INDEX

Notice and Grounds of Appeal.

New Jersey Supreme Court

JENNIE Y. MARTIN, *Petitioner-Defendant,* *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Respondent-Prosecutor.*	*In Certiorari.* *Notice and Grounds of Appeal.*

To: Charles E. Miller, Esq.,
Attorney of Respondent-Prosecutor,

SIR:

Please take notice that the petitioner-defendant in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit: because the Supreme Court erred in giving judgment to the respondent-prosecutor instead of the petitioner-defendant.

Respectfully yours,

HARVEY ROTHBERG,
Attorney of Petitioner-Defendant.

Dated: August 8, 1935.

Writ of Certiorari.

July 7, 1934.

NEW JERSEY, ss.

THE STATE OF NEW JERSEY to the Court of Common Pleas, in and for the County of Hudson, and Gustav Bach, Clerk of said Court and Jennie Y. Martin, GREETING:

(Seal)

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the 5th day of June, Nineteen Hundred and Thirty-four, by the Honorable Thomas H. Brown, one of the Judges of said Court of Common Pleas, in and for the said County of Hudson, in certain proceedings brought on behalf of Jennie Y. Martin, petitioner, against Central Railroad Company of New Jersey, respondent, for the determination and recovery of compensation under an Act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April fourth, Nineteen Hundred and Eleven, and the Acts amendatory thereof, 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

Return.

this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the 27th day of July, Nineteen Hundred and Thirty-four, that therein may be caused to be done what of right and according to law ought to be done.

WITNESS, the Honorable Thomas J. Brogan, Chief Justice of our said Supreme Court, at Trenton, this 7th day of July, Nineteen Hundred and Thirty-four.

FRED L. BLOODGOOD,
Clerk.

WM. F. HANLON,
Attorney.

This Writ is allowed; let it be sealed.

July 7, 1934.

CLARENCE E. CASE,
Justice Supreme Court.

Return.

The answer of Thomas H. Brown, Esquire, Judge of the Court of Common Pleas holden in and for the County of Hudson, and Gustav Bach, Clerk of said Court, and within named, the record and proceedings of the plaint whereof mention is within made, with all things touching the same, I send to the Justices of our Supreme Court of Judicature, at Trenton, N. J., at the day and year

within contained in a certain schedule to this writ annexed as within I am commanded.

THOMAS H. BROWN,
Judge.

Attest:

GUSTAV BACH,
Clerk.

(Seal)

Notice of Appeal to the Hudson County Court of Common Pleas.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU.

JENNIE Y. MARTIN, *Petitioner,* *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Respondent.*	*On Petition for Compensation.*

NOTICE IS HEREBY GIVEN by the Central Railroad Company of New Jersey, the respondent in the above entitled cause, that it appeals to the Hudson County Court of Common Pleas from the judgment rendered in said cause on the 7th day of December, 1933, by Daniel A. Spair, Esq., Deputy Commissioner, New Jersey Workmen's Compen-

sation Bureau, and duly entered in and filed with said New Jersey Workmen's Compensation Bureau, which said judgment was entered in favor of Jennie Y. Martin, the petitioner in the said cause, and against the said respondent, The Central Railroad Company of New Jersey, at the rate of $10.00 per week for a period of 300 weeks and the statutory burial allowance of $150.00, provided by the Workmen's Compensation Act; also counsel fee of $250.00, $150.00 of which was ordered paid by the respondent.

WM. A. BARKALOW,
Attorney for Respondent.

Dated: December 28, 1933.

Due & legal service of the within Notice acknowledged this 2nd day of January, 1933.

SIDNEY SCHWARTZ,
Attorney for Petitioner.

Filed Clerk's Office,
Jan. 9, 1934,
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Dependent's Claim Petition for Compensation.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU

TRENTON, N. J.

JENNIE Y. MARTIN,
Petitioner,

vs.

CENTRAL RAILROAD OF NEW JERSEY,
Respondent.

Received at Trenton Mar 1-1933
Claim Petition No.....
Date of Accident....., 19....

If known state name of insurance company....

Attorney for Petitioner Sydney Schwartz, 412 West Front St., Plainfield, N. J.

