick.

Q How fast was the car traveling then? A Around thirty-five or forty miles an hour.

Q Did anything unusual happen on the way back to New Brunswick? A Not that I remember.

Q Was there an accident coming back?

Mr. Tynan: I have stipulated that an automobile was struck by the train some- 40

Curtis L. Clark, cross.

time, I don't know whether it was coming or going.

A It appeared to me there was—of course, I don't remember it, when I come to the hospital I was told about it by the other parties.

10 Q Who was driving the car after you had turned around and was coming toward New Brunswick? A Thomas Mellor.

Q Did you, yourself, or did you hear anyone in the car ask Tom Mellor to drive out the highway? A No, sir.

Mr. Tynan: I would like that last question and answer read by the stenographer, if your Honor please.

20 Mr. Edgar: Take the witness.

Cross examination by Mr. Tynan.

Q What time did you get to the Scuyler street garage that morning, Mr. Clark? A By guessing, I judge it was about twenty minutes or twenty-five minutes to six, right around that time.

30 Q You say Mr. Guyer directed you and the others to ride to French street and get your busses? A Yes.

Q And Mr. Mellor was directed to drive you there? A Yes, sir.

Q How far is it from the Scuyler street garage to the French street garage, about? A It is about three-quarters of a mile.

40 Q How far is it from the French street garage to the Voorhees Railroad Crossing? A It is about one mile and a half; pretty close to a mile and a half.

Curtis L. Clark, cross.

Q You are a resident of the City of New Brunswick? A Sir?

Q You live in New Brunswick? A Yes, sir.

Q I wish you would look at this map. You have no objection to the map?

Mr. Edgar: Not at all.

10

Q I don't know whether you are familiar with the location. There is Highland Park, there is the river and here is Scuyler street, is that your recollection of about the position of the Scuyler street garage? A That red dot?

Q Yes, here is the French street. A This is the State Highway.

Q Here is the Voorhees Crossing down here. Do you remember what street you drove from the Scuyler street garage to get to the Lincoln Highway? A We went out Scuyler and up Bayard street.

20

Q You came down Scuyler street this way (indicating). The streets are not all named on this map that is the trouble? A Bayard street is about a block away from the garage, this garage lays in the center, this is Codwise avenue starting in right here (indicating).

Q Is that red spot about in the position of the Scuyler street garage? A Yes, sir.

30

Q Is that second red spot about in the position of the French street garage? A Yes, sir.

Q Is this Lincoln Highway the street you then followed when you passed the French street garage? A Yes, sir.

Q And you kept right on straight ahead across this Voorhees Crossing here? A Yes, sir.

Q And went on a half mile beyond here? A Yes, sir.

40

Curtis L. Clark, cross.

Q And then turned back? A Towards New Brunswick.

Q And your supposition is that an accident happened at that Voorhees Crossing? A Yes, sir.

10 Q What speed were you going at that crossing? A I couldn't recall how much speed he was making when he came towards the crossing, before he reached the crossing.

Q How is that? A That comes on everybody, I suppose. I didn't never remember hearing a bell or whistle or even seeing the train.

Q How far before you reached the crossing did you lose your head? A It may have been when he first applied his brakes and began skidding.

20 Q How far from the crossing was that? A One hundred feet away from the track.

Mr. Tynan: I would like to have the map marked R. 1 for identification.

Map marked R. 1 for identification.

30 Q When Mr. Guyer gave you orders to go to the French street garage, did he give anybody a key to that garage? A Not that I seen personally, I don't remember.

Q You had been up there other mornings? A That was my first morning for quite awhile, I had been up there previous to that, it was previous to that but that was one of the mornings I happened to have to go up there.

40 Q Was there any conversation in this automobile after you left the Scuyler street garage and before you reached the French street garage? A No, sir, no conversation at all.

Curtis L. Clark, cross.

Q Everybody silent? A Everybody was silent.

Q No discussion at all by anybody? A No discussion before they reached the French street garage, there wasn't any discussion of any kind.

Q You passed the French street garage and Mellor drove right past it you say? A Yes, 10
sir.

Q There hadn't been any plan between you, by the time you reached French street? A No, sir.

Q After you left the French street garage was there any conversation? A The boys, some of them, seemed to be surprised but they didn't make any emotions to that effect, I do remember about an accident that happened there the day before but I had no idea then that they was 20
going to that crossing. I spoke up and I told them there wasn't any use of going out there because they moved it the day before, he just proceeded right on.

Q Who was it that said something that led you to say that?

Mr. Edgar: Just a moment, he testified he didn't know. 30

Q Who was it that said something that led you to say that? A I can't recall who it was that spoke, someone in front of me.

Q You are not sure whether it was on the front seat or in the middle? A I am sure it was in front of me.

Q Did anybody make any protest? A Only what I told them, there wasn't any use in visiting that crossing.

Q No one else? A No one else. 40

Curtis L. Clark, cross.

Q Raised any objection to the course of procedure? A Didn't seem to.

Q Everybody sat tight and you went right along? A Yes, sir.

Q Is that right? A Yes, sir.

Q When you reached that railroad crossing was the automobile stopped? A No, sir.

10 Q How fast was he going across the crossing? A I don't remember how fast it was going after it reached the crossing but it never stopped at the crossing.

Q Are there gates at that crossing? A No, sir.

Q Is there a flagman at that crossing? A No.

Q Is there anything in the way of a safety appliance at that crossing?

20

Mr. Edgar: I object to that line of questioning. We stipulated about the accident and nothing about the liability of the Pennsylvania Railroad or anyone else. This is a Workmen's Compensation hearing. I have shown what has happened up to the time of the accident and it is improper cross examination.

30

Mr. Tynan: Your Honor, of course, as this automobile crossed this crossing he could have stopped and I feel I would like to find out what kind of a crossing it was and why they didn't stop.

40

Mr. Edgar: This is a Workman's Compensation hearing and I don't intend to have testimony elicited for any other case that might come up in this matter. We are not talking about the type of accident, how it happened. There was an accident and the

Curtis L. Clark, cross.

petitioner's husband was killed. I have shown the petitioner's husband was in a car and nothing to do with ringing of bells, lights or anything else. It is entirely improper. It is very material to any future case.

Q Your automobile went right ahead and crossed the crossing? A Yes, sir. 10

Q About a half mile beyond you turned? A Yes, sir.

Q About how far is it from the French street garage to that crossing? A It is about a mile and a half.

Q And your voice was the only voice you heard utter any protest about going ahead? A Yes, sir. 20

Q You, by the way, knew something about the accident there the day before? A I was an eye-witness to the accident there the day before that, that is how I come to know there wasn't anything there. I saw it all removed, I saw them take the car away and get the lady to the hospital and also her husband.

Q Did you talk about that prior accident to these men? A I didn't mention that whatever they learned of that, they learned from another source. 30

Q After this accident when did you become conscious again? A About 2 o'clock in the afternoon.

Q In a hospital? A Yes, sir.

Q Did you have your watch with you? A It was there at the hospital but they had taken it off me.

Q When did you see the watch again? A I saw the watch a few days afterward. 40

Curtis L. Clark, cross.

Mr. Edgar: I object to the question. It is again immaterial and improper. We haven't brought anything out here about his watch or what he done in the hospital. I brought him up to the time of the accident and dropped.

10 Mr. Tynan: Of course, I can make the witness my own.

Mr. Edgar: Of course you can do that.

Mr. Tynan: I can make the witness my own at this stage of the matter. To be perfectly candid the thing that I am endeavoring to show now is the time the accident happened. I think it might be essential to the petitioner as well as the respondents.

20 By the Commissioner: Have you other means of establishing it except by the petitioner's witness?

Mr. Tynan: I wouldn't care to enter into that with your Honor, now. I can postpone that so it won't be involved in the cross examination.

Q These busses were to leave the bus stand at the Pennsylvania station? A Yes, sir.

30 Q Were any of them due to travel toward this railroad crossing? A No, sir.

Q None of them? A No, sir.

Q Mr. Clark, is that your signature? (Showing witness paper.) A Yes, sir.

Q On page 1. Is that your signature on page 2? A Yes, sir.

Q Is this your signature on page 3? A Yes, sir.

40 Mr. Tynan: I would like to have these marked for identification.

Curtis L. Clark, cross.

Marked Exhibits R. 2, 3, 4 for identification.

Q Do you know Mr. McFayden, Mr. Clark?

A Yes, sir.

Q Did you make a statement to him a couple of days after the accident? A Yes, sir.

10

Q And did you sign it? A Yes, sir.

Q And is this it (Exhibits R. 2, 3, 4 for identification)? A Yes, sir, that is the statement I made to Mr. McFayden.

Q This statement you made to Mr. McFayden, was the truth? A As far as I could remember.

Q This was two days after the accident? A That was up until the accident, that was up until we reached the French street garage and then the statement I made about the accident I only make it up until we started back and after we started back I remember nothing.

20

Q But this statement—as far as the statement went it was the truth as you remember it two days after the accident? A Yes, sir.

Mr. Edgar: What is the purpose of bringing in the statement?

Mr. Tynan: I would like to call the witness' attention to several discrepancies.

30

By the Commissioner: Has the petitioner's attorney any objection?

Mr. Edgar: I would like to see it first. Why don't you offer it in evidence?

Mr. Tynan: I can't put it in evidence until my case arises.

Q Can you explain this discrepancy between this statement and your testimony today? In

40

Curtis L. Clark, cross.

your statement you say "we went to the French street garage we did not stop at the garage, we were all talking about an accident that occurred the day before at the Voorhees Pennsylvania Railroad Crossing." Do you remember any better now about that? A We wasn't all talking about it.

10 Q Who was talking about it? A Someone in front of me but I don't remember who it was, there was some words spoke about an accident the day before.

Q Was anybody proposing to go down to see where it was? A No one, but when that was mentioned my idea was that they was going out there and that is how I come to speak up and tell them there was nothing there to see.

20 Q That is how you came to tell them that? A Yes, sir.

Q Can you explain the discrepancy between the statement in this document and your testimony here, "we did not stop until we got to the Voorhees crossing, we crossed the railroad and stopped and a man named Soden, an employee, was the only one that got out"? A I don't remember making that statement because no one got out of the car at all at the crossing. In fact, two days after that, I really wouldn't feel my head was clear. At that time I don't believe I would have remembered it. As far as I can remember now the car never even stopped.

30 Q You would think your memory wasn't as good two days after the accident as it is now? A Really, it is a blank yet.

Q If Soden got out and say he remained two or three minutes, would you remember that at all, at the crossing? A We didn't even stop at the crossing.

40

Curtis L. Clark (for Respondent) direct.

Mr. Tynan: If counsel is finished with this witness I have several questions I want to ask him as my own witness. Shall I call him later?

Mr. Edgar: If it is understood he is your witness, I prefer to have you bound by his answers. 10

Mr. Tynan: Can I proceed now?

Mr. Edgar: I am perfectly willing that from this time on, from now on, you are questioning Mr. Clark as your direct examination, as your witness.

Direct examination by Mr. Tynan.

Q You had a watch at the time of this accident? A Yes, sir. 20

Q How soon after the accident did you again see your watch? A I saw it a few days after that while I was in the hospital.

Q Was the watch affected by the accident? A It was tore all to pieces.

Q Was it stopped? A Yes.

Mr. Edgar: I object to this line of questioning as immaterial and improper in this particular hearing. I agree that he had a right to ask the questions, call him as his witness, but the answer or expected answers are not material in this case, unless they show foundation for the purpose of the answer. 30

Mr. Tynan: If your Honor please, we have set up as a defense that Mr. Soden was not in this respondent's employ on this morning. It has been shown by the petitioner that the first bus was to leave the 40

Curtis L. Clark (for Respondent) direct.

10 Pennsylvania Cab Stand at 5:55. It has been shown by the petitioner on cross examination of the petitioner's witness that compensation to the bus drivers begins five minutes before their assigned busses were to leave, five or ten. It has been shown by the petitioner's witness that Mr. Soden had not been assigned to any bus. It has also been shown that all these men, the only one that had an assigned bus was Clark, whose bus left at 6:20 something. It therefore follows that the 5:55 bus had to leave the Pennsylvania Cab Stand at 5:55 and that these assigned men, of whom there were three, including Soden, in this automobile, had to be back at the Scuyler street garage in time to be assigned to that bus. It therefore becomes important to know whether it was a physical possibility for any of them to be on the job, at his duty at the time in question, therefore, the exact time of the happening of this accident is of great importance and the bringing of it out through the watch of this witness, as it stopped, when it stopped seems highly pertinent.

20 Mr. Edgar: I have no objection.

30 By the Commissioner: No objection?

Mr. Edgar: No further objection, I have already voiced my objection.

By the Commissioner: It seems to me it may be important to the respondents but I must say that unless you can show that the position of the hands of the watch after being shattered did not change it would mean nothing to me.

40 Mr. Tynan: I want to put it in for what it's worth.

Curtis L. Clark (for Respondent) cross.

By the Commissioner: Proceed.

Q The watch was stopped, was it? A Yes, sir.

Q How badly shattered was it? A All the works inside were loose, it cost me about ten dollars for me to get it fixed back right.

10

Q What time did the hands show the watch stopped? A The hands showed about five minutes of six.

Cross examination by Mr. Edgar.

Q Mr. Clark, you were in the employ of the Public Service on August 7, 1924? A Yes, sir.

Q You were in the party that rode out that road? A Yes.

20

Q You are still in the employ of the Public Service, are you not? A Yes, sir.

Q Would it have been possible for someone in the car ahead of you to have objected to the acts of the driver without your hearing?

Mr. Tynan: We can only surmise what the witness saw or heard, the question would it be possible is not material—

30

By the Commissioner: We can take it for what it is worth.

Mr. Tynan: I don't think it is worth anything and we would thereby get an opinion of the witness on a subject matter which is not open to opinion.

By the Commissioner: It might not carry much weight but I prefer to have it stand.

Mr. Tynan: Your Honor, will allow me an exception?

40

John McFayden, direct.

By the Commissioner: Yes.

Question repeated.

A Yes, it would have been impossible for me to hear. That all depends on how loud they had spoken, the motor was making a noise—

10 Mr. Edgar: That is enough, you have answered my question. That is our case, if the Court please.

PETITIONER RESTS.

The hearing then adjourned to 1:30 P. M., for lunch.

AFTER RECESS.

20

JOHN McFAYDEN, sworn for the respondent.

Direct examination by Mr. Tynan.

Q Mr. McFayden, who are you employed by?
A Public Service Corporation.

Q That includes the Public Service Transportation Company, and the Public Service Railway Company? A Yes, sir.

30 Q What is your line of work? A Investigator.

Q Were you so employed on August 9, 1924?
A Yes, sir.

Q Did you, at that time, interview one, Curtis Clark? A Yes.

Q Where was it that you interviewed him? A At the hospital, Middletown or Middlesex Hospital.

40 Q Middlesex Hospital? A Yes.

John McFayden, direct.

Q What did you talk to him about? A I talked to him about an accident that occurred at the Voorhees crossing.

Q What was his state of mind? A All right, as far as I could see, I would say perfect.

Q Did his mind seem to be cloudy? A No, sir.

10

Q Did he, at that time, say to you, we went to the French street garage but did not stop at the garage, we were all talking about an accident that occurred the day before at Voorhees Pennsylvania Railroad crossing?

Mr. Edgar: I object to that as immaterial to this case, unless he is now endeavoring to impeach or contradict the testimony of Mr. Clark.

Mr. Tynan: That is the purpose.

20

Mr. Edgar: I am somewhat confused as to when you made him your witness. The purpose of the respondent is to illicit the testimony given by Mr. Clark on that day. Mr. Clark is the best witness of that, he is here and may be called. In view of the fact that this particular question which you are asking is not a question which you claim is in dispute I think if you want to illicit what he said on August 9th, Mr. Clark is here and he is the best witness.

30

Mr. Tynan: Mr. Clark was asked if he said these things and he said he didn't recall saying them, that his mind, he thought, was cloudy on that day, it didn't accord with his present recollection. We have produced a witness who says his mind wasn't cloudy and I have asked if Mr. Clark told him these things.

40

John McFayden, cross.

By the Commissioner: I can see nothing improper in the question. I should say, let the record stand.

Question repeated.

A He did.

10 Q Did he, on that occasion, also say "we crossed the railroad and then stopped and a man named Soden, an employee, was the only one that got out, we only remained two or three minutes." A That is what he said.

Q His mind seemed clear to you? A Yes, sir.

Mr. Tynan: Take the witness.

20 *Cross examination by Mr. Edgar.*

Q Did you interview other people at that time, Mr. McFayden? A I think that Mr. Clark was about the first I interviewed.

Q Did you interview any of the others? A Afterwards.

Q Do you recall exactly the words that Mr. Clark told you on August 9, 1924? A I recall those words because he dictated them to me.

30 Q Then this paper which has been marked for identification R. 2, 3, 4, is written in your handwriting? A Yes, sir.

Q Mr. Clark as I understand it affixed his signature to it? A He did.

Q This was when Mr. Clark was on his bed in the hospital? A Yes.

Q This was some forty-eight hours after the accident? A Probably. At least that.

40 Q Are you a doctor? A I am a veterinary surgeon by profession, a graduate of the University of Pennsylvania.

John McFayden, cross.

Q Are you not a physician? A Not in that line.

Q When this statement was taken, which has been marked for identification R. 2, 3, 4, do you remember the procedure? A How do you mean?

Q Do you remember how it was taken? I mean, in question and answer or narrative form or how it was taken? A I do. 10

Q How was it taken? A Well, I asked Mr. Clark how he was feeling and then talked about the accident and I told him I would like to have a statement in writing if he had no objection, he said he had not. I then took his statement and swore him to it after he signed it, and read it over to him, in fact, he read it with me. I read it over and he read it over and he signed his name and I swore him to it and he said it was true. 20

Q You are still in the employ of the Public Service? A Yes, sir.

Q Prior to the taking of this statement had you been at the scene of the accident? A No, I don't believe I was, not prior to taking this statement.

Q Do you know whether or not you were? A No, I was not. 30

Q Had you heard anything? A Only notification I got from the company to go down and investigate the accident and I went first to the hospital and saw Mr. Clark, and after talking to him and taking his statement, I went out to where the accident occurred and looked over the ground and met some people and discussed about the accident and I also noticed the automobile wheel where it had skidded along for considerable distance, it was pointed out to me by one of the State Troopers. 40

John McFayden, re-direct.

Q What did you do on August 8th?

Mr. Tynan: It don't seem pertinent at all.

Q What did you do on August 7th?

10 Mr. Tynan: I don't see, if your Honor please, what that has to do with it.

By the Commissioner: I don't know what he is trying to bring out.

Mr. Tynan: It is so irrelevant, it isn't worth the time to bring it out.

Q What did you do on August 7th? A It would take me a long while to describe what I do in a day.

20 Q Do you remember any of the things you did on that day? A I don't know whether that was the day I took the statement or not, the 7th or 8th.

Q Do you remember what you did on the 8th of August? A I couldn't say, I have a great deal of different work to do that I couldn't keep track of it all.

30 Q Do you remember reporting for work that morning? A I report every morning.

Q Do you know where you went? A I might go a half dozen different places in one day.

Mr. Edgar: That is all.

Re-direct examination by Mr. Tynan.

Q You are a Notary Public, Mr. McFayden?

A I am a Notary Public.

40 Q You were a Notary on August 9, 1924? A Yes, sir.

Frank A. Gillespie, direct.

Q You swore Mr. Clark to this statement? A Yes, sir.

Q He signed all three sheets of it? A Yes, sir.

FRANK A. GILLESPIE, sworn for the respondent. 10

Direct examination by Mr. Tynan.

Q By whom are you employed? A Public Service Transportation Company.

Q Who were you employed by on August 7, 1924? A Public Service.

Q Where was their place of employment at that date? A Three Scuyler street, New Brunswick. 20

Q Scuyler street garage? A Yes.

Q Are you day superintendent? A Day station master.

Q What time do you go on duty? A 5:55 that morning A. M. I am supposed to report at 6 A. M.

Q When you reached the garage on that morning had Mr. Soden and the others, were they still there or had they left? A They had left. 30

Q Do you know where they had gone? A No, Mr. Guyer told me he had sent men to the French street garage for busses but he didn't say what men.

Q When did Mr. Guyer leave, when was his shift over? A At 6 A. M.

Q After that you had charge? A Yes, I didn't go on at that time that morning.

Q He did not go home? A Yes, around 8 A. M. 40

Frank A. Gillespie, direct.

Q Were you expecting these men back from the French street garage? A Yes.

Q Did they come back? A No.

10 Q What did you do about it? A We hesitated about it, we had one operator there and I had my car there and I took this other operator to the French street garage, we thought perhaps the service car had been crippled but when we got there the man in charge of the French street garage was trying to use the telephone to call Scuyler street to tell us of the accident at Voorhees Crossing and I proceeded right to the Voorhees Crossing.

Q At the Voorhees Crossing what did you see? A Three men killed.

Q Any of them Mr. Soden? A No.

20 Q How far about is it from the Scuyler street garage to the French street garage? A Seven-tenths of a mile.

Q And approximately how far is it from the French street garage to Voorhees Crossing? A About a mile and a half, mile and three-quarters.

Q Is it necessary in going from the Scuyler street garage to go to the French street garage to cross the Voorhees Crossing? A No.

30 Q Is it possible to go from the Scuyler street garage to the French street garage in any way that would take you across the Voorhees Crossing? A Not unless you go about five miles out of the way.

Q Did you have anything to do with the keeping of time of these men? A I do.

Q Are you familiar with the rates of remuneration they receive? A I am.

40 Q What time did the remuneration of any chauffeur begin on that day? A Five minutes before his starting time at the Pennsylvania

Frank A. Gillespie, direct.

Station, for instance, if his run was 6 o'clock he would be allowed five minutes to get his bus and get to the Pennsylvania Station.

Q Did anybody else but you have charge that day of these men? A Supervisor.

Q Was he there? A No, he wasn't there until I called him.

Q In the meantime you had charge? A Yes, sir. 10

Q Were any of your busses so routed that day that they would have to cross the Voorhees Crossing of the Pennsylvania Railroad? A No.

Q What was the nearest to the Voorhees Crossing that any bus of the Public Service Transportation Company would have gone that day? A A mile this side, between a mile and a mile and a half this side of the Voorhees Crossing. 20

Q There were no established bus lines controlled by the Public Service Transportation Company going to or crossing the Voorhees Crossing on that day? A No.

Q Were there any Public Service Transportation busses on established routes or otherwise, due to cross that crossing that day? A Not that day.

Q Are you a resident of New Brunswick? A Yes, sir. 30

Mr. Tynan: Has counsel any objection to this map going in evidence?

Mr. Edgar: I haven't any objection to using it but I don't know whether it is a true map and I don't want to bind my client. I want to be as agreeable as possible.

Q I would like to see if this witness can identify it particularly with reference to these 40

Frank A. Gillespie, direct.

particular things, these red marks, there is Scuyler street shown on this blue print and that red mark is supposed to designate the approximate position of the Scuyler street garage, is it familiar to you? A The streets look familiar there.

10 Q This other red mark is supposed approximately to designate the position of the French street garage, does that look familiar to you? A No answer.

Q Then this Lincoln Highway going in a fairly direct line to the Voorhees Crossing is supposed to represent the direct distance, too, that was traveled by this automobile after having passed the second garage, is that fairly familiar to you? A Yes, sir; it looks right.

20 Mr. Tynan: I offer the map in evidence.

Mr. Edgar: I prefer to have you rule on this. I, myself, am familiar with the lineup of the streets but I don't know whether this is a correct map or not.

By the Commissioner: As a matter of evidence it seems to be entirely admissible, although we don't need it.

30 Mr. Tynan: Assume we put it in evidence simply to point out the relative positions of the first garage, second garage and the railroad crossing. I offer it for that limited purpose. Of course, it is not drawn to scale.

Marked Exhibit R. 1.

Q How long have you been employed by the Public Service Transportation Company? A Since they took it over from the Gray Bus Line, I was with the Gray Bus Line.

40

Frank A. Gillespie, direct.

Q They took it over on August 2nd, last? A Yes.

Q Before that you worked for the Gray Bus Line? A Yes, sir.

Q How long did you work for the Gray Bus Line? A Since March, 1920.

Q In what capacity? A Started as driver, later as foreman, and when the Public Service took it over I was appointed station master. 10

Q Before the Public Service took it over was the French street garage used in connection with the Scuyler street garage? A Yes, sir; it had been used perhaps ten months before that.

Q Every morning were chauffeurs sent up there? A They reported at 5:25 and sent there for their busses and they reported back to Scuyler street, except the regular men, and they would know what busses and what routes they were to go on. 20

Q Had you been night station master for long? A No, I was day station master.

Q Have you been day station master for long? A I had a job similar to that for quite some time.

Q Did you know about the time in the morning these men went to the other garage? A Yes, they left there between 5:30 and 6. 30

Q Did you ever know them before to be late getting back? A No, I can't say that I have.

Q It was the first time you noticed such a lapse? A Yes.

Mr. Tynan: Take the witness.

Mr. Edgar: No questions.

Mr. Tynan: That is our case, if your Honor, please. 40

Opinion of Commissioner.

Mr. Tynan addressed the Commissioner for the respondent.

Mr. Edgar addressed the Commissioner for the petitioner.

The hearing then adjourned.

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OPINION OF COMMISSIONER.

NEW JERSEY DEPARTMENT OF LABOR.
WORKMEN'S COMPENSATION BUREAU,
TRENTON, N. J.

20	CLARA G. SODEN, <div style="text-align: right;"><i>Petitioner,</i></div> <div style="text-align: center;"><i>vs.</i></div> PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <div style="text-align: right;"><i>Respondent.</i></div>	}	<i>Opinion.</i> <i>Claim</i> <i>Petition No.</i> <i>3639.</i> <i>April 28,</i> <i>1925.</i>
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This is a workmen's compensation case the facts of which may be briefly stated as follows:

30 Raymond Soden left his home as usual at 5:15 A. M., August 7, 1924, and he reported for duty at the Scuyler street garage of the Public Service Transportation Company as usual for orders. Charles R. Guyer, whose duty it is to assign the men to their various runs, directed Soden and three other chauffeurs to go with Thomas Miller, who was ordered by Guyer to take the four men in one of the company's automobiles to the French street garage, approximately one-half mile distant, where each man was to secure a bus and
40 drive it back to the Scuyler street garage. This

Opinion of Commissioner.

was at 5:42 A. M. Miller drove the car to French street, but instead of turning in where he should, in order to arrive at the French street garage, he went directly past at a speed of twenty-five or thirty miles an hour and continued directly on about one and one-quarter miles to the Pennsylvania Railroad crossing. He proceeded about one-half mile further to a lane where he turned the car and drove back toward the center of the town. At the railroad crossing the car was struck by an engine and Soden and three other men were killed. Curtis L. Clark was the only one to survive the accident. Two days after this occurrence Clark made a statement of the various events leading up to the accident, to John McFayden, an investigator for the Public Service Company, to which statements he took his affidavit.

Mr. Tynan, counsel for the respondent, presents several reasons for moving for a dismissal of this claim. First, that Soden was not in the employ of the company when killed. He states that it is a rule of the company that each driver's pay period begins five minutes before he is scheduled to begin his regular run from the starting point of that route; that until a driver is assigned a route and it is within five minutes of his scheduled time for starting on the first run, he is not in the employ of the company. In this opinion I find myself unable to concur. My reading of the decisions leads me to conclude that one becomes an employee the moment the relation of master and servant becomes operative. Obviously the moment one is subject to the orders of the other this relation is established and the courts have recognized this by holding the employer as subject to the Compensation Act

Opinion of Commissioner.

for a reasonable time before and after the actual money-earning hours of work. The rule of this Bureau is in harmony with this, and in effect is, that an employee is in the course of his employment under the purview of the Compensation Act, as soon as he passes onto the property of the employer for the reason that at that moment he becomes subject to the orders and authority of the master, whereas the moment previous to crossing the property line he is on the public highway and subject to no one. I am unable to subscribe to the theory that any employer is privileged to promulgate a rule nullifying a rule of the courts. Soden had arrived on the premises where he regularly reported for duty, he had so reported, and he had been given orders. I must therefore conclude that he had entered regularly into his contract of employment.

The respondent next contends that, if Soden was in the course of his employment when he left the first garage, he was no longer in the employ of the company the moment the car proceeded past French street. To analyze this it is to be remembered that Soden, with others, was placed in the care of Thomas Miller, and it was he who was controlling the car, and it becomes pertinent to inquire if a contract existing between two parties can be broken by the deliberate act of a third person. The question admits of no controversy. The relation of master and servant having been established, I hold it is incumbent upon the employer to show that the contract of employment was broken by one of the parties thereto. I am unable to find that the respondent has so shown. I can attach but little weight to the defendant's contention that, by his

Opinion of Commissioner.

act or failure to act, the decedent became a party to the act of the driver of the car. One may ask what one should do upon finding himself carried beyond his intended destination. Should he immediately jump out, or should he be equally unwise in throwing himself upon the driver to compel him to stop, and thereby precipitate a wreck? Any normal person would be apt to sit passive pending an explanation. An inquiry would of course be in order and natural, and we do not know that such inquiry was not made. Its absence, however, in my judgment does not constitute a deliberate act such as to take a person out of the course of his employment. 10

Testimony on behalf of the respondent was introduced to the effect that John McFayden, an investigator for the company, prepared a written statement at the bedside of the injured man Clark, on the second day after the accident, and it is contended that two of these statements, which were sworn to by Clark, disagreed with his direct testimony as given at this trial. It appears that the day prior to this accident an automobile was struck by a train at the same crossing where this accident occurred, and the written statement sets forth that the men were all talking about this prior accident when they left the first garage. On the witness stand, Clark denied the correctness of this, testifying that he himself was the only one who spoke of it. I am unable to attach any importance to this inasmuch as it has been disclosed what was said by the other men. I take it the respondent would have us conclude that the men had agreed among themselves to go out to the scene of the wreck. I cannot see how this can be so determined in the absence of any proof whatever. 20
30
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Opinion of Commissioner.

10 The respondent also attacks the testimony of Clark on the ground that in the written statement he acknowledged that Soden got out of the car at the railroad crossing, whereas at this hearing he maintained that the car did not stop and nobody got out. To me the contention seems irrelevant and I am of the opinion we should give some weight to the assertion of Clark, that his present statements are the correct ones, and that he was far from normal, mentally, on the second day after the accident and might easily have erred in signing something written by the company's investigator.

20 The respondent further contends this claim should be dismissed because the crossing of this railroad introduced into the situation a hazard not incidental to this man's employment. The merit of this argument would be obvious if Soden were the one responsible for crossing the tracks. However it has not been so shown. The testimony discloses that the deceased, was directed by one in authority to go with Tom Miller, thereby placing him in the care of Miller. This exercise of authority must necessarily carry with it a broadening of the hazard to whatever extent the obedience given to this authority exposed the one obeying the order.

30 Summing up the entire situation briefly, Soden was ordered to do a certain thing, and in compliance with this order he came to his death. Is it then possible to say that the authority issuing the order is without responsibility? I am unable to reach such a conclusion, and I must therefore prepare an order in favor of the petitioner.

(Signed) W. E. STUBBS,
Deputy Commissioner of Compensation.

*Determination of Facts.***DETERMINATION OF FACTS AND RULE
FOR JUDGMENT.**

NEW JERSEY DEPARTMENT OF LABOR.
WORKMEN'S COMPENSATION BUREAU,
TRENTON, N. J.