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What was the full name of the decedent? Joseph Y. Martin.
2. Where did decedent live? 59 Myrtle Avenue, North Plainfield, N. J.
3. Sex of decedent Male
4. Date of birth of decedent May 31, 1872

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 Decedent Jennie Y. Martin
Age at Last Birthday 60
Date of Birthday May 6, 1872
Relation to Decedent Wife

6. By whom was decedent employed at the time of accident? (Give name and business address) Central Railroad of New Jersey Terminal Station Jersey City, New Jersey

7. What was the business of the employer? Railroad

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

11. Did you notify the employer of this accident? Yes

12. If so, on what date? Immediately, Nov. 2, 1932

13. Have you made claim to the employer for compensation? Yes

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Painter, at the time of the accident he was repairing the skylight

on the roof of the terminal building in Jersey City.

15. When did the accident happen? November 2, 1932

16. Where did the accident happen? Terminal Building, Jersey City

17. What was the nature of the accident, and how did it happen? Deceased fell through skylight, suffered various severe injuries and fractures and died on November 3rd, 1932

18. Did deceased work any after the accident? No

20. Give date of death November 3, 1932

21. Were his wages fixed by piece work? No

25. Give number of days in an ordinary working week Six

26. State the amount of weekly wages Thirty-two dollars

27. How much money have you received from the employer as compensation (not medical aid) since the accident? None

28. Has the employer promised to pay you any compensation? No

30. Was medical aid required? Yes

31. If so, was this service furnished by the employer? Yes

32. What other sum did you expend for medical, surgical or hospital service? None

33. Give name and address of physician and hospital. Christ Hospital Jersey City, N. J.

Dependent's Claim Petition for Compensation.

34. What other facts are there which you believe important? Widow was totally dependent upon husbands earnings

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 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

JENNIE Y. MARTIN,
69 Myrtle Ave.
No. Plfd. N. J.

STATE OF NEW JERSEY, }
COUNTY OF SOMERSET, } ss.:

JENNIE Y. MARTIN, of full age, 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 famil-

iar with the contents thereof; and that the matter and things therein set forth are true according to the best of her knowledge and belief.

JENNIE Y. MARTIN

Subscribed and sworn to before me, this 28th day of February, 1933 at North Plainfield, N. J.

ELLA I. JOHNSON
My commission expires April 30, 1936

(Seal)

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

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.

WORKMEN'S COMPENSATION BUREAU.

W. E. STUBBS
Secretary

Respondent's Answer to Dependent's Claim Petition.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU
TRENTON, N. J.

JENNIE Y. MARTIN, *Petitioner,* *vs.* CENTRAL RAILROAD OF NEW JERSEY, *Respondent.*	*Claim Petition No. 25049.* *Mar. 14, 1933.*

March 13, 1933.

Attorney for Respondent WM. F HANLON, 143 Liberty St., New York City.

In answer to Claim Petition filed in this case:

1. What was decedent's name? Joseph Y. Martin

2. Where did decedent reside? 59 Myrtle Avenue, North Plainfield, N. J.

17. What was the nature of the accident, and how did it happen? Decedent was working on the roof of the terminal train shed of the respondent at Jersey City

34. What other facts are there which you believe important? If you deny that compensation is payable in this case, explain fully your rea-

son for this conclusion. Respondent alleges that at the time of the accident mentioned in the petition the decedent was engaged in interstate commerce and/or transportation and the Workmen's Compensation Bureau is therefore without jurisdiction.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
143 Liberty Street, New York City

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

F. T. DICKERSON of full age, being duly sworn according to law, on his oath deposes and says: That he is the Secretary and Treasurer 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.

F. T. DICKERSON,
Respondent.

Subscribed and sworn to before me, this thirteenth day of March, 1933, at New York, N. Y.

WM. F. HANLON,
Attorney at Law of New Jersey.

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

Determination of Facts and Rule for Judgment.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU.