10

CLARA G. SODEN,

*Petitioner,**vs.*PUBLIC SERVICE TRANSPORTA-
TION COMPANY,*Respondent.*

*On Petition
for Compensa-
tion, De-
termination
of Facts and
Rule for
Judgment.*

*Claim
Petition
No. 3639.*

20

*April 28,
1925.*

A petition having been filed in the above-stated matter, praying for the compensation to which the petitioner may be entitled by virtue of the terms and 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 the employe in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, together with the several supplements thereto and acts amendatory thereof, and a time and place for the hearing of petition having been fixed, and it appearing that said petition,

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40

Determination of Facts.

and the order fixing the time and place of said hearing have been duly served upon the respondent and an answer having been filed by the said respondent, and the petitioner and respondent having appeared on the 8th day of April, 1925, the date set for the summary hearing herein, the petitioner being represented by Joseph H. Edgar, and the respondent by Leonard Tynan, and testimony having been taken as presented by the parties hereto:

I do find and determine from the evidence and testimony as follows:

First. That Raymond Soden, the petitioner, was on August 7, 1924, in the employ of the Public Service Transportation Company, a corporation, the respondent, as a bus driver, which employment was subject to the compensation section of Chapter 95, Laws of 1911.

Second. That on the aforesaid date the petitioner met with an accident arising out of and in the course of the employment, and that intoxication was not the proximate cause of said accident nor was the injury intentionally self-inflicted.

Third. That the respondent herein had knowledge of said accident within the time prescribed in Paragraph 15 of the aforesaid act.

Fourth. That the accident occurred as follows:

Pursuant to instructions given him by regularly authorized superior, Raymond Soden entered an automobile owned by the respondent, and Thomas Miller, a fellow employee, was directed by the same person in authority to drive the auto containing Soden and other employees from the company's Scuyler street garage to their French street garage. For reasons not established by this hearing, Miller deviated from

Rule for Judgment.

direct course between the two garages and as a result Miller, Soden and two other employees were killed when a locomotive of the Pennsylvania Railroad Company struck the automobile.

Fifth. That the wages of the decedent were \$40.95 per week. 10

Sixth. That the decedent left surviving him, his wife, Clara G. Soden, and a son, John Edward Soden, born May 14, 1924, who are entitled to compensation.

It is, therefore, on this 28th day of April, 1925, Ordered, that judgment final be entered in favor of the petitioner, and that the respondent make payments to the petitioner as follows:

Compensation at the rate of \$16.38 per week, being 40 per cent. of the deceased's wages, for a period of three hundred weeks from the date of the accident. The amount that has become due to the date of the first payment shall be paid in one lump sum. After the expiration of the three hundred weeks' period compensation shall be paid to the petitioner for the benefit of the son at the rate of \$14.33 per week until he reaches the age of sixteen years on May 14, 1940. 20

It is further Ordered that the sum of \$150.00 be paid the petitioner by the respondent on account of burial expenses, and a further sum of Three Hundred Dollars (\$300.00) as counsel fee to the petitioner's attorney. 30

(Signed) W. E. STUBBS,
Deputy Commissioner of Compensation.

Notice of Appeal.

NOTICE OF APPEAL.

NEW JERSEY DEPARTMENT OF LABOR.
WORKMEN'S COMPENSATION BUREAU,
TRENTON, N. J.

10	CLARA G. SODEN, <div style="text-align: right; padding-right: 20px;"><i>Petitioner,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> PUBLIC SERVICE TRANSPORTA- TION COMPANY, <div style="text-align: right; padding-right: 20px;"><i>Respondent.</i></div>	}	<i>Claim Petition No. 3639.</i> <i>Notice of Appeal to Common Pleas.</i>
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20 To Joseph H. Edgar, attorney, petitioner,
Secretary of the Workmen's Compensation
Bureau, the County Clerk of the County of
Middlesex, or To Whom It May Concern:

30 PLEASE TAKE NOTICE that the respondent here-
by appeals to the Court of Common Pleas in
and for the County of Middlesex, from the de-
termination of the Workmen's Compensation
Bureau made in the above-entitled matter on the
28th day of April, 1925, wherein the aforesaid
bureau awarded the petitioner compensation as
follows:

Compensation at the rate of \$16.38 per week,
being 40 per cent. of the deceased's wages, for
a period of 300 weeks from the date of the ac-
cident;

The amount that has become due to the date of
the first payment shall be paid in one lump sum;

40 After the expiration of the 300 weeks' period,
compensation shall be paid to the petitioner for
the benefit of the son at the rate of \$14.33 per

Notice of Appeal.

week until he reaches the age of sixteen years on May 14, 1940.

IT IS FURTHER ORDERED that the sum of \$150 be paid the petitioner by the respondent on account of burial expenses, and a further sum of \$300 as counsel fee to the petitioner's attorney.

Respectfully,

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JAMES O. BOYD,
Attorney of Respondent-Appellant.

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Order Fixing Date of Hearing.

ORDER FIXING DATE OF HEARING.

COURT OF COMMON PLEAS OF
MIDDLESEX COUNTY.

10	CLARA G. SODEN, <i>Petitioner-Appellee,</i>	}	<i>On Appeal.</i> <i>Order.</i>
	<i>vs.</i>		
	PUBLIC SERVICE TRANSPORTA- TION COMPANY, a corporation, <i>Respondent-Appellant.</i>		

20 A notice of appeal having been filed in this court by Public Service Transportation Company, respondent-appellant, and a request having been made that the matter be set for a hearing, it is, therefore, on the application of the respondent-appellant, on this twenty-eighth day of May, nineteen hundred and twenty-five—

ORDERED that this matter be set down for a hearing on the 19th day of June, 1925, at the Court House in the City of New Brunswick, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

30 And it is further ordered that a true, but uncertified copy of this order, be served upon Clara G. Soden, or her attorney at least ten days before the date of said hearing.

JOHN P. KIRKPATRICK,
 Judge of Middlesex County
 Court of Common Pleas.

*Determination of Facts and Order.***FINDING OF FACTS, DETERMINATION
AND ORDER.**

NEW JERSEY DEPARTMENT OF LABOR.
WORKMEN'S COMPENSATION BUREAU,
TRENTON, N. J.

<p>CLARA G. SODEN, <i>Petitioner,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>PUBLIC SERVICE TRANSPORTA- TION COMPANY, <i>Respondent.</i></p>	<p><i>On Petition for Com- pensation.</i></p> <p><i>Determina- tion of Facts and Rule for Judgment.</i></p> <p><i>Claim Petition No. 3639.</i></p> <p><i>April 28, 1925.</i></p>	<p>10</p> <p>20</p>
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A petition having been filed in the above-stated matter, praying for the compensation to which the petitioner may be entitled by virtue of the terms and 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 the employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, together with the several supplements thereto and acts amendatory thereof, and a time and place for the hearing of petition having been fixed, and it appearing that said petition, and the order fixing the time and place

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Determination of Facts and Order.

of said hearing have been duly served upon the respondent and an answer having been filed by the said respondent, and the petitioned and respondent having appeared on the 8th day of April, 1925, the date set for the summary hearing herein, the petitioner being represented by
 10 Joseph H. Edgar, and the respondent by Leonard Tynan, and testimony having been taken as presented by the parties hereto:

I do find and determine from the evidence and testimony as follows:

First: That Raymond Soden, the petitioner, was on August 7, 1924, in the employ of the Public Service Transportation Company, a corporation, the respondent, as a bus driver, which employment was subject to the compensation section of Chapter 95, Laws of 1911.
 20

Second: That on the aforesaid date the petitioner met with an accident arising out of and in the course of the employment, and that intoxication was not the proximate cause of said accident nor was the injury intentionally self-inflicted.

Third: That the respondent herein had knowledge of said accident within the time prescribed in paragraph 15 of the aforesaid act.
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Fourth: That the accident occurred as follows:

Pursuant to instructions given him by regularly authorized superior, Raymond Soden entered an automobile owned by the respondent, and Thomas Miller, a fellow employee, was directed by the same person in authority to drive the auto containing Soden and other employees from the company's Scuyler street garage to their French street garage. For reasons not
 40 established by this hearing, Miller deviated from

Determination of Facts and Order.

direct course between the two garages and as a result Miller, Soden and two other employees were killed when a locomotive of the Pennsylvania Railroad Company struck the automobile.

Fifth: That the wages of the decedent were \$40.95 per week.

Sixth: That the decedent left surviving him, 10
his wife, Clara G. Soden, and a son, John Edward Soden, born May 14, 1924, who are entitled to compensation.

It is, therefore, on this 28th day of April, 1925, ORDERED, that judgment final be entered in favor of the petitioner, and that the respondent make payments to the petitioner as follows:

Compensation at the rate of \$16.38 per week, being 40 per cent. of the deceased's wages, for a period of three hundred weeks from the date of 20
the accident. The amount that has become due to the date of first payment shall be paid in one lump sum. After the expiration of the three hundred weeks' period, compensation shall be paid to the petitioner for the benefit of the son at the rate of \$14.33 per week until he reaches the age of sixteen years on May 14, 1940.

It is further ORDERED that the sum of \$150.00 be paid the petitioner by the respondent on account of burial expenses, and a further sum of 30
three hundred dollars (\$300.00) as counsel fee to the petitioner's attorney.

(Signed) W. E. STUBBS,
Deputy Commissioner of Compensation.

Opinion of Middlesex Common Pleas.

**OPINION OF MIDDLESEX COUNTY COURT
OF COMMON PLEAS.**

Filed July 6, 1925.

MIDDLESEX COUNTY COURT OF COMMON
PLEAS.

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CLARA G. SODEN,
Petitioner-Appellee,

vs.

PUBLIC SERVICE TRANSPORTA-
TION COMPANY,
Respondent-Appellant.

*On Appeal
from the New
Jersey De-
partment of
Labor, Work-
men's Com-
pensation
Bureau.*

Opinion.

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Appearances:

For the petitioner-appellee, Mr. Joseph H. Edgar.

For the respondent-appellant, Mr. James O. Boyd.

KIRKPATRICK, J.

30 This is an appeal from a determination awarding compensation to the petitioner-appellee against the respondent-appellant, made by W. E. Stubbs, Deputy Commissioner of Compensation, in an Employer's Liability Compensation case.

The appellant and appellee are in substantial agreement concerning the facts from which it appears that the petitioner's decedent prior to August 7, 1924, and upon that day was employed by the respondent as a driver of one of its busses. On August 7, 1924, he reported to his superior, Charles I. Guyer, at a garage main-

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Opinion of Middlesex Common Pleas.

tained by the respondent on Scuyler street in the City of New Brunswick. Guyer, who appears to have been the bus master, directed the petitioner's decedent, together with three other bus drivers, to proceed in a Packard touring car driven by one Miller, an employee of the respondent, from the Scuyler street garage to the respondent's garage on French street in the City of New Brunswick. This was at or about twenty minutes of six on the morning of August 7th. Miller did not stop when he had reached the French street garage, but continued in a westerly direction on French street about one and one-quarter miles to the crossing of the Pennsylvania Railroad Company. He then proceeded across the railroad track and about one-half mile beyond he turned the car and proceeded back toward New Brunswick and when he had reached the crossing the automobile in which the petitioner's decedent and the others were riding was struck by a locomotive of the Pennsylvania Railroad Company and the petitioner's decedent met injuries resulting in his death within a very short time. Nothing connected with decedent's employment required him to ride beyond the French street garage and we may infer from the testimony, curiosity concerning an accident on the previous day at the railroad crossing prompted decedent to go beyond the French street garage.

The above statement of the facts is not in dispute. Upon these facts the Deputy Commissioner who heard the case, in a very well considered and carefully prepared opinion, arrived at the conclusion that at the time of the accident the decedent was in the employ of the respondent and that he met his death from an accident which

Opinion of Middlesex Common Pleas.

arose out of and in the course of his employment and that said injury was neither intentionally self-inflicted nor had for its proximate cause intoxication.

In reviewing this case I have listened carefully to the argument of counsel and studied not only
 10 the opinion written by the Deputy Commissioner, but the briefs of counsel as well and I have arrived at the conclusion:

First: That the decedent met his death on August 7, 1924, and was at the time of his death in the employ of the Public Service Transportation Company, the respondent, as a bus driver and that such employment was subject to the Compensation Section of Chapter 95, Laws 1911.

Second: That on the aforesaid date the peti-
 20 tioner's decedent met his death from an accident that was not an injury self-inflicted nor was intoxication the proximate cause of said accident.

Third: That the respondent herein had knowledge of said accident within the time prescribed in paragraph 15 of the aforesaid act.

Fourth: That the wages of the decedent at the time of his death were forty dollars and ninety-five cents (\$40.95) per week.

30 Fifth: That the decedent left him surviving, his wife, Clara G. Soden, and a son, John Edward Soden, born May 14, 1924.

This leaves for determination the further influential elements necessary to be determined before compensation can be awarded and that is the question, "Was this an accident arising out of and in the course of the decedent's employment?" This question was answered in the affirmative by the Deputy Commissioner.

Opinion of Middlesex Common Pleas.

“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. 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.

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Within the purview of the Employer's Liability Act of April 4, 1911, an accident arises in the course of the employment if it occurs while the employee is doing what a man so employed might reasonably do within a time during which he is employed and at a place where he might reasonably be during that time.” *Bryant v. Fissell*, 86 *Atlantic Reporter*, 458.

Applying the above definitions to the facts developed in the matter in consideration it cannot, I think, be reasonably said that the accident in which Soden lost his life was one the risk of which might have been contemplated by Soden or by a reasonable person when entering the employment as incidental to it, nor do I think that it could be said that it occurred while the employee was doing what a man so employed might reasonably do within a time during which he was employed nor at a place where he might reasonably be during that time.

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Having arrived at this conclusion I find therefore that the accident resulting in the death of Soden, while it occurred during his employment, neither arose out of the employment nor in the course of such employment. The petition therefore will be dismissed.

JOHN P. KIRKPATRICK,
Judge.

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Finding of Facts.

**FINDING OF FACTS, DETERMINATION
AND ORDER OF MIDDLESEX COUNTY
COURT OF COMMON PLEAS.**

10	CLARA G. SODEN, <i>Petitioner-Appellee,</i> <i>vs.</i> PUBLIC SERVICE TRANSPORTA- TION COMPANY, <i>Respondent-Appellant.</i>	} <i>On Appeal.</i> } <i>Finding of</i> } <i>Facts,</i> } <i>Determina-</i> } <i>tion and</i> } <i>Order.</i>
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20 This matter coming on to be heard before me is an appeal from a determination awarding compensation to the petitioner-appellee against the respondent-appellant, made by William E. Stubbs, Deputy Commissioner of Compensation, under an act entitled, "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto.

30 The cause came on for trial at the Middlesex County Court House, in the City of New Brunswick, on June 19, 1925, the petitioner-appellee being represented by Attorney Joseph H. Edgar and respondent-appellant by Attorney James O. Boyd.

Determination and Order.

After careful consideration of the transcript of the record of the case, the testimony taken before the Deputy Commissioner, the argument of counsel, and having read over the briefs submitted by counsel, I determine and find as follows:

First: That the decedent met his death on August 7, 1924, and was at the time of his death in the employ of the Public Service Transportation Company, the respondent-appellant, as a bus driver and that such employment was subject to the Compensation Section of Chapter 95, Laws of 1911. 10

Second: That on the aforesaid date the petitioner's decedent met his death from an accident that was not an injury self-inflicted nor was intoxication the proximate cause of said accident.

Third: That the respondent herein had knowledge of said accident within the time prescribed in paragraph fifteen of the aforesaid act. 20

Fourth: That the wages of the decedent at the time of his death were \$40.95 per week.

Fifth: That the decedent left surviving him, his wife, Clara G. Soden, and a son, John Edward Soden, born May 14, 1924.