JENNIE Y. MARTIN, *Petitioner,* *vs.* CENTRAL RAILROAD OF N. J., *Respondent.*	*On Claim Petition for Compensation No. 25049.*

A petition was heretofore filed in the above entitled cause, praying for compensation to which petitioner may be entitled by virtue of the term 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 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, together with the supplements thereto and amendments thereof; said petition was duly served upon the respondent; an answer was duly filed by the respondent; a time and place for the hearing of the petition was fixed and due notice thereof was served upon both parties; the petitioner and respondent appeared on the day set for the hearing, the petitioner being represented by Sydney Schwartz, Esq., and the respondent by William

F. Hanlon, Esq., who stipulated to all of the important facts surrounding the accident.

I find as follows:

1. That one Joseph Y. Martin, of 59 Myrtle Avenue, North Plainfield, County of Somerset and State of New Jersey, was, on the second day of November, 1932, in the employ of the respondent, his duties being to do general painting and repair work for the respondent.

2. That on the said second day of November, 1932, the said Joseph Y. Martin was killed in an accident arising out of and in the course of his employment, the particulars of which accident are as follows:

While repairing the sky-light on the roof of the train terminal shed of the respondent at Jersey City, N. J., the deceased sustained a fall through the sky-light on to the tracks below, which fall caused his death on the third day of November, 1932.

3. The respondent contends that the petitioner's decedent was engaged in interstate commerce at the time of the happening of the aforesaid accident, and is therefore not subject to the provisions of Chapter 95, Laws of 1911, of the State of New Jersey, and supplements thereto and amendments thereof.

In the case of *Chicago & Northwestern Railway Co.* v. *Bolle*, 284 U. S. 74; (Nov. 23, 1931), it was held by the United States Supreme Court that a fireman, who, at the time of an accident, was tending an engine to be used to generate steam

for the purpose of heating a depot and passenger coaches in yards, was not engaged in interstate commerce. The Supreme Court also held that the character of work which employee did at other times becomes immaterial in determining whether injury occurred while engaged in interstate commerce, and that the true test to determine whether the employee was engaged in interstate commerce when injured is decided by whether he was engaged in interstate "transportation", or in work so closely related thereto as to be practically part thereof. If his work is not so related, he is not engaged in interstate commerce.

In *New York, New Haven & Hartford Railroad Co.* v. *Benzue*, 284 U. S. 415, decided Jan. 25, 1932, the Supreme Court of the United States, reversing the Supreme Court of the State of New York, held that a laborer was not engaged in interstate commerce merely because the terminal facilities in which the employee worked constituted part of the railroad's system necessary to operation of road and to conduct of interstate commerce. Whether employee is engaged in interstate commerce depends not on the kind of plant in which he was working or character of labor usually performed, but whether the work was directly used for interstate transportation.

In the opinion of Justice Sutherland, delivered for the Supreme Court of the United States in *Chicago & Eastern Illinois Railroad Company* v. *Industrial Commission of Illinois, et al.*, it was held that an employee oiling an electric motor furnishing power for hoisting coal into chute, to be taken therefrom and used by locomotives principally employed in moving interstate freight, was not engaged in interstate commerce.

Determination of Facts and Rule for Judgment.

I find in this case that the deceased was not engaged in interstate commerce, but that his employment was subject to Section 11, Chapter 95, Laws of 1911, of the Laws of the State of New Jersey, and the supplements thereto and amendments thereof.

4. That the respondent had notice and knowledge of the said accident within the time prescribed in Paragraph 15 of the aforesaid act.

5. That the only dependent of the said Joseph Y. Martin, deceased, is his wife, Jennie Y. Martin, who was a total dependent of the said Joseph Y. Martin at the time of his death.

6. That the wages of the deceased, Joseph Y. Martin, were $24.21 per week, which entitled the petitioner Jennie Y. Martin to compensation at the rate of $10.00 per week for 300 weeks from November 2, 1932.

7. That there is due to petitioner from respondent, the sum of $150.00, statutory burial allowance, on account of funeral expenses.

8. That petitioner's attorney is entitled to a counsel fee, which I fix at the sum of $250.00, payable $100.00 by the petitioner and $150.00 by the respondent.

It is, therefore, on this 7th day of December, 1933, ORDERED, that judgment be entered in favor of the petitioner, Jennie Y. Martin, and against the respondent, Central Railroad of New Jersey, as follows:

Determination of Facts and Rule for Judgment.