Sixth: That the accident resulting in the death of the petitioner's decedent did not arise out of nor in the course of his employment with the respondent. 30

Seventh: That the petition should be dismissed.

IT IS THEREFORE, on this 14th day of July, nineteen hundred and twenty-five, ORDERED that judgment final be entered in favor of the Public Service Transportation Company, the respondent-appellant, and against Clara G. Soden, the

Determination and Order.

petitioner-appellee, and that the petition be dismissed and the prayers of the petitioner-appellee denied.

JOHN P. KIRKPATRICK,
Judge of Middlesex County
Court of Common Pleas.

10 Dated July 14, 1925.

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New Jersey Court of Errors and Appeals

CLARA G. SODEN, <i>Petitioner-Appellee,</i>	}	<i>On</i> <i>Certiorari.</i>
<i>vs.</i>		<i>On Appeal</i> <i>from</i>
PUBLIC SERVICE TRANSPORTATION COMPANY, <i>Respondent-Appellant.</i>	}	<i>New Jersey</i> <i>Supreme</i> <i>Court.</i>

BRIEF FOR RESPONDENT-APPELLANT.

This case was tried before the Workmen's Compensation Bureau of the State of New Jersey and said Bureau awarded compensation to the dependents of the decedent. The case was appealed to the Middlesex County Court of Common Pleas, and the said Court found and determined that the accident did not arise out of and in the course of the employment and rendered judgment in favor of the respondent, Public Service Transportation Company, and against the petitioner, thereby reversing the findings of the Workmen's Compensation Bureau. The case was then taken to the Supreme Court on a Writ of Certiorari and the Supreme Court reversed the findings of the Middlesex Court of Common Pleas. This appeal is to the judgment of the Supreme Court.

Facts.

The petitioner's decedent Raymond Soden, prior to August 7th, 1924, was employed by the respondent as a driver of one of its buses. On August 7th, 1924, he reported to his superior, Chas. R. Guyer, at a garage maintained by the respondent on Schuyler street in the City of

New Brunswick. Guyer, who was employed as a night station master and whose duty it was to assign in the morning the various men and buses out to their runs, directed the petitioner's decedent, together with three other bus drivers to proceed in a Packard touring car driven by one Mellor, an employee of the respondent, from the Schuyler Street Garage to the respondent's garage on French Street, in the City of New Brunswick. This was at or about twenty minutes of six, on the morning of August 7th. Curtis L. Clark, the sole survivor of this accident, had witnessed an accident the day before at the Voorhees crossing, and from the testimony it could be inferred that someone suggested that they all go to the scene of the former accident. Mellor did not stop when he had reached the French Street Garage, but continued in a westerly direction on French street, about one and one-quarter miles to the Voorhees crossing of the Millstone Branch of the Penna. Railroad where the railroad crosses the Lincoln Highway. He then proceeded to cross the railroad track and about one-half mile beyond he turned the car and proceeded back toward New Brunswick, and when he had reached the crossing the auto in which the petitioner's decedent and the others were riding was struck by a locomotive of the Pennsylvania Railroad Company, and the petitioner's decedent suffered injuries resulting in his death within a very short time. The petitioner's decedent was one of five men in the automobile, four of which were killed there being only one survivor, Curtis L. Clark.

ARGUMENT.

The respondent-appellant appeals to the Court of Errors and Appeals and contends that the judgment of the Supreme Court should have been in favor of the respondent-appellant and against the petitioner-appellee for the following reasons:

1. That the accident on which this case is brought did not arise out of the employment.
2. That the accident on which this case is brought did not arise in the course of the employment.
3. That the Supreme Court erred in reversing the judgment of the Court of Common Pleas on a question of fact, when there was evidence in the case to support the findings of the Common Pleas.

The whole case depends on the construction of the phrases "arising out of and in the course of the employment," and therefore we will argue all the reasons together.

In the case of *Bryant v. Fissell*, 84 N. J. Law 72, it was held "Even if there be an accident which occurred 'in the course of the employment,' if it did not arise 'out of the employment,' there can be no recovery and even if there be an accident which arose 'out of the employment,' if it did not arise 'in the course of the employment,' there can be no recovery." *Fitzgerald v. Clark & Son* (1908-2 K. B. 796; *Craske v. Wigan* (1909) 2 K. B. 635.

Charles R. Guyer, sworn for the petitioner, said (p. 33, ll. 10-20) that he at that time was employed by the defendant company as night station master at the defendant's Schuyler street

garage, and one of his duties each morning was to assign the extra men and buses out to their runs, not the regular men who already know what lines to cover.

“Q On the morning of August 7th did you assign Raymond Soden to duty? A I assigned him to the French Street Garage to get a bus and come back to Schuyler Street. Q Did you send him with anyone else? A Three other drivers and the night mechanic. Q What did you send those three other drivers and mechanic in? A Twin six Packard touring car. Q Was this automobile used by the Public Service? A Yes, sir, it was used as a service car. Q Did you see the car go out that morning? A Yes, sir. Q Who was driving the car? A Tom Mellor. Q Is he employed by the Public Service? A He was, as night mechanic. Q Who directed Mr. Mellor to take these men up to the—? A French Street Garage. Q Who all were in the car? A Curtis Clark, John Shesta, Ray Gold, Raymond Soden, and the driver, Thomas Mellor.”

It appeared (p. 34, ll. 30-40) that witness worked from 6 P. M. to 6 A. M., that (p. 34, ll. 30-40), Tom Mellor, the night mechanic, also went to work at 6 P. M. and was thru at 6 in the morning; and (p. 35, ll. 7-10) the distance from the Schuyler street garage to the French street garage is about half a mile.

“Q Who did you give your direction to about going out on this trip? A On that morning the car was in front of the garage in the street, and as the drivers reported of course, I gathered them together and put them in the car and Mellor was in the garage working and I told him to drive these men up to the French street garage. Q They were together in the machine? A

Three of them and the fourth driver came along and I put him into it (p 35, ll. 10-20). Q Did you tell these men what to do when they got to the French street garage (p. 35, ll. 20-30)? A I told them each to get a bus and come back to Schuyler street. Q Had you assigned a particular route to Mr. Soden? A Not at that time, he was to be assigned when he came back with the bus."

It further appeared (p. 35, ll. 20-30) that the buses daily left the bus stand at the Pennsylvania Railroad Station, about four blocks from the Schuyler street garage, the first of the buses that these men were to run going out at 5:55 (p. 29, ll. 30-40.) The men that started out in the auto all had the same orders and all understood those orders.

Mellor was the night mechanic (p. 34, ll. 30-40) and *the only authority given him, was to take the men to the French Street Garage.*

The pay of the men for the day was to begin five minutes before their schedule, they being paid for that five minutes, which time was allowed them to get their buses (p. 36, ll. 20-40). Soden had not been assigned to any run, and the question when his pay would begin was an open question until later when he would return with his bus and be assigned and allowed five or ten minutes. Therefore, when he left the Schuyler street garage to go to the French street garage, the question of when his pay should begin was not settled. (p. 31, ll. 20-30) "A They were sent out at 18 minutes to 6 which allowed them 13 minutes to get there and get back with the first bus going out. * * * Q One question. Who was to take out the 5:55 bus that morning? A That had not been assigned to any

man yet. * * * (p. 31, ll. 30-40) Q So the 5:55 bus depended on the— A On the first man getting back from the other garage. Q Of whom Soden was one? A Soden was one of them.” Curtis Clark was a regular driver. His bus was due to go out at 6:20. The other three were the extra men, and whichever of them was the first to get back would be the men to go out on the first trip. (p. 32, ll. 20-30).

Those were the conditions under which these men started out. There is no dispute about it. Curtis L. Clark, the surviving occupant of the automobile, said (p. 32, ll. 30-40) that on that day he worked for the Public Service Transportation Company, that on that morning he first reported to the Schuyler street garage, and was directed by the night station master, Charles Guyer, to go to the garage where they keep part of the equipment. Three other men, Raymond Soden, LeRoy Gold and John Sheska were ordered out with witness at that time, and Tom Mellor was supposed to take them up in the service car. They left the Schuyler street station, and (p. 33, ll. 20-30) Thomas Mellor drove the car.

The automobile reached the French street garage, to which the five men had been sent, and instead of stopping there it kept right on, going about a mile and a half further (p. 37, l. 10) to the Voorhees Railroad Crossing, across the crossing, still further for a distance of a half a mile beyond (p. 41, ll. 20-30) and then turned around and started in the opposite direction, and when on the said Voorhees Railroad Crossing was hit by a train, thereby bringing about this tragedy and the decedent's death.

Curtis L. Clark, the only survivor of the five men, testified (p. 39, ll. 30-40) that the decedent,

Raymond Soden, sat in the front seat with the driver. (p. 40, ll. 20-30) There were five people in the car. They proceeded toward French street, where the buses were located. (p. 40, ll. 30-40) “Q When did you first notice anything unusual on your way to your work? A When the driver passed the place where we were supposed to get off at. * * * (p. 41, l. 10) A Only a few feet passed the garage, we knew that we weren't stopping there. * * * Q How fast was this car going at this point? A At the rate of about thirty or thirty-five miles an hour, as we passed the garage. Q Did the car continue to go along? A Yes, sir. Q Did the car cross the tracks of the Pennsylvania Railroad on the highway? A Yes, sir. Q In what direction were you proceeding at that time? A Proceeding south. * * * Q Did you stop at the crossing? A No. Q Where did you go? A We went about a half mile beyond the crossing. Q What did you do then? (p. 41, ll. 20-30) A Pulled in a lane and turned around. Q What did you do after you turned around? A Started back towards New Brunswick. Q How fast was the car traveling then? A About thirty-five or forty miles an hour. Q Did anything unusual happen on the way back to New Brunswick? A Not that I remember. Q Was there an accident coming back? Mr. Tynan: I have stipulated that an automobile was struck by the train sometime, I don't know whether it was coming or going. A It appeared to me there was—of course, I don't remember it, when I come to the hospital I was told about it by the other parties. Q Who was driving the car after you had turned around and was coming toward New Brunswick? A Thomas Mellor. Q Did you, yourself, or did you hear anyone in the

car ask Tom Mellor to drive out the highway? A No, sir."

This witness Clark further said, (p. 42, ll. 30-40) that it is about three-quarters of a mile from the Schuyler street garage to the French street garage, and about one mile and a half from the French street garage to the Voorhees Railroad Crossing. (p. 42, ll. 30-40) The witness does not remember, prior to the accident, of hearing a bell or whistle or even seeing a train. "Q How far before you reached the crossing did you lose your head? A It may have been when he first applied his brakes and began skidding. Q How far from the crossing was that? A 100 feet away from the track. * * * (p. 44, ll. 30-40) Q Was there any conversation in this automobile after you left the Schuyler street garage and before you reached the French street garage? A No, sir, no conversation at all. Q Everybody silent? A Everybody was silent. Q No discussion at all by anybody? A No discussion before they reached the French street garage, there wasn't any discussion of any kind. Q You passed the French street garage and Mellor drove right past it you say? A Yes, sir. Q There hadn't been any plan between you, by the time you reached French street? A No, sir. Q After you left the French street garage, was there any conversation? A The boys, some of them, seemed to be surprised but they didn't make any emotions to that effect, I do remember about an accident that happened there the day before but I had no idea then that they was going to that crossing. I spoke up and I told them there wasn't any use of going out there because they moved it the day before, he just proceeded right on. Q Who was it that said something that led you to say that? Mr.

Edgar: Just a moment, he testified he didn't know. Q Who was it that said something that led you to say that? A I can't recall who it was that spoke, someone in front of me. Q You are not sure whether it was on the front seat or in the middle? A I am sure it was in front of me. Q Did anybody make any protest? A Only what I told them, there wasn't any use in visiting that crossing. Q No one else? A No one else. Q Raised any objection to the course of procedure? A Didn't seem to. Q Everybody sat tight and you went right along? A Yes, sir. Q Is that right? A Yes, sir. Q When you reached that railroad crossing was the automobile stopped? A No, sir. Q How fast was he going across the crossing? A I don't remember how fast it was going after it reached the crossing but it never stopped at the crossing. Q Are there gates at that crossing? A No, sir. Q Is there a flagman at that crossing? A No."

Mr. Clark further said (p. 47, l. 20) that the automobile went right ahead, crossed the crossing and went about half a mile beyond and then turned, and that it is about a mile and a half from the French street garage to the crossing. (p. 47, ll. 10-20) "Q And your voice was the only voice you heard utter any protest about going ahead? A Yes, sir. Q You, by the way, knew something about the accident there the day before? A I was an eyewitness to the accident there the day before that, that is how I come to know there wasn't anything there. I saw it all removed, I saw them take the car away and get the lady to the hospital and also her husband. Q Did you talk about that prior accident to these men? A I didn't mention that whatever; they learned of that they learned from another source."

Mr. Clark further testified (p. 48, ll. 20-30) as follows: "Q These buses were to leave the bus stand at the Pennsylvania station? A Yes, sir. Q Were any of them due to travel toward this railroad crossing? A No, sir. Q None of them? A No, sir."

Referring to a written statement made a couple of days after the accident, which Mr. Clark (p. 49, ll. 10-30) admitted signing, he said (p. 49, ll. 30-40) "Q Can you explain this discrepancy between this statement and your testimony today? In your statement you say 'we went to the French street garage, we did not stop at the garage, we were all talking about an accident that occurred the day before at the Voorhees Pennsylvania Railroad Crossing.' Do you remember any better now about that? A We wasn't all talking about it. Q Who was talking about it? A Someone in front of me, but I don't remember who it was, there was some words spoke about an accident the day before. Q Was anybody proposing to go down to see where it was? A No one, but when that was mentioned my idea was that they was going out there and that is how I come to speak up and tell them there was nothing there to see. Q That is how you came to tell them that? A Yes, sir."

The witness Clark further said, (p. 51, ll. 10-30) that he had a watch at the time of the accident, there he saw it a few days afterward at the hospital, that "It was tore all to pieces," it was stopped (p. 53, ll. 1-10) all the works inside were loose, * * * and "Q What time did the hands show the watch stopped? A The hands showed about five minutes of six."

The witness Clark was asked by the petitioner (p. 53, ll. 20-40) "Q Would it have been possible

for someone in the car ahead of you to have objected to the acts of the driver without your hearing?"

By "in the car ahead of you" of course is meant sitting ahead in the same auto, for there was only one auto concerned. This question is ostensibly asked on cross examination after the respondent had taken the witness as its own for the purpose of establishing the time that his watch stopped; but obviously it was in fact direct examination by the petitioner of her own witness. Mr. Tynan, for the respondent, objected to the question as calling for an opinion upon a subject matter not open to opinion. The question was allowed, an exception taken, and the witness answered (p. 54, l. 20) "A Yes, it would have been impossible for me to hear. That all depends on how loud they had spoken, the motor was making a noise—."

It of course follows that if the witness could have missed hearing an *objection* to what was going on, he could likewise have missed hearing an *acquiescence* in what was going on. The supposition that these four men, all experienced bus drivers, and therefore familiar with motor mechanism would let Thomas Mellor, the driver of the auto, kidnap them, against their will, is absurd. It is particularly absurd as to petitioner's decedent, Raymond Soden, who sat in the front seat with the driver. An experienced bus driver such as he was could readily have stopped the auto even against the driver's will, by turning off the spark, or stopping the flow of gasoline, or disordering some of the mechanism on the dash board. The only reasonable inference to draw from the situation is that all these men acquiesced in this trip and this abandonment of their intended employment by the respondent.