For compensation for a period of 300 weeks, at the rate of $10.00 per week, beginning November 2, 1932;

For statutory burial allowance, $150.00 and

For Sidney Schwartz, Esq., attorney for the petitioner, the sum of $150.00, as respondent's portion of petitioner's attorney's fee.

And it is further ORDERED that the petitioner pay to Sydney Schwartz, Esq., her attorney, the sum of $100.00 as her portion of her attorney's fee.

DANIEL A. SPAIR (Sgd)
Deputy Commissioner

Filed Clerk's Office
Jan. 11, 1934
Hudson County, N. J.

GUSTAV BACH, Clerk

Finding of Facts and Determination.

HUDSON COUNTY COURT OF COMMON PLEAS.

JENNIE Y. MARTIN, *Petitioner-Appellee,* *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Respondent-Appellant.*	*On Appeal from Workmen's Compensation Bureau.*

The above matter coming on for hearing, and having been submitted to me for decision, I hereby find and determine as follows:

1. That this is a proceeding brought by Jennie Y. Martin and against the Central Railroad Company of New Jersey, under an act entitled "An Act prescribing the liability of an employer and 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; that a petition was duly filed with the Workmen's Compensation Bureau; that a copy of the said petition was duly served on the respondent; that an answer was filed with the said Bureau by the respondent, and that a hearing was duly held before Daniel Spair, Dep-

uty Commissioner of the Workmen's Compensation Bureau; and that an award was made to the Petitioner for compensation for a period of three hundred (300) weeks at the rate of $10.00 a week beginning November 2, 1932; for a statutory burial allowance, $150.00; and for Sydney Schwartz, Esq., attorney for the petitioner, the sum of $150.00, as respondent's portion of petitioner's attorney's fee; that notice of appeal was duly filed with the Secretary of said Workmen's Compensation Bureau and with the County Clerk of Hudson County; that the matter was submitted to me by stipulation and by briefs and that transcript was duly filed; and that memorandums were properly submitted by the attorneys for the petitioner and respondent.

2. All of the facts being stipulated and admitted, the only ground of appeal was the contention that the deputy commissioner erred in his judgment as the petitioner's decedent was engaged in interstate commerce at the time of the accident, and, therefore, not subject to the provisions of Chapter 95, Laws of 1911, State of New Jersey, the supplements thereto, and amendments thereof.

3. I have read the testimony and briefs submitted and I find that the petitioner was not engaged in interstate commerce for the reasons expressed by Deputy Commissioner Daniel Spair in his determination.

4. I also find that Joseph Y. Martin, of 59 Myrtle Avenue, North Plainfield, County of Someset and State of New Jersey, was, on the second day

of November, 1932, in the employ of the respondent, his duties being to do general painting and repair work for the respondent.

5. That on the second day of November, 1932, the said Joseph Y. Martin was killed in an accident arising out of and in the course of his employment, the particulars of which accident are as follows:

While repairing the sky-light on the roof of the train terminal shed of the respondent at Jersey City, N. J., the deceased sustained a fall through the sky-light on to the tracks below, which fall caused his death on the third day of November, 1932.

6. I hereby affirm the decision of the referee below, that the petitioner is entitled to compensation for a period of 300 weeks at the rate of $10.00 per week beginning November 2, 1932.

7. The legal advisor of the petitioner is entitled to compensation in addition to his costs allowed by law in the sum of $250.00, to be paid $150.00 by the respondent as awarded by the Deputy Commissioner and an additional counsel fee of $150.00 for defending the appeal in the Common Pleas Court of Hudson County.

8. Costs will be allowed the petitioner.

It is therefore, on the 5th day of June, 1934, ORDERED, that judgment final be entered in favor of the petitioner, Jennie Y. Martin, and against Central Railroad Company of New Jersey, in the

sum of $10.00 per week for a period of 300 weeks, beginning the second day of November, 1932, and $150.00 for burial allowances together with counsel fee and costs.

THOMAS H. BROWN,
Judge, Hudson County Court
of Common Pleas.

Filed Clerk's Office
June 5, 1934
Hudson County, N. J.

GUSTAV BACH,
Clerk.

Judgment Entered June 5, 1934.

HUDSON COUNTY COURT OF COMMON PLEAS.

JENNIE Y. MARTIN,
Petitioner,
vs.
CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Respondent.