Mr. Clark, on cross examination by the respondent, admitted (p. 49, ll. 1-20) as follows:—
 “A Yes, sir, that is the statement I made to Mr. MacFayden,” and he says it was the truth so far as he could remember it *two days after the accident*. On page 50, lines 20-30, he qualifies that part of the statement which reads—
 “we went to the French street garage, we did not stop at the garage, we were all talking about an accident that occurred the day before at the Voorhees Pennsylvania Railroad Crossing.” He admits, however, that someone in front of him was talking about it. There were, of course, three persons in front of him, Soden and the driver in the front seat, and another man in the center seat. The witness Clark is also asked (p. 50, ll. 20-30) about that part of the statement which reads— “we did not stop until we got to the Voorhees crossing, we crossed the railroad and stopped and a man named Soden, an employee, was the only one that got out.” He replies that he does not remember making that statement, “because no one got out of the car at all at the crossing.” On page 50, line 30, he expresses the opinion that two days after the accident, the time of the alleged statement, he thought his head was not clear. His present recollection is that the auto never even stopped. “Q You would think your memory wasn’t as good two days after the accident as it is now? A Really, it is a blank yet.”

The respondent, (p. 54, ll. 20-30) produced a witness, John MacFayden, who took the statement from Clark. He says (p. 55, l. 10) “Q What was his state of mind? A All right, as far as I could see, I would say perfect. Q Did his mind seem to be cloudy? A No, sir.” Mr. MacFayden testified that Clark, at that time,

said to him— “we went to the French street garage but did not stop at the garage, we were all talking about an accident that occurred the day before at Voorhees Pennsylvania Railroad Crossing.” Mr. MacFayden further testified (p. 56, ll. 10-20) that Clark said— “we crossed the railroad and then stopped and a man named Soden, an employee, was the only one that got out, we only remained two or three minutes.”

The method of taking the statement is set forth by Mr. MacFayden on page 57, lines 10-20, as follows:—

“A Well, I asked Mr. Clark how he was feeling and then talked about the accident, and I told him I would like to have a statement in writing if he had no objection, he said he had not, I then took his statement and swore him to it after he signed it, and read it over to him, in fact, he read it with me. I read it over and he read it over and he signed his name and I swore him to it, and he said it was true.”

Mr. MacFayden (p. 58, ll. 30-40) was a Notary Public at that time. He states that he got notice from his company to go down and investigate the accident, “*and I went first to the hospital and saw Mr. Clark,—*” It is difficult to see how any differentiation in the statement should have been made as to petitioner’s decedent Mr. Soden unless Mr. Clark, in making the statement, made that differentiation. It is difficult also to see how Clark would speak of Soden getting out at the scene of the prior day’s accident unless it in fact was so, and it seems probable that his memory was better two days after the accident than it was at the time of the trial. Mr. MacFayden could have had little object in falsely embodying such an assertion in the Clark state-

ment. The first thing he did about the investigation of the accident was to go to see Clark, and he probably had never heard of Soden. And with four dead men, why would he pick Soden as the only one chargeable with getting out at the railroad crossing obviously to examine the scene of the accident of the previous day? We are, of course, aware that this contradiction of Clark by means of his prior statement does not create affirmative evidence. We have no evidence that Raymond Soden got out of the automobile at the railroad crossing. But the contradiction affects the force of Mr. Clark's testimony at every point at which it is inimical to this respondent.

It will be recalled Clark sat in the back seat on the right-hand side, Gold in the back seat on the left-hand side, Sheska on a small seat between the front and rear seats and Soden and Mellor rode on the front seat (p. 40, ll. 10-30).

Clark said the boys, some of them seemed surprised (p. 45, ll. 10-20) but they didn't make any emotion to that effect.

If they didn't talk, if they didn't make any emotion, how can Clark testify whether they were surprised or not, as their backs were toward him. He wouldn't know unless they talked and isn't that just what they did, according to his signed affidavit taken two days after the accident.

On this testimony it becomes a question of fact, whether to believe Clark's affidavit, or his testimony on the stand, or to disbelieve both. If the affidavit is believed then Soden acquiesced in the trip outside the scope of his employment and he would not then be a passive occupant of

the car, but was an active agent deviating from his employment.

Our contention is that the Court of Common Pleas having decided a question of fact, there being evidence to support said finding, the finding should not be disturbed by the Supreme Court.

It has been held repeatedly that the jurisdiction of the Supreme Court over these matters is limited to reviewing questions of law.

Dunnwald v. Steers, 89 N. J. L. 601, 99 A. 345.

Frank A. Gillespie was sworn as a witness for the respondent (p. 59, ll. 10-20). He is employed by the respondent at the Schuyler street garage as Day Station Master. When he reached the garage that morning Mr. Soden and the others had left. Mr. Guyer's shift was over at 6 A. M. but that morning he did not go home till around 8 A. M. Witness was expecting the men back from the French street garage. They did not come back. He went to the French street garage to investigate, where he learned of the accident and proceeded to Voorhees crossing where he saw that three men had been killed. Mr. Soden was not there then. From Schuyler street garage to French street garage is 7-10 of a mile. From French street garage to Voorhees crossing is about a mile and a half or a mile and three-quarters. In going from Schuyler street garage to French street garage it is not necessary to cross the Voorhees crossing. It is not possible to cross that crossing in going from one garage to the other unless you go about five miles out of the way. Witness has something to do with keeping the time of these men, and is familiar with their rates of remuneration. Remuneration

of a chauffeur began five minutes before the starting time at the Pennsylvania Station. (p. 60, ll. 30-40) "Q Were any of your buses so routed that day that they would have to cross the Voorhees crossing of the Pennsylvania Railroad? A No. Q What was the nearest to the Voorhees crossing that any bus of the Public Service Transportation Company would have gone that day? A A mile this side, between a mile and a half this side of the Voorhees crossing. (p. 61, ll. 10-20) Q There were no established bus lines controlled by the Public Service Transportation Company going to or crossing the Voorhees crossing on that day? A No. Q Were there any Public Service Transportation buses on established routes or otherwise, due to cross that crossing that day? A Not that day." (p. 61, ll. 20-30).

The witness identified as familiar points on a map offered in evidence, and the map was put in evidence (p. 62, ll. 20-30) and marked Exhibit R. 1, "simply to point out the relative positions of the first garage, second garage and the railroad crossing."

Witness had been day station master or a similar job, for sometime (p. 63, ll. 1-10) and this was the first time he had known men to be late in getting back after being sent for their buses to the other garage.

The foregoing (together with some formal admissions on pages 29-30) is the case. The respondent contended, and here contends,—

1. That the accident did not arise *in the course of* the employment.
2. That the accident did not arise *out of* the employment.

Our New Jersey Workmen's Compensation Act (first paragraph of Section 2, called paragraph 7) makes compliance with both of these conditions necessary for a recovery.

If Mr. Soden, the plaintiff's decedent, voluntarily rode past the second garage, then assuming for the moment that he had heretofore been in the respondent's employ, his employment at that moment ceased, and any undertaking on the respondent's part to carry him from the first garage to the second garage had been absolutely carried out.

If the plaintiff's decedent was carried past the second garage against his will by the driver Tom Mellor, then at the moment of passing the second garage Tom Mellor had ceased to be employed by the respondent because he abandoned the course of conduct outlined for him by the respondent, and therefore the decedent was not carried past the second garage by any servant of the respondent for Tom Mellor had ceased to be such a servant. Therefore the decedent's kidnapping having taken place through the act of one who had ceased to be a servant of the respondent and not an act in any way incident to the business of the respondent, such kidnapping in effect caused a cessation of decedent's employment (if employment existed) for the respondent from the moment that he was driven past the second garage.

It must be conceded that to bind the employer the actions or conduct of Mellor must have been within the scope of his authority. The only authority he had was to take the occupants of his car to the French street garage.

On either of the two preceding suppositions a mere turning back from the distant point for

the purpose of turning toward New Brunswick (and that is all that the testimony brought out as to the purpose of turning back) could not be a return to the employment for Tom Mellor, the driver, had completed what he was to do for his employer when he took these men so far as the second garage, and as said Tom Mellor then abandoned his employment, and the other men either voluntarily abandoned such employment or were carried away from such employment by one who virtually was a stranger to the employer, it follows that whether the abandonment by Soden was voluntary or force, the driven Mellor after crossing the railroad had no authority from this employer to drive the men back to the garage. At best a resumption of employment could not take place until the men had again reached garage No. 2, which they never did because of the accident. There are strong reasons for assuming that even such reaching of the second garage on a return journey from the railroad crossing could not create, or re-create, an employment.

We submit that at no time that morning had any employment of Soden begun, for the testimony shows by two witnesses that wages would not begin until five minutes before the time of starting a bus from the railroad station. It appeared that these men were allowed five minutes to get the bus from the second garage, and return with it to the first garage and the railroad station. Soden had no allotted bus, and therefore had no allotted route. It would only be after he returned with the bus, and a trip was allotted to him, that his pay, and, we submit, his employment, would begin except for antedating the pay by five minutes. This matter of the five minutes' allowance was testified to by Mr.

Guyer (p. 36, ll. 30-40) and by Mr. Gillespie (p. 60, ll. 30-40). We are familiar with the cases which hold that a reasonable time to get ready for work must be included in the period of employment, but we submit that when this five-minute period was agreed on, and the method of allowing it as five minutes prior to the starting time of the assigned trip, was agreed on, that the measure of employment must be exactly that five minutes. In this case Soden had no allotted trip (p. 36, ll. 30-40), and he never came back from the second garage, and was never assigned to a trip, therefore it is impossible to calculate a five-minute allowance from any period, and so we claim that he had not yet entered upon his day's employment.

It appears (p 35, ll. 30-40) that one of these men was to take out the bus that was to leave the Pennsylvania Railroad Station Bus Stand, at 5:55 (p. 36, ll. 30-40). Soden had not been assigned to any run, but when he would return that his bus would be assigned, and allowed the extra minutes which (p. 36, ll. 30-40) were five or ten. (p. 36, ll. 30-40) The 5:55 bus that morning had not been assigned to any man yet, but, (p. 38, ll. 10-20) depended upon the first man getting back from the other garage, and Soden was one of these men. We must, therefore, assume that Soden was assignable to the 5:55 bus which would make his pay start at 5:50, or at 5:45, if the allowance was ten minutes, but we find from the testimony of Mr. Clark (p. 53, ll. 10-20) that the watch that he wore, in which the works were put out of order by the accident, had stopped, that the hands showed about five minutes of six. As this is the only evidence of the exact time of the accident we think it should be taken as a basis for establish-

ing that time, and this basis shows conclusively that Soden instead of being ready to be assigned to the 5:55 bus trip was at that moment receiving mortal injuries in an accident over two miles away. This again establishes that his day's work for the respondent had not then begun, and could not begin.

Regardless of whether the decedent Soden had voluntarily joined in this little joy ride, or had been kidnapped and carried along against his will, we submit that a controlling element of this case is that the risk of crossing that railroad was not a risk inherent in the employment. The thing that these men had been hired to do, to wit, to drive where there was no such railroad crossing, did not contain this risk. The risk was *not in contemplation of the parties when the contract of employment was entered into*. The risk was created either by an act of the decedent in willingly joining in the joy ride, or by a man named Mellor, who, when he had passed the second garage, had ceased to be employed by the respondent, and who had kidnapped the decedent. In no case, and in no sense, was the risk one created by, or within the purview of the respondent. Therefore, even though it should be held that the accident arose *in the course of* the decedent's employment for the respondent, it obviously necessarily did not arise *out of* such employment, but was an additional risk needlessly undertaken by Soden or by Mellor without the act or acquiescence of the respondent.

Mr. Clark, as witness for the petitioner, said (p. 48, l. 30) that the buses were due to leave the bus stand at the Pennsylvania Station, and that none of them were due to travel toward that railroad crossing.

Mr. Gillespie, for the respondent, (p. 61, ll. 20-30) said that none of these buses were so routed that day that they would have to cross the Voorhees crossing of the Pennsylvania Railroad, and the closest they would have to go to it was a mile this side, between a mile and a mile and a half this side of the crossing. He said (p. 55, ll. 30-40) that no established bus lines, controlled by this respondent, went to, or crossed, that crossing, and no bus on established routes, or otherwise, of this respondent, were due to cross that crossing that day. Mr. Gillespie further said (p. 60, l. 20) that it is not necessary to go to that crossing in going from one garage to the other, and it is not possible in going from one garage to the other to go across that crossing unless you go about five miles out of the way. Obviously, no risks incident to this crossing, which (p. 46, ll. 10-20) is without gates, and without flagmen, were in any way incident to the employment by the respondent of Mr. Soden.

We submit that Soden was a voluntary participant in this joy ride. If the testimony of Clark shows anything at all, the inference is acquiescence rather than remonstrance. To assume that these four chauffeurs, skilled in the operation of motor vehicles, were taken that mile and a half to the crossing, and then beyond the crossing, by Tom Mellor, the driver, and that they were so taken against their will, is to assume an absurdity. Soden, sitting on the front seat with the driver, would, if he had *protested, have made the fact so known that Clark could not but have noticed it.* Clark's failure to notice such a protest raised a fair presumption that there was none, and that acquiescence was prevalent. Of course, the burden of proof is on the petitioner. *Predale v. Berntz,*

37 New Jersey Law Journal, page 60. As was said in *Curran v. Newark Gear Cutting Machine Company*, 37 New Jersey Law Journal, page 21,— “The judge is entitled to draw an inference, but he cannot arrive at it by guess or conjecture; and the onus is in the first instance on the applicant to furnish evidence from which an inference in the applicant’s favor can be legitimately drawn.”

We submit that so far as the proofs go no protest was made by the petitioner’s decedent, when, or after, the automobile passed the second garage; that protest cannot be presumed; and that silence, which is all the proof shows, implied acquiescence.

Clark heard somebody ahead of him, who may, or may not, have been Soden from the driver’s seat (p. 45, l. 30) talking about the accident that had occurred the day before at that crossing. It raised the thought in Clark’s mind that they were going out there, and so he spoke and told them there was nothing there to see. We believe that conversation is in favor of the inference that Soden sitting on the front seat next to the driver, (p. 39, ll. 30-40) undertook this joy ride willingly, and if that be the case it needs no legal citations to establish the proposition that when he passed the second garage he abandoned his employment. And that Thomas Mellor, the driver of the automobile, when he disobeyed orders and passed the second garage, ceased to be a servant of this respondent, would seem to need no argument. If the driver Mellor invited this man to ride beyond the second garage, or if he forced this man to ride beyond the second garage, in either case he was not on his master’s business and was outside the scope of his authority. The case of *Eldridge v. Calhoun*, (New Jersey Court of Errors and

Appeals) 95 N. J. L. 168, 112 Atlantic Reporter (p. 340) holds that a servant having disobeyed his employer's instructions, and deviated from the business he was directed to pursue, his use of an automobile was his own use, and the relation of master and servant was thereby terminated.

This case also holds, what the court terms, "a sound and practical test whereby to determine whether an act done by a servant for his own interest comes within the scope of his employment; which test requires that it should appear that the service performed was for the benefit of both master and servant."

It doesn't seem logical to argue that these bus drivers and Mellor were performing a service for the benefit of both master and servant, in taking a joy ride, out into the country a couple of miles past the place of their employment, using the master's car, gas, tires and oil, on the master's time (assuming the employment had started, we contend that it had not) and meeting with an accident at the exact time they should have been two miles away from where they were, ready to take out a bus, to carry out the master's obligation to the public.

In the case of *Cronecker v. Hall*, N. J. Court of Errors and Appeals, 92 N. J. L. 450; 105 A. 213, it was held

"An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, done, not as a means for the purpose of performing that work, but solely for the accomplishment of the independent malicious or mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master in any sense and should not be deemed

so as a matter of law. As to it, the relation of master and servant does not exist between the parties, and for the injury resulting to a third person from it the servant alone should be held responsible."

The case of *Jennings v. Okin*, 88 N. J. L. 659, 97 A. 249, cited in *Cronecker v. Hall* holds "From the moment it (the deviation) was undertaken, the relationship of principal and agent theretofore subsisting was severed."

Further argument on the question as to whether Thomas Mellor driving the automobile had ceased to be a servant of the respondent, when he passed the second garage, seems unnecessary.

If the petitioner's decedent voluntarily joined in this joy ride, going away from the course of his employment, then obviously the accident did not arise either *out of*, or in the *course of* the employment of the petitioner's decedent by the respondent.

If the petitioner's decedent was carried away against his will by this Tom Mellor who had ceased to be the servant of the respondent, and who, therefore, was in substance a stranger, we submit that, nevertheless, the employment then and there ended; but whether or not the employment then and there ended, we submit that the risk was one entirely foreign to the employment.

The following are decisions of our courts in cases where the employee has met with an accident, which accident was not within the contemplation of the parties at the time of hiring.

Lynch, Admr. v. Newman, Warren County Common Pleas, 37 New Jersey Law Journal, 17.

In this case a recovery was denied for death of Lynch because the death resulted from additional risks not naturally inherent in his employment, and which he had been forbidden to take. The court quotes numerous cases among them one in which Lord Atkinson said: "The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service, directly or indirectly, involved or at all obliged him to encounter. It was not, therefore, reasonably incident to his employment. That is the crucial test."

Kreutz v. Newmann Hardware Co., Essex County Common Pleas, 37 New Jersey Law Journal, 58, Judge Osborne said: "If the petitioner, in running the elevator, arrogated to himself duties which he was neither engaged, nor entitled, to perform, then he was acting out of the scope of his employment and is not entitled to recover."

Bryant v. Fissell, New Jersey Supreme Court, 84 N. J. L. 72, 86 Atlantic Reporter, 458, holds— "Within the purview of the employer's liability act of April 4th, 1911, 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.* * * * 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." *It could never have been within the contemplation of the parties at the time of hiring that Soden would meet with an accident at this particular railroad crossing, because nothing in the employment called for Soden to cross that railroad crossing.*

Vreeland v. Cogswell & Boulter Co., Essex Common Pleas, 37 New Jersey Law Journal, page 57. In this case the petitioner's skirt was caught in a revolving pulley. Judge Osborne said,—“If she left her machine and crossed the aisle to the place where she was injured in pursuance of her duties, she is entitled to recover; if she went for business of her own, or for her own pleasure, apart from the work upon which she was engaged for her employers, she is not entitled to recover.” Quoting *Read v. Great Western Railroad Co.*, 2 Butterworth's Compensation cases, 109.

Pancona v. Volcanite Portland Cement Co., Warren County Common Pleas, 37 New Jersey Law Journal, page 75. In this case Judge Roseberry said,—“The question is, did this accident arise out of and in the course of the petitioner's employment, and this raises the further question whether the hanging of the pail to catch the dripping oil was reasonably incidental to the petitioner's 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; it is not incidental to the employment when it is not due to the nature of the employment, or when it is a new or added peril to which a workman by his own conduct exposes himself; a peril which his contract of service, neither directly nor indirectly, involves or obliges him to encounter.”

Schelf v. Kishpaugh, Warren County Common Pleas, 37 New Jersey Law Journal, page 173, says “When the petitioner went, against the respondent's orders, in close proximity to the saw to throw over fuel to the furnace, it was a new or added peril to which the petitioner, by his own conduct, exposed himself; a peril which his con-

tract of service neither directly, nor indirectly, involved or obliged him to encounter. It did not belong to, nor was it connected with what the petitioner had to do in fulfilling his contract of service on the safe side of the fuel pile. * * * The petition is dismissed." In the above case the respondent had commanded the petitioner to work on the safe side of the fuel pile when throwing the wood into the furnace.

Phillip, Admx. v. Hamburg Steamship Co., Hudson Common Pleas, 37 New Jersey Law Journal, 167. The decedent was in the employ of the defendant about its piers. He fell off a ship at the dock, was taken out of the water and died. Judge Tennant said,—“There was no reason shown for Phillip going on board the ship; his instructions were to collect the blocks and falls which were located on the other side of the pier from the ship, said pier being 100 ft. wide; and there is nothing in the testimony which discloses any reason, or motive, or duty of Phillip which would take him on board the ship at that time.” Judge Tennant referring to other decided cases held that a person claiming compensation must prove that the injury arose out of, and was sustained in the course of, the employment unless facts were proved, the natural and reasonable inference from which is that the accident happened while the deceased was engaged in his employment, in which case the burden would shift to the employer to prove the contrary. Judge Tennant, however, held that there was no such natural and reasonable inference and there was nothing to show why the decedent went on the ship, and the particular duty that had been assigned to him by his foreman required his person in a totally different place, namely the other side of the pier.

Reimes v. Proctor Publishing Co., New Jersey Supreme Court, 85 N. J. L. 441, 89 Atlantic Reporter 931. This case holds that where a workman taking his employer's automobile contrary to orders met with an accident, there could be no recovery for compensation for the accident. There is an indication from the text that the use of the auto may have been about the master's business. Despite this the decision holds as stated.

Smith, Admr. v. Crescent Belting and Packing Co., Mercer Common Pleas, 37 New Jersey Law Journal, 292. A boy was killed by an elevator. The Court said,—“It has been held that, when a workman does something entirely foreign to the work which he is employed to do (playing a practical joke for example) whereby he is injured, the accident could be said to have occurred ‘during the course of the employment,’ but could not be said to arise ‘out of the employment’ because the workman was not doing anything which he was employed to do when the accident happened. It is quite evident, in this case, that the boy was not at the place where the accident occurred in furtherance of his employment,—. In my opinion the testimony has failed to establish that the death was caused by an accident arising out of and in the course of his employment,—.”

Ballman v. D-Arcy Spring Co., (Michigan) 192 Northwestern Reporter, 596. An employee against orders left the shop to go to a drug store to get some Bromo Seltzer. On his way back he was killed by a train and it was held that the accident did not arise in the course of the employment—the employee having voluntarily gone outside of the scope of his employment against orders, and there being no emergency justifying such action. The decedent had

gone to the drug store for his foreman. The court said in volunteering this errand for Stevens, "Ballman assumed a task unexcused by habit or custom outside the place and line of his employment, not in pursuance of the interest of his employer in the absence of any peril requiring him to act in an emergency, *and involving a risk not applying to or connected with what he was required to do in fulfilling his contract of service.* The errand upon which he went was not negligent, or unauthorized conduct within a sphere of his employment, which in itself does not necessarily prevent recovery, *but an act involving street and railroad risks entirely, outside, and not in the limits of said sphere.*"

Zabriskie v. Erie Railroad Co., New Jersey Supreme Court, 85 N. J. L. 157, 88 Atlantic Reporter, 824, refers to *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atlantic Reporter 458, as defining an accident arising 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, and refers to the concrete conclusion of that case with—"An accident arises out of the employment, where it is something the risk of which might have been contemplated by a reasonable person when entering the employment as incident to it."

A line of cases directly pertinent to this situation are the so-called "Skylarking" cases which we will refer to.

The law has been well established in this and other States and in England that compensation cannot be recovered where an employee has been

injured as the result of fooling or horseplay of fellow employees.

The Supreme Court in its *Per Curiam* in this case refers to the passive occupants of the car, of which Soden was one, and holds that the misconduct of a fellow employee should not bar the petitioner as a deviation.

It must be admitted that in a case of horseplay, where an employee is injured through the acts of fellow employees, he may be a passive agent, and his injury came about through no action on his part, but through the wrongful act of his associates. So that we have exactly the same situation in the case at bar as exists in so-called "Skylarking" cases.

If Mellor had said I am going to have some fun with these fellows, I am going to make them late for work, and then had taken them past the garage out to this same crossing and they were injured; under the decisions, none of the occupants of the car could recover, because they were injured through the wrongful act of a fellow servant, which act was unconnected with the business of the employer.

Our contention is that it doesn't matter what was in the mind of Mellor, he went outside the scope of his employment and caused an injury to the occupants of his car, which action on his part had absolutely nothing to do with the master's business.

Assuming that Mellor had either on the way to the French street garage or after he passed it, struck Soden on the head with a club and killed him, and it was shown that there had been no argument about the work, or that the blow had nothing to do with furthering the interests

of the employer, Soden's dependents could not recover, even if the accident happened in the course of the employment. The reason for this being that such an occurrence could not arise out of the employment because it was *not within the contemplation of the parties at the time of hiring.*

The Supreme Court in its opinion in this case implies that if Mellor's dependents had brought an action for his death, that they could not recover, because he was acting outside the scope of his authority.

It was Mellor's wrongful act outside the scope of his authority that caused Soden's death, therefore how could the accident be said to arise out of the employment.

"An injury to an employee knocked down while in the course of his employment as a result of fooling, or horseplay, of fellow employees, in which one of the other employees was pushed out of a doorway and against compensation claimant, did not arise out of the employment, as such acts, whether done in a spirit of play or from a malicious motive, are outside the scope of the employment of those causing the injury, and have no relation to the employment." *Lee's Case*, Mass. 134 Northeastern 268.

"Because the skylarking of boys employed in a plant came under the observation of the president and superintendent of the employing company, those officers were thereby charged with contemplating no more than the same thing might occur again, that is, skylarking or horseplay, not that one boy might thereafter commit an atrocious assault upon the other.

"The Workmen's Compensation Act (Act April 4, 1911, P. L. 134-D) does not provide an

insurance for a workman against every happening to him while engaged in his employment, but only against accidents arising out of and in the course of that employment; and an accident caused by a fellow workman doing a wrongful act entirely outside the scope of his employment is not an accident so arising, unless it appears that what happened was a risk reasonably within the contemplation of the employer." *Mountain Ice Co. v. McNeil, et al.*, 91 N. J. L. 528, 103 Atlantic Reporter 184, New Jersey Court of Errors and Appeals.

Applying to the case at bar the principles of the case last mentioned, as laid down by our own New Jersey Court of Errors and Appeals, it would appear that *even if Tom Mellor, the driver of the auto, continued to be a servant after he passed the second garage, and even if in a fit of viciousness, or insanity, or frolic, he kidnapped Raymond Soden, and drove him to his death, this respondent, as employer both of Mellor and of Soden, could not be charged with such death unless it knew of such a vicious, insane, or frolicsome tendency upon the part of the driver Tom Mellor.* There was no proof of that. In fact Gillespie testified that he does not recall, on this journey from garage to garage and return, of the chauffeurs ever being late before. Obviously, in the case at bar, and applying the principles laid down by our Court of Errors and Appeals in the case of *Mountain Ice Co. v. McNeil*, the accident did not arise out of the employment.

"An employee who suffers injury in a street brawl brought on by himself, and for his own purposes, is not entitled to compensation, even though he was engaged in his employer's business just before the fracas, and intended to resume it immediately afterwards."

Wooley, et al. v. Minneapolis Equipment Co., et al., 196 Northwestern Rep. 477, Supreme Court of Minnesota.

“An employer is not liable, under the Workmen’s Compensation Act (P. L. 1911, p. 134), to make compensation for injury to an employee which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident, happening in such circumstances, may arise in the course of, it cannot be said to arise out of, the employment.” *Hulley v. Moosbrugger*, 88 N. J. L. 161, 95 Atlantic Rep. 1007, New Jersey Court of Errors and Appeals.

In the case of *Burton, Admx. v. Eggette Coal Co.*, 37 New Jersey Law Journal, page 271, Judge Gnichtel, sitting in the Mercer Common Pleas, said:—

“The testimony shows that Charles Burton was employed by the Eggette Coal Company as a mixer, and that his duties on the third floor where the accident happened, were simply that of a mixer. He had no business on the third floor when the machinery was operated; it is well established that under the rules, nobody was allowed up there during the operation of the machinery except the operator and his assistant, unless special permission was given. On December 8th, Burton went up on the third floor for the purpose of borrowing a couple of matches from the foreman, Charles P. Craig. After receiving the matches, he walked toward Henry Lewis who was working on this floor, stirring up the stuff that goes through the mixer, and commenced playing or fooling with him. He grabbed his hat, and almost immediately, Harry made a grab at his. In the jostling and pulling and

hauling that followed, Burton pulled the cap from Lewis, staggered back and lost his balance, and with his left foot stepped into the trough or conveyer, * * * . Burton was severely injured, and died shortly afterward. * * * I am of the opinion that the evidence clearly shows that the accident was due to the skylarking or fooling that was carried on by Lewis and Burton, and did not arise out of and in the course of the employment.”

“Where a brewery agent and collector was murdered while on his employer’s business in a district of bad repute, his representative could not recover compensation in the absence of a showing that the object of the murder was robbery, or that the employer knew of the dangerous character of the locality and the hazards of sending the employee to such a place.”

Schmoll v. Weisbrod & Hess Brewing Co., 89 N. J. L. 150, 97 Atlantic Reporter 723, New Jersey Sup.

“A railway company is not liable to a section man, struck by a flying piece of an exploding torpedo, placed on the track to frighten him, by a fireman, in perpetrating a joke.” *Goupiel v. Grand Trunk Ry. Co.*, 111 Atlantic Reporter 346, Sup. Ct. of Vermont.

“If an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise ‘out of the employment,’ and the employee is not entitled to compensation therefor under the Employers’ Liability Act.”

Pierce v. Boyer-Van Kiran Lumber & Coal Co., 156 Northwestern 509, Sup. Ct. of Nebraska.

“In another New York case (*Clark v. Voorhees*), where the employee left his place of em-

ployment to obtain a cup of coffee at a nearby restaurant and was killed by a motor truck in the street, compensation was refused.”

Ct. of App. of N. Y. 1921, 131 N. E. 553.

“Injuries sustained by an employee by reason of a harmful prank of a co-employee in throwing him down are not injuries ‘arising out of’ the employment, and are therefore not compensable under the Workmen’s Compensation Act.

“An injury is one ‘arising out of employment,’ within the Workmen’s Compensation Act, where there is a causal connection between the conditions under which the employee worked and the injury received. Workmen’s Compensation Act (Rev. St., c. 50, Laws 1919, c. 238) §1, cannot be legitimately construed in the light of providing that every accident that may happen to an employee while on the premises of his employer shall be compensable.” *Washburn’s case*, 123 Atlantic Reporter 180, Supreme Judicial Ct. of Maine.

In the case of *Oliver v. Smith*, decided in Morris County Court of Common Pleas, reported in 38 New Jersey Law Journal, page 148, the court held as to the matter then under consideration as follows:—

“The accident under the circumstances of the case at bar was not the result of risk reasonably incident to the employment, and therefore it was not an accident arising out of the employment.” The court said:—

“It is an unwarranted interpretation of the statute to say that an employee, during the period of his employment, may engage himself in his own business or devote himself to idleness, physically separated from his work, and,

while thus engaged or devoted, the circumstances at the place of his service becoming changed, and because of which an accident happens and injuries are sustained by the employee while he is endeavoring to resume his place of duty, that under such a situation he may be properly said to have been at the time of the accident '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.' "

The case of *Predale v. Berntz*, decided in the Essex Common Pleas, reported in 37 New Jersey Law Journal, page 60, holds "The burden is upon the petitioner to show that the accident arose out of and in the course of his employment." Citing *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atlantic Reporter 458.

It cannot be said in any of the foregoing "skylarking" cases, that the employee injured acquiesced in his injury and in fact had he had an opportunity it is fair to assume he would have protested.

The courts have held, time and time again, that a person may be busily engaged doing his work and attending to his own business, and if he is assaulted or injured by a fellow employee, and the act of the fellow employee is not connected with the work of the employer, that the injured employee, even though he be unaware of the act of the fellow employee until he is injured cannot recover under Section #2 of the Workmen's Compensation Act.

True the act should be liberally construed, but to construe that the petitioner is entitled to compensation in this case is to hold that the employer is an absolute guarantor of compensation

payments to any employee who meets with an accident irrespective of whether it arose out of or in the course of the employment.

That is not the intent of the act.