Damages	$3,000.00
Counsel fees	300.00
Burial Allowances	150.00
Total	$3,450.00

SYDNEY SCHWARTZ
Attorney.

Judgment, Finding of Facts and Determination in the above entitled cause was entered in this Court on the 5th day of June in the year of our Lord One Thousand Nine Hundred and Thirty-four, in favor of the Petitioner, Jennie Y. Martin and against the Respondent, Central Railroad Company of New Jersey, in a plea of Action at Law, for the sum of Three Thousand Dollars Damages, Three Hundred Dollars Counsel fees, and One Hundred Fifty Dollars Burial Allowances.

Judgment entered and signed this 5th day of June, 1934.

THOMAS H. BROWN,
Judge.

Transcript of Proceedings before Workmen's Compenstion Bureau.

NEW JERSEY DEPARTMENT OF LABOR

WORKMEN'S COMPENSATION BUREAU
SOMERVILLE, SOMERSET COUNTY DISTRICT.

JENNIE Y. MARTIN,
Petitioner,
vs.
CENTRAL RAILROAD OF NEW JERSEY,
Respondent.

May 1st, 1933.

Before Honorable DANIEL A. SPAIR, Deputy Commissioner of Labor.

Appearances:

SIDNEY SCHWARTZ, ESQ., of Plainfield, for the Petitioner.

WILLIAM F. HANLON, ESQ., 143 Liberty Street, New York City, for Respondent.

Mr. Hanlon: It is stipulated by and between the parties, through their respective attorneys, that petitioner's decedent was in the employ of the respondent on November 2nd, 1932, as a painter. He was working in the course of his employment and met with an accident in the following manner:

While repairing the skylight on the roof of the terminal train shed of the respondent, at Jersey City, he sustained a fall through the skylight unto the tracks, which fall caused his death.

He earned sixty-seven and a quarter cents per hour, eight hours a day, and his wages are to be figured, under the New Jersey Compensation Act, on the basis of five days a week; ten per cent. off, the deduction to be ten per cent. on the wages, the regular deduction made by the respondent at the time.

The petitioner is the sole dependent, the dependency is admitted. The funeral expenses exceeded one hundred and fifty dollars, and if an award is made, the regular statutory burial fee of one hundred and fifty dollars is to be included.

The respondent sets up as a defense, that at the time of the accident, the decedent was engaged in interstate commerce, and therefore the Workmen's Compensation Bureau is without jurisdiction.

I want these two pictures marked into evidence. They are consented to. (Two photographs received in evidence and marked as exhibits R-1 and R-2 respectively.)

Exhibit marked R-1 in evidence shows the terminal train shed of the respondent, at Jersey City. The top portion of the picture shows the skylight on which the decedent was working.

The mark "X" on exhibit R-1 is the window through which he fell. The bottom portion of the picture shows the regular passenger platform and tracks where the passengers on all trains of the respondent, coming in to Jersey City and New York, are discharged.

Some of these passenger trains come from out of the state, like Scranton or Easton, Pennsylvania, and some of them come from within the

state, such as our seashore trains, carrying passengers in both classes of commerce. The passengers, when they have left the train in Jerey City, board a boat of the respondent railroad for New York.

Exhibit R-2 in evidence shows on the right center, the window through which the decedent fell.

I Hereby Certify that the foregoing is a true and correct transcript of the proceedings in the above entitled matters as taken stenographically before me at the time, place and date hereinbefore set forth.

Daniel A. Spair,
Deputy Compensation Commissioner.

I Hereby Certify that the foregoing is a true and accurate transcript of the proceedings in the above matter taken by me stenographically at the time, place and date hereinbefore set forth.

Samuel Winard,
Court Reporter.

Filed Clerk's Office
Jan. 11, 1934
Hudson County, N. J.

Reasons.

NEW JERSEY SUPREME COURT.

JENNIE Y. MARTIN, *Petitioner and Defendant in Certiorari,* *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Respondent and Prosecutor in Certiorari.*	*On Certiorari to to Hudson Common Pleas.*

The prosecutor assigns the following reasons for the setting aside of the conclusions, order and judgment of the Court of Common Pleas of Hudson County, and the other proceedings in the said Court, brought up by writ of certiorari in the above entitled cause:

1. Because the Court of Common Pleas of Hudson County found that the petitioner was entitled to compensation under the terms and provisions of the act of the Legislature 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, together with the amendments thereof and the supplements thereto, commonly known as the New Jersey Workmen's Compensation Act.