“The Workmen’s Compensation Act (Act April 4, 1911, P. L. 134-D) does not provide an insurance for a workman against every happening to him while engaged in his employment, but only against accidents *arising out of and in the course of that employment*; and an accident caused by a fellow workman doing a wrongful act entirely outside the scope of his employment is not an accident so arising, unless it appears that what happened was a risk reasonably within the contemplation of the employer.” *Mountain Ice Co. v. McNeil, et al.*, 91 N. J. L. 528, New Jersey Court of Errors and Appeals.

What a stretch of the imagination would be required to hold that the employer could foresee at the time of hiring that one of his employees would be killed at a railroad crossing over which he had no occasion to go, and over which the employer had no business whatsoever.

It will be noted that the test of what risks might be anticipated is not every conceivable or possible risk, but a *risk reasonably within the contemplation of the parties*.

The Court of Common Pleas passed upon the credibility of the witness Clark and determined how much of his testimony was credible, having in mind the written statement which he made, and drew such inferences from his testimony as were warranted by the credible proof, and from those inferences, determined as a matter of fact that the accident occurred while the decedent was not in the course of his employment. Such a conclusion on the facts cannot be at-

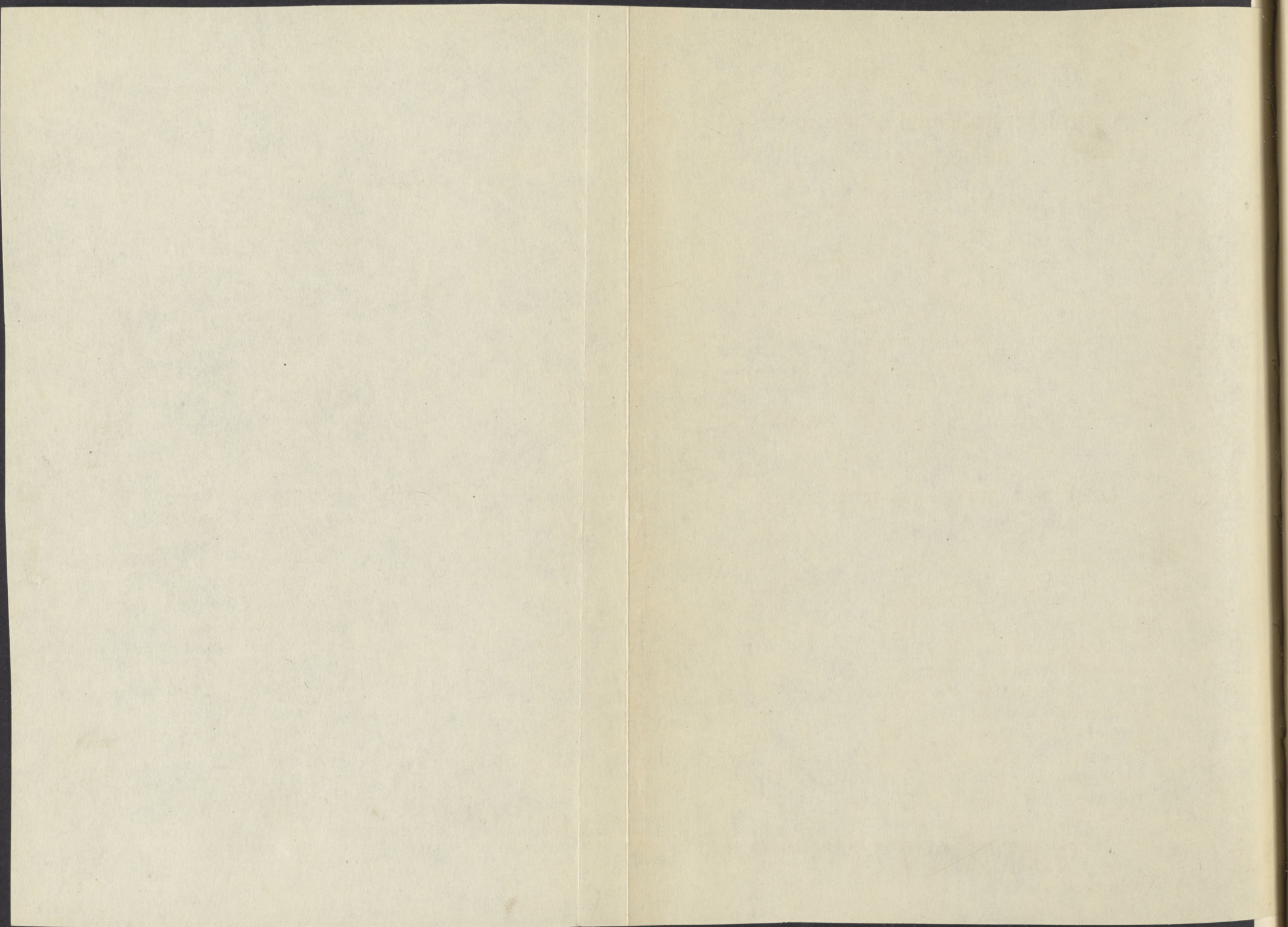
tacked here, on the ground that other inferences might have been drawn had the judge taken a different view as to the value of certain portions of the testimony.

It has been repeatedly held that the jurisdiction of the Supreme Court over these matters is limited to reviewing questions of law, (*Dunnewald v. Stwers*, 89 N. J. L. 601, 99 Atl. 345; *Brinsko v. Lehigh Valley Railroad Company*, 90 N. J. L. 658, 102 Atl. 390) and that the Common Pleas findings of fact must be accepted by the Supreme Court on certiorari as conclusive and binding if there is any legal evidence to support them. *Sexton v. Newark District Telegraph Company*, 84 N. J. L. 85, 86 Atl. 451, 86 N. J. L. 701, 91 Atl. 1070; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458; *Scott v. Payne Bros.*, 85 N. J. L. 446, 89 Atl. 927; *Muzik v. Erie Railroad*, 85 N. J. L. 129, 89 Atl. 248.

We respectfully submit that the decedent did not meet with an accident arising either out of or in the course of his employment; that he was neither in a place where he would reasonably be expected to be during the time of his employment, nor was he doing what he would be expected to be doing at the time of his employment, nor was the decedent in a place where his employment was to begin at the time he met with this accident.

Respectfully submitted,

JAMES O. BOYD,
Attorney for Respondent-Appellant.



New Jersey Court of Errors and Appeals

CLARA G. SODEN,

Petitioner-Appellee,

VS.

PUBLIC SERVICE TRANSPORTATION COMPANY,

Respondent-Appellant.

*On Certiorari—On Appeal from New Jersey
Supreme Court.*

BRIEF FOR PETITIONER APPELLEE.

This case was tried before the Workmen's Compensation Bureau of the State of New Jersey and said Bureau awarded compensation to the dependents of the decedent. The case was appealed to the Middlesex County Court of Common Pleas, and the said Court found and determined that the accident did not arise out of and in the course of the employment and rendered judgment in favor of the respondent, Public Service Transportation Company, and against the petitioner, thereby reversing the findings of the Workmen's Compensation Bureau. The case was then taken to the Supreme Court on a Writ of Certiorari and the Supreme Court reversed the findings of the Middlesex Court of Common Pleas. This appeal is to the judgment of the Supreme Court.

FACTS.

The petitioner appellee's intestate, Raymond Soden, was one of four drivers of Public Service busses, who were required to report to the night station-master, named Guyer, shortly before six in the morning, for duty, and were then put into a touring car driven by another employée named Miller to be taken to the garage, where they were themselves to take charge of their several busses and start out at their scheduled times. On the morning in question the men were assembled and the touring car started for the garage. It never arrived there to discharge its passengers. The car proceeded beyond the garage, across the railroad tracks for a short distance. The car still under charge of Miller then turned around and was crossing the railroad tracks on its return when it was struck by a train and all the occupants with the exception of a man named Clark, and including Soden, were killed.

ARGUMENT.

The Respondent Appellant has stipulated three reasons in his brief as to why the judgment of the Supreme Court should have been in favor of the Respondent Appellant and against the Petitioner Appellee.

In the Respondent Appellant's argument he has added a further reason to the effect that the Petitioner Appellee's decedent had not entered the employment of the Respondent Appellant prior to the accident. He has further by indi-

rection throughout his entire brief set forth an additional reason to the effect that the Court of Errors and Appeals should by inferences and assumptions of probabilities, drawn from selected portions of the testimony, consider, review and decide questions of fact.

The Petitioner Appellee therefore deems it necessary not only to meet all of these five reasons, but also to stress certain salient features of this case. These features therefore will be briefly considered before the reasons of the Petitioner Appellee are stated.

The instant case involves only the rights, powers, privileges and immunities of Soden, as an employee of the Respondent Appellant, in his relations with his employer and the driver of the employer's car, be the driver a fellow servant or a stranger. The instant case does not involve the rights of a third person, (a non-employee), with the Respondent Appellant and the driver of the Appellant's car. The instant case involves only the rights, powers, privileges and immunities of Soden and does not involve the status of Miller's rights. The Respondent Appellant has confused, in its contentions and cited cases, these three separate and distinct thoughts, by using the latter two as analogies for the first one, such as can be seen on pages 23 and 24 of Respondent Appellant's brief.

ARGUMENT.

The Petitioner Appellee submits the following reasons why the judgment of the Supreme Court should be affirmed by the Court of Errors and Appeals.

1. That the Court of Errors and Appeals will review only questions of law in such a case as the instant case.

2. That Supreme Court did not err in reversing the judgment of the Court of Common Pleas on a question of fact.

3. That the Petitioner Appellee's decedent was in the employment of the Respondent Appellant prior to the accident on which this case is brought.

4. That the accident on which this case is brought did arise in the course of the employment.

5. That the accident on which this case is brought did arise out of the employment.

6. That the accident on which this case is brought did arise out of and in the course of the employment.

PETITIONER APPELLEE'S FIRST REASON.

The Court of Errors and Appeals will review only questions of law in such a case as the instant case.

The facts in this case were brought out from the testimony of Curtis Clarke and other witnesses before the Deputy Workmen's Compensation Commissioner. It was at this time that Curtis Clarke and other witnesses were on the stand, under oath, and subject to cross examination. The Commissioner heard the testimony

and stated that there was no proof of an agreement among the occupants of the car to go to the scene of the accident, (Case P. 67, 11 36-40) and that it had not been shown that Soden was the one responsible for crossing the tracks, (Case P. 68, 11 19-25). He further stated that "for reasons not established by this hearing, Miller deviated from the direct course between the two garages and as a result Miller, Soden and two other employees were killed when a locomotive of the Pennsylvania Railway Company struck the automobile," (Case P. 70, 11, 39-40 and P. 71, 11, 1-5).

In accordance with the statute when the case was heard on appeal before the Middlesex Court of Common Pleas only the transcript of the testimony was before that Court. In the opinion of the Middlesex Court of Common Pleas and in the findings of fact of that Court neither the testimony of Curtis Clark nor the facts as stated by the Deputy Workmen's Compensation Commissioner were in any way controverted or denied.

Furthermore the Supreme Court in reviewing the questions of law and questions of fact, (which it had authority to do by virtue of reasons hereinafter to be more fully set forth), decided that the Commissioner was justified on the testimony of Clarke in finding that Soden at least had nothing to do with the deviation, (Case P. 5, 11, 33-36).

A large number of the Respondent Appellant's contentions are devoted to the truth of the testimony of Curtis Clarke, (Pages 7, 8, 9, 10 of Respondent Appellant's brief.), and to inferences, (Pages 11, 22 of Respondent Appellant's brief) and assumptions (Pages 19, 20, 21 of the

Respondent Appellant's brief). Respondent Appellant has also endeavored to give the testimony of John McFadden together with an alleged statement of Clark's, (Pages 12, 13, 14 of Respondent Appellant's brief), although Clark's alleged statement was never offered into evidence, the force of affirmative testimony. The Workmen's Compensation Commissioner refused to consider it in this light in view of Clark's testimony on the stand, (Case P. 67, 11 18-33 and P. 68, 11 1-15).

Further the Middlesex Court of Common Pleas in its opinion and in its findings of fact did not touch on the force or value of the alleged statement, possibly because of the fact that that court had not had the opportunity of judging the demeanor of the witness, Clark on the stand when the testimony was given and possibly because of the fact that no such statement was introduced into evidence.

Further the Supreme Court in its opinion did not touch on any matters affecting the truth of Clark's testimony on the stand, but felt that the Commissioner was justified in believing Clark's testimony in so far as it affected Soden, (Case P. 5, 11, 33-37).

Therefore the Petitioner Appellee respectfully contends that the Respondent Appellant cannot expect this Court to consider, review and decide either questions of fact from inferences and assumptions of probabilities drawn from selected portions of the testimony, or the truth of testimony of witnesses.

PETITIONER APPELLEE'S SECOND REASON.

The Supreme Court did not err in reversing the judgment of the Court of Common Pleas on a question of fact.

The Respondent Appellant in his brief has endeavored to persuade this court that the jurisdiction of the Supreme Court in Workmen's Compensation cases is limited to reviewing questions of law and that the findings of fact in the court of Common Pleas must be accepted and that the Supreme Court cannot review questions of fact in the instant case. He mentions six cases in support of this contention. It is true that prior to the year 1921, paragraph 20 of the Employer's Liability Act, which was approved on April 4th, 1911, contained the following phraseology: "—that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court to review questions of law by certiorari.

The case of *Dunnewald vs. Steers* 89 N. J. Law 601, (cited on page 38 of Respondent Appellant's brief), is based on *Banister Company vs. Kriger* 84 N. J. Law 30 wherein the Court stated that section 20 of the Public Laws of 1911, page 134 limited the right of review of the Supreme Court to questions of law. The case of *Brinsco vs. Lehigh Valley Railroad Company*, 90 N. J. Law 658, (cited on page 38 Respondent Appellant's brief) is based on the Dunnewald case. *Sexton vs. Newark District Telegraph Company*, 84 N. J. Law 85, (cited on page 38 of Respondent Appellant's brief,) recites that the statute of 1911 prohibits the Supreme Court from reviewing findings of fact. *Bryant vs. Fissell* 84 N. J. Law 72 (also cited on page 38 of Respondent Appellant's

brief) is based on the Sexton case. *Scott vs. Payne Bros.* 85 N. J. Law 446 (cited on page 38 of Respondent Appellant's brief) states that the Supreme Court is prevented by the force of the statute of 1911, page 134 to review anything, but questions of law in Workmen's Compensation cases. The case of *Mucik vs. Erie Railroad Company*, 85 N. J. Law 129, (cited on page 38 of Respondent Appellant's brief), was decided on January 9th, 1914 on this same Public Law of 1911, page 134.

The under-lying theory in all of the above entitled cases is clearly stated in the Sexton Case wherein the Supreme Court explains that it is limited by the statute to decide only questions of law, for the Court in its opinion stated as follows; "furthermore, paragraph 20 of this act, which relates to procedure in all cases of dispute, expressly provides that, after the entry of judgment, subsequent proceedings thereon shall only be for the recovery of monies thereby determined to be due and provided that nothing herein contained shall be considered as limiting the jurisdiction of the Supreme Court to review questions of law by certiorari." The words "question of law" were italicized and clearly show that the Supreme Court by virtue of the restrictions in the statute would not at that time review questions of fact.

However the Legislature in its wisdom passed an act in the year 1921 known as Chapter 229 of the Public Laws of 1921 where it states on page 735 "subsequent proceedings thereon shall only be for the recovery of monies thereby determined to be due; provided that nothing herein contained shall be construed as limiting the jurisdiction of the Supreme Court to review questions of law *and fact* by certiorari. (The Respondent

Appellant feels justified in setting forth the words 'and facts' in italics) This statute amended paragraph 19 of Chapter 149 of the Laws of 1918, which paragraph in turn amended paragraph 20 of the laws of 1911, page 134. It will also be noted that all of the cases cited by Respondent Appellant (on page 38 of Respondent Appellant's brief) were decided after the passage of the act of 1911 and prior to the passage of the act of 1921.