Reasons.

2. Because said Court held that the matters before it were subject to, and governed by, the provisions of the New Jersey Workmen's Compensation Act.

3. Because said Court should have found that the provisions of the New Jersey Workmen's Compensation Act did not apply and that the case was subject to, and exclusively governed by, the provisions of the Act of Congress of April 2, 1908, commonly known as the Employers' Liability Act.

4. Because said Court found that petitioner's decedent at the time of the accident from which he sustained his injuries, was engaged in intrastate commerce.

5. Because said Court should have found that petitioner's decedent, at the time of said accident, was engaged in interstate commerce.

6. Because said Court should have found that petitioner's decedent was not entitled to any compensation under the provisions of the New Jersey Workmen's Compensation Act.

7. Because said Court should have held that petitioner's sole remedy, if any, was under the provisions of the Federal Employers' Liability Act.

8. Because at the time of the accident which resulted in his injuries petitioner's decedent was not engaged in intrastate commerce.

9. Because the petitioner failed to establish that the time of the accident resulting in the

Reasons.

injuries to her decedent, said decedent was engaged in wholly intrastate commerce within the State of New Jersey.

10. Because the petitioner failed to establish that at the time of the accident resulting in her decedent's death, decedent was engaged in a service which was not regulated by the provisions of the Federal Employers' Liability Act.

11. Because the Court of Common Pleas of Hudson County should have found that petitioner's decedent, at the time of the accident resulting in his injuries, was engaged in interstate commerce and that his sole remedy, if any, was under and by virtue of the provisions of the Federal Employers' Liability Act.

12. Because said Court should have found that at the time of said accident petitioner's decedent was engaged in interstate commerce; that, by reason thereof, the terms and provisions of the New Jersey Workmen's Compensation Act did not apply and that petitioner was not entitled to compensation thereunder.

13. Because said Court of Common Pleas affirmed the judgment directed entered by the Workmen's Compensation Bureau of New Jersey, allowing petitioner's petition for compensation under the provisions of the New Jersey Workmen's Compensation Act.

14. Because said Court should have held that petitioner failed to affirmatively prove that her decedent was engaged in work not governed by

Reasons.

the provisions of the Federal Employers' Liability Act.

15. Because the conclusions, findings and determination of facts by said Court of Common Pleas of Hudson County and the entry of judgment thereon are in divers other respects unjust, illegal, erroneous and contrary to law.

WM. F. HANLON,
Attorney for Prosecutor.

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

No. 242 October Term, 1934

JENNIE Y. MARTIN,
Respondent,
vs.
CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Prosecutor.

Submitted October Term, 1934, decided March 28, 1935

On Certiorari.

Before Justices Heher and Perskie.

For the prosecutor: Charles E. Miller

For the respondent: Harvey Rothberg

The opinion of the court was delivered by

HEHER, *J.*

Respondent's decedent, Joseph Y. Martin, suffered death, on November 2, 1932, by accident arising out of and, in the course of his employment with the prosecutor. The Workmen's Compensation Bureau awarded compensation to his dependents under the State Compensation Act. *Pamph. L. 1911, p. 134.* The Hudson Common Pleas affirmed the judgment, and the employer sued out a writ of certiorari.

The question at issue is whether the deceased, at the time he sustained the fatal injuries, was employed in interstate commerce within the in-

tendment of the Federal Employers' Liabilitiy Act. *45 USCA, Sec. 51-59.*

The facts are stipulated. Prosecutor is the operator of a railroad in this State. It engages in both interstate and intrastate commerce. In the transaction of such business, it maintains a train shed at its terminal in the City of Jersey City. It employed the deceased as a painter. While engaged in repairing the skylight on the roof of the terminal train shed, he fell through an opening to the railroad tracks below, and thereby sustained the fatal injuries.

Tested by the apposite rule, the service at which the deceased was engaged when the accident befell him falls into the category of interstate commerce. The criterion of employment in such commerce is, "was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." *Rossi* v. *Pennsylvania Railroad Co.,* 114 N. J. L. It is essential that the carrier be engaged in interstate commerce at the time the injury is sustained, and that the injured employee be then employed by the carrier in such commerce. The nature of the particular employment on other occasions is of no moment. The act has reference to the service being rendered when the injury was sustained, and it necessarily follows from the foregoing that one may be employed in what is technically interstate commerce, and yet not be a member of the class entitled to the benefits of the federal statue. Mr. Justice McKenna, speaking for the Federal Supreme Court said: "The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the

work and general repair shops of a railroad, and those employed in them, are accessories to that movement,—indeed, are necessary to it; but so are all attached to the railroad company,—official, clerical or mechanical. Against such a broad generalization of relation, we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal act. And there is no difference in the instrumentalities. In some, the tracks, bridges, and roadbed and equipment in actual use, may be said to have definite character, and give it to those employed upon them." *Industrial Accident Commission* v. *Davis,* 259 U. S. 182, 42 S. Ct. 489, 66 L. Ed. 888.

The formula for the classification of such cases has been stated thus: Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was the performance of this work a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? *Pedersen* v. *Delaware L. & W. R. Co.*, 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125. Mr. Justice Vandenventor said: "Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules

of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. * * * Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used, it is none the less an instrument of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.''

A terminal train shed is an indispensable adjunct of interstate passenger transportation; it is clearly an instrumentality used in the conduct of such commerce. That being so, it is incumbent upon the railroad to keep it in repair, and to adopt the measures necessary to safeguard its users, and it is a corollary of this that the work

done in the performance of this duty, while it is used in such commerce, is so closely and immediately related to interstate transportation as to be, for all practical purposes, a part of it.

In Kinzell v. *Chicago, M. & St. P. R. Co.*, 250 U. S. 130, 63 L. Ed. 893, the injured workman was engaged in clearing obstructions from the tracks of a railroad used for interstate commerce, at a point where an earth fill was in process of being substituted for a wooden tressle bridge by which the tracks were carried across a dry gulch —the purpose being to continue the tracks upon the solid embankment when the fill was completed. It was contended that the fill in process was not the repairing of, nor the furnishing of support to, the bridge, and that therefore the principle of the Pederson case did not apply. This contention was rejected. Mr. Justice Clarke, holding that the doctrine of the Pedersen case was apposite, declared that it could not soundly be said that Kinzell was acting independently of the interstate commerce in which the railway company was engaged or that the performance of his duties was a matter of indifference to the conduct of that commerce. He was "employed" in keeping the interstate track, which was in daily use, clear and safe for interstate trains. The work had reached the stage "where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the work of such men was thereafter not only concerned with, it was an intimate and integral part of the conducting of interstate transportation over the bridge.

So here, the deceased was engaged in work vitally essential for the safe conduct of the railroad's interstate transportation business. The

train shed was indisputably an instrumentality of interstate transportation. The work of maintaining this shed was an intimate and integral part of the safe conduct of the railroad company's interstate transportation business. In *Minneapolis R. R. Co.* v. *Winters,* 242 U. S. 353, 37 S. Ct. 170, 61 L. Ed. 358, Mr. Justice Holmes distinguished between "the matter of repairs upon a road permanently devoted to commerce between the states," and a facility, such as a locomotive, that is not "permanently devoted to any kind of traffic."

Respondent invokes the rules laid down in *Pierson* v. *N. Y. S. & W. R. R. Co.,* 83 N. J. L. 661, and *Granger* v. *P. R. R. Co.,* 84 N. J. L. 338, which, following *Pedersen* v. *Delaware L. & W. R. Co.,* 197 Fed. 537, hold that the "repairing of an instrument of commerce, which is used sometimes in interstate and sometimes in intrastate transportation, whether it be the roadbed of a railroad, or a car or an engine which is run over it, is not an *engaging* in commerce, but a preparation for engaging therein in the future. But the Pedersen case was later reversed by the Supreme Court. 229 U. S. 146, 33 S. Ct. 648, 57 L. Ed. 1125. The rules there laid down is controlling here. *Rossi* v. *Pennsylvania Railroad Company, supra.* While the Pedersen case antedates the case of *Shanks* v. *Delaware, L. & W. R. Co.,* 239 U. S. 556, 36 S. Ct. 188, 60 L. Ed. 436, which declared the now accepted criterion of employment in interstate commerce, the view therein expressed that the relation of rairoad facilities to interstate commerce determines the status of those employed upon them, and the character of their service, has not been overruled. *New York Central R. Co.* v. *White,* 243