The Petitioner Appellee, therefore, respectfully contends that the Supreme Court by virtue of the statute of 1921 had the right to review questions of law and fact on certiorari and that the Supreme Court (*if it did so consider questions of fact in the instant case*) did not err in reversing the judgment of the Court of Common Pleas on a question of fact.

PETITIONER APPELLEE'S THIRD REASON.

That the petitioner appellee's decedent had entered the employment of the respondent appellant prior to the accident on which this case is brought.

Each and every tribunal who has considered this case arrived at the opinion that Soden at the time of the accident was in the employment of the Respondent Appellant.

The Workman's Compensation Commissioner brushed aside the contention that Soden was not in the employ of the Public Service Transportation Company at the time of the accident and held that the relation of master and servant existed, (Case P. 65, 11, 21-40 and P. 66, 11, 1-21.), (Case P. 70, 11, 16-21).

The Middlesex Court of Common Pleas also arrived at the conclusion that “—the decedent at the time of his death was in the employ of the Public Service Transportation Company—.” (Case P. 80, 11 13-18) and (Case P. 83, 11. 9-15).

The Supreme Court stated that the defense, that Soden’s employment had not begun to run, was properly brushed aside, (Case P. 5 11, 17-20).

Employment starts when transportation beneficial both to the master and servant is furnished. This proposition has been stated and followed by the Court of Errors and Appeals in *Cicalese vs. Lehigh Valley Railroad Company*, 75 N. J. L. 897, 69 at 166, which case is cited in *Depue et al vs. George D. Salmon Company*, 92 N. J. L. 550. See also *Fisher vs. Tidewater Building Co.* 97 N. J. L. 324.

The Respondent Appellant, therefore, respectfully contends that Soden had entered the employment of the Respondent Appellant, prior to the accident.

PETITIONER APPELLEE’S FOURTH REASON.

That the accident on which this case is brought did arise in the course of the employment.

It is an accepted fact that the petitioner appellee’s decedent was acting in the course of his employment when he entered the Respondent’s Packard touring car on Schuyler Street. (Determination of Workmen’s Compensation Commissioner. Case, P. 70, Lines 32-39, and the opinion of the Middlesex Court of Common Pleas Case, P. 78, Lines 38-40, and Case P. 79, Lines 1-12).

The Petitioner-Appellee respectfully urges and submits that, if these conditions which were

established at the Schuyler Street garage were in no way changed up to the time of the accident, it must necessarily be determined that Raymond Soden was acting in the course of his employment at the time of the accident.

Soden's obedience to the order of Guyer, the night superintendent to get into the respondent's Packard touring car and be conducted to a definite destination, the French Street garage, by Miller, the driver of the car, an employee of the Respondent, acting under the orders of Guyer, established a set of circumstances from which, both, the Workmen's Compensation Commissioner and the Court of Common pleas decided that Soden was in the course of his employment when they left the Schuyler Street garage. There was but one change, other than the natural lapse of time, in this set of circumstances at the time of the accident. Soden though still in the car was at a place beyond the French Street Garage and he was in no sense answerable for this change.

The driver's action in taking this car to a point other than the designated destination, the French Street Garage, was not the result of any act of commission or omission by the Petitioner Appellee's deceased. It is proper to say if Raymond Soden were obeying his orders at all times, it, of course, necessarily follows that he was at all times acting in the course of his employment from his entry into the Packard touring car at the Schuyler Street garage until he suffered the injuries which brought about his death.

Soden's obedience to orders is the test. It was his duty to get into the car and be conducted to the French Street garage. Soden's presence in the car at the time of the accident indicated that he

was still obeying orders and this obedience to orders at the time of the accident fulfilled the test of whether or not he was in the course of his employment when the accident took place.

A ruling to the effect that Soden was not acting in the course of employment at the time of the accident would therefore be based on the fact that the Court found there was an act of commission or omission on the part of Soden, which constituted a breach of his obedience to orders, when he discovered that he was not being taken to his destination.

But did Soden commit any such act which forever barred this employee or his dependant wife and child from receiving the benefits granted by the legislature through the medium of our Workmen's Compensation Act? There is no evidence of any such act of commission on the part of Soden which constitutes a breach of his obedience to the order to get into the car and be conducted to the French Street garage. He was not the driver of the car. He did not control the car.

Since it could not be properly ruled that Soden committed an act which removed him from the course of his employment, it necessarily follows that the ruling of the Court of Common Pleas was based on Soden's negligence in not acting when the car was driven past the French Street garage. This ruling, making Soden's failure to act, an extra condition to the test of obedience, when it appeared that he could not immediately carry out the orders that were given to him, imposed an additional burden which is not required in Workmen's Compensation cases. Negligence is no bar to the recovery of compensation. *Dixon vs. Andrews*, 91 N. J. L. 373 affirmed by the Court

of Errors and Appeals, October 11, 1918, 92 N. J. Law, 52.

Byant vs. Fissell, 84 N. J. L., 72, lays down the rule of law as follows: (at P. 77), "That the 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." It was reasonable for Soden to be in the Packard car within a time during which he was employed, he having been ordered to allow himself to be conveyed to a definite destination through the instrumentality of the car. His course of employment while he was in the car consisted of obeying orders, namely, that he be conducted to the French Street garage. It will be remembered that the car was proceeding in the direction of the French Street garage when the accident took place.

The use of automobiles is so prevalent in the modern business world that there can be no hesitancy in determining that the presence of an employee under orders in a motor vehicle of the employer is a place where he may reasonably be during his employment. This conclusion cannot be altered by the removing of this car to a point some distance from the premises of the employer by a fellow-employee, who has been given the control of the car under instructions.

It is contended by the petitioner that the petitioner's deceased was acting in the course of his employment at the time he received the injury which resulted in his death and that the Supreme Court did not err in ruling that the decedent was in the course of his employment at the time of the accident.

PETITIONER APPELLEE'S FIFTH REASON.

That the accident on which this case is brought did arise out of the employment.

The Petitioner Appellee respectfully urges that the accident which caused the death of the petitioner appellee's deceased was one that arose out of his employment.

In *Bryant vs. Fissell*, 84 N. J. L., 72, the Supreme Court approves the language used by Mr. Lord Justice Buckley, in *Fitzgerald vs. Clark & Sons*, 2 K. B. 796, as follows: "The words 'out of' point I think to the origin and cause of the accident." He further states that these words are descriptive of the character of quality of the accident and further, "the character or quality of the accident as conveyed by the words 'out of' involve, 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." *Hulley vs. Moosbrugger*, 88 N. J. L., 161, defines the words "out of" as follows: "Where an accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment." *Bryant vs. Fissell (supra)*, defines a risk that is incidental to 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."

Raymond Soden was obliged by the orders of his superior to submit himself to the risks incidental with riding in a motor car, when he was ordered to get into the Packard touring car at the Schuyler Street garage. It was the act of

an employee of the respondent, who was a fellow-servant of the deceased, which caused the accident. The subjection of the employee to danger by the conditions of his employment does not relieve the employer of his liability; and a workman, who is required in the performance of his work to go into a dangerous place and incur the dangers connected with that place, is entitled to compensation on the ground that such an accident arises out of the employment. (*Zabriskie vs. Erie R. R. Co.*, 85 N. J. L. 158, affirmed by the Court of Errors and Appeals, 86 N. J. L., 266.)

“It arises ‘out of’ the employment when there is apparent to the rational mind upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury.” *Hulley vs. Mossbrugger, supra*. In the instant case the work that Soden was required to perform was to allow himself to be ordered into an automobile and be conveyed by a fellow-employee, also under orders, to a definite destination. Soden would not have been barred from recovering compensation had he been injured in an accident somewhere between the Schuyler Street garage and the French Street garage, regardless of whether or not it was caused by the negligence and recklessness of the driver as a fellow-employee, or by a third party. It is certain that this could have been a risk incidental to the employment. The petitioner contends that the risk of riding in a motor vehicle driven by a reckless or negligent driver was just as incidental to the employment when the driver proceeded past the French Street garage as it was just before the driver reached the French Street garage.

It has been contended that inasmuch as the crossing of a railroad track was not contemplated in any part of Soden's duties, that it was not a risk incidental to the employment and further that the actions of the driver were not contemplated. Such a distinction is too narrow. The risk contemplated was the risk of riding in a motor vehicle and if necessary the risk which Soden took can be determined as an extraordinary risk, which was only indirectly connected with the employment owing to the special nature of the employment. This broader view is set forth in *Emerick et al vs. Slavonian Roman Greek Catholic Union*, 93 N. J. L., 282. This is especially so in view of the present widespread use of motor vehicles in the business world.

Following out orders increases the risk contemplated in the employment in so far as the risk is incidental to the carrying out of the orders, *Nevich vs. L. & W. Ry. Co.*, 99 N. J. L., 228.

Further, in respect to the respondent appellant's contention that the crossing of the railroad tracks was an extra hazard, not contemplated, it is respectfully submitted that there can be no distinction between being conveyed in a dangerous manner and in being conveyed to a dangerous location, in so far as it may be a risk incidental to the employment, whether this risk be an ordinary one, or an extraordinary one that may be only indirectly connected with the employment, because of the special nature of the employment, such as being ordered to be conveyed in a motor vehicle.

The actions of the driver cannot be considered and have no bearing in the instant case. An accident resulting from "skylarking" is, of course, one that cannot be said to arise out of the

employment. In this case, however, it is submitted, that there has been no finding of facts or no testimony showing that anyone was engaged in "horse play or sky-larking," and the question is therefore not a subject for consideration in this case. It is further contended, by the Petitioner Appellee that "the skylarking doctrine" could not have applied in the instant case. Accidents resulting from "skylarking" have been explained as accidents caused by the tortious acts of a fellow-workman, which acts have no relation whatever to the employment. *Hulley vs. Moosbrugger, supra*, approving the opinion of Mr. Lord Justice Cozens Hardy, in *Armitage vs. L. & Y. Ry. Co.* L. R. 192, 2 K. B. 178, at 183. The same test is applied in *Fitzgerald vs. Clark & Son, supra*, as approved by *Bryant vs. Fissell, supra*.

In these four cases and in all "skylarking" cases it will be seen that the acts of the fellow-employee have been acts involving physical movements, separate and apart from the particular physical movements used in carrying out the particular duties of his employment. In the instant case Miller's actions were a direct continuation of the same physical acts used by him while operating the Packard car between Schuyler Street garage and French Street garage. Furthermore the theory of the "skylarking" cases cannot be followed in the instant case, for Miller, the driver, of the car was in the act of proceeding towards the French Street garage in accordance with his original instructions when this unfortunate accident took place.

It has been contended that the disobedience of Miller established a set of conditions that will relieve the employer of any liability.

This theory is incorrect and attention is called to the case of *Scott vs. Payne Brothers Inc.*, 85 N. J. L. 446, wherein Justice Swayze in the opinion of the court stated as follows: "The case, therefore, does not involve an accident happening to a Petitioner by reason of his own disobedience. We see no reason to doubt that a disobedience of orders by his fellow workman is as much one of the risks of the employment as a defect in the appliances."

The Petitioner Appellee respectfully contends that this theory, as set forth by Justice Swayze becomes even of greater importance when a motor vehicle is placed in the control of a fellow employee, who disobeys instructions and that any risk arising out of the fact that Soden was in an automobile is certainly one that can be said to flow from the employment as a rational consequence.

Petitioner Appellee, therefore, respectfully submits that the Supreme Court did not err in deciding that this accident arose out of the employment.

PETITIONER APPELLEE'S SIXTH REASON.

That the accident on which this case is brought did arise out of and in the course of the employment.

The actions of Miller, the driver, interfered with Soden's rights, while Soden was obeying instructions to ride in the car. In the line of cases covering employees injured while being transported, precedents are laid down in *Foley vs. Home Rubber Co.*, 84 N. J. L., 474, where Justice Kalisch in rendering an opinion to the

effect that Foley was killed as a result of an accident, arising out of his employment stated: (mentioning the example of riding in a train) "The fact that the collision or derailment was caused by some malicious person with a design to injure a railroad company or some person in its employment would not operate to make an injury received by a salesman traveling on the car, collided with or derailed, any the less an injury the result of an accident arising out of the employment of such salesman, than if such injury had been received by him as a result of the cars going through an open draw-bridge or falling from a defective trestle."

Regardless of whether Miller was a malicious person or still a fellow employee after passing the French Street garage, the Petitioner Appellee respectfully submits that Soden was still an employee of the Public Service Transportation Company obeying certain orders namely to allow himself to be conveyed in a motor vehicle in the course of his employment.

There can be submitted herewith, the problem of a motor vehicle in connection with these principles. There are few if any cases dealing with motor vehicle accidents that have been considered by this honorable court, where a conveyance is furnished to the employee by the employer. One must of necessity refer to cases decided in other jurisdictions where the test includes the application of these same principles that the accident must arise in the course of or out of the employment, or both.

Scalia vs. American Sumatra Tobacco Co. et al, 93 Conn., 82, 105 Atlantic 356, is a leading case in Connecticut where individuals were conveyed in an automobile by a representative of a tobacco company to the tobacco company's plantation

where they were to be hired. Before reaching the plantation the automobile skidded on account of the slippery condition of the road, causing the death of the petitioner appellee's deceased. The court held that injuries and death arose in the course of the employment and that the injuries and death arose out of the employment.

It is again submitted that there can be no distinction as a matter of law between being conveyed in a dangerous manner and in being conveyed over a dangerous spot. In either case the injury arises out of the employment in that the risk incidental to the employment is the risk of riding in an automobile. In either case it is considered in the course of employment in that the individual has subjected himself to the instructions of an employer or prospective employer.

In the neighboring state of Pennsylvania the only test required is that the accident must have arisen in the course of employment. It would seem reasonable to infer that any such test which might be laid down in that jurisdiction, to determine whether an accident arose in the course of employment, would be as strict as any test used to prove the same fact in our own jurisdiction.

In the case of *Messer vs. Manufacturing Light & Heat Co.*, 263 Penn., 5, 106 Atlantic, 85, the engineer of the company was called by the superintendent of the company to inspect a plumbing station. While driving on his way home or on his journey towards the station he was injured. The court found as follows: "The fact that he was prevented from actually carrying out his purpose to go on his way to the Plumbing

Station did not alter his legal status. The test to be applied is, did he go upon this mission voluntarily or because of the request of his superintendent."

The analogy is clear. The fact that Soden was prevented from actually arriving at the French Street garage should not alter his legal status. Especially so when it is recalled that Soden was not driving the car.

The arguments of the petitioner-appellee have been somewhat lengthy and in detail. But can not all these arguments be summed up by referring to the case of *Fisher vs. Tide-Water Building Company*, 96 N. J. L. 103, 114 at 150, affirmed 97 N. J. L. 324.

Here is a case similar in history and principle. There was an award by the Commissioner, which was set aside by the Common Pleas and a reversal of the Common Pleas by the Supreme Court, with an affirmation of the ruling of the Supreme Court by this Honorable Court, all involving the principle of the employer's transportation of an employee. It clearly states that even though the accident occurred before the beginning or after the termination of the actual working hours, if it occurred during the period of transportation, it is held to be one arising out of and in the course of the employment.

As far as Soden was concerned this accident occurred during the period of transportation. And after all it is with the rights of Soden as an employee that the instant case is concerned.

Further this very case of *Fisher vs. Tidewater Building Company* repeats that humane principle which the Petitioner Appellee submits should be considered in the instant case. "At all events the Workmen's Compensation Statute (Law

1911, P. 134, as amended by laws 1913, P. L. 309), is a remedial law of prime import and should be liberally construed; Mayor and etc. of Jersey City, vs. Borst, 90 N. J. L., 454.”

In conclusion therefore the Petitioner Appellee respectfully contends that the Supreme Court did not err in deciding that the judgment of the Pleas be reversed and that the award of the Commissioner be affirmed and further the Petitioner Appellee respectfully asks that this decision of the Supreme Court be affirmed by this Honorable Court.

Respectfully submitted,

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