U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667; *Southern P. Co.* v. *Industrial Accident Commission*, 251 U. S. 259, 40 S. Ct. 130, 64 L. Ed. 258; *New York Central R. Co.* v. *Porter*, 249 U. S. 168, 63 L. Ed. 536; *Kinzell* v. *Chicago, M. & St. P. R. Co.*, *supra*. In *Southern P. Co.* v. *Industrial Accident Commission*, *supra*, the workman an electric lineman, received a fatal shock while wiping insulators supporting a wire which they carried electric power manufactured by the railroad for the propulsion of its cars engaged both in interstate and intrastate commerce. It was held that, power being no less essential than tracks or bridges to the movement of the cars, the service thus rendered was directly and immediately connected with interstate transportation. In *Missouri P. R. Co.* v. *Aeby*, 275 U. S. 426, 72 L. Ed. 351, the station agent of a common carrier in interstate commerce was held to be engaged in interstate commerce with the intendment of the federal statute; and that the station platform is covered by the word "works" as employed in the provision making the carrier liable for injuries resulting to its employees by reason of any defect of insufficiency due to its negligence in "its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." In *Chicago & N. W. R. Co.* v. *Bolle*, 284 U. S. 74, 76 L. Ed. 173, it was held that a workman injured while engaged in firing a stationary engine used to generate steam utilized for heating the baggage room and other structures used for general railroad purposes was not engaged in work so closely related to interstate transportation as to be practically a part of it. It was likened to the cases holding that one engaged in conveying to or depositing in storage bins coal to

be used by locomotives engaged in interstate commerce is not within the federal statute. *Rossi* v. *Pennsylvania Railroad Co., supra;* compare, also *Chicago & E. I. R. Co.* v. *Industrial Commission,* 284 U. S. 296, 52 S. Ct. 151, 76 L. Ed. 304; *New York, N. H. & H. R. Co.* v. *Bezue,* 284 U. S. 415, 76 L. Ed. 370. It was pointed out by Mr. Justice Sutherland that the duty of one or so engaged "ended when he had produced a supply of steam for that purpose; he had nothing to do with its distribution or specific use."

The principle to be deduced from these cases is that where the instrumentality is so directly and immediately connected with interstate transportation as to be practically a part of it, the work done thereon in the performance of the imperative duty to maintain it in a state of repair is properly classable as an engagement in interstate commerce within the intendment of the federal statute; otherwise, it does not fall into that classification. The operation and maintenance of a railroad terminal shed employed in interstate carriage of passengers is as much a part of interstate transportation as the maintenance of the roadbed, bridges and like facilities used in such commerce; one is as essential as the other in the transaction of such business—each is so closely and intimately related to interstate transportation as to be, for all practical purposes, a part of it. The work vital for the safe conduct of such interstate transportation is closely and directly linked thereto.

This criterion has been applied in this jurisdiction. *Vincellie* v. *Central Railroad Co.,* 98 N. J. L. 726; *Culp* v. *Atlantic City Railroad Co.,* 93 N. J. L. 244; *Hart* v. *Central Railroad Co.,* 106 N. J. L. 31; *Stiedler* v. *P. R. R. Co.,* 94 N. J.

L. 197; *Tonsellite* v. *New York Central R. R. Co.*, 87 N. J. L. 651; *Lincks* v. *Erie R. Co.*, 91 N. J. L. 168.

So tested, the deceased was engaged in interstate commerce when he sustained his fatal injuries, and was therefore not entitled to compensation under the State Statute.

Judgment reversed, but without costs.

Rule of Reversal.

NEW JERSEY SUPREME COURT.

JENNIE Y. MARTIN, *Petitioner and Defendant-in-Certiorari,* *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *Respondent and Prosecutor-in-Certiorari.*	*On Certiorari.* *Rule of Reversal.*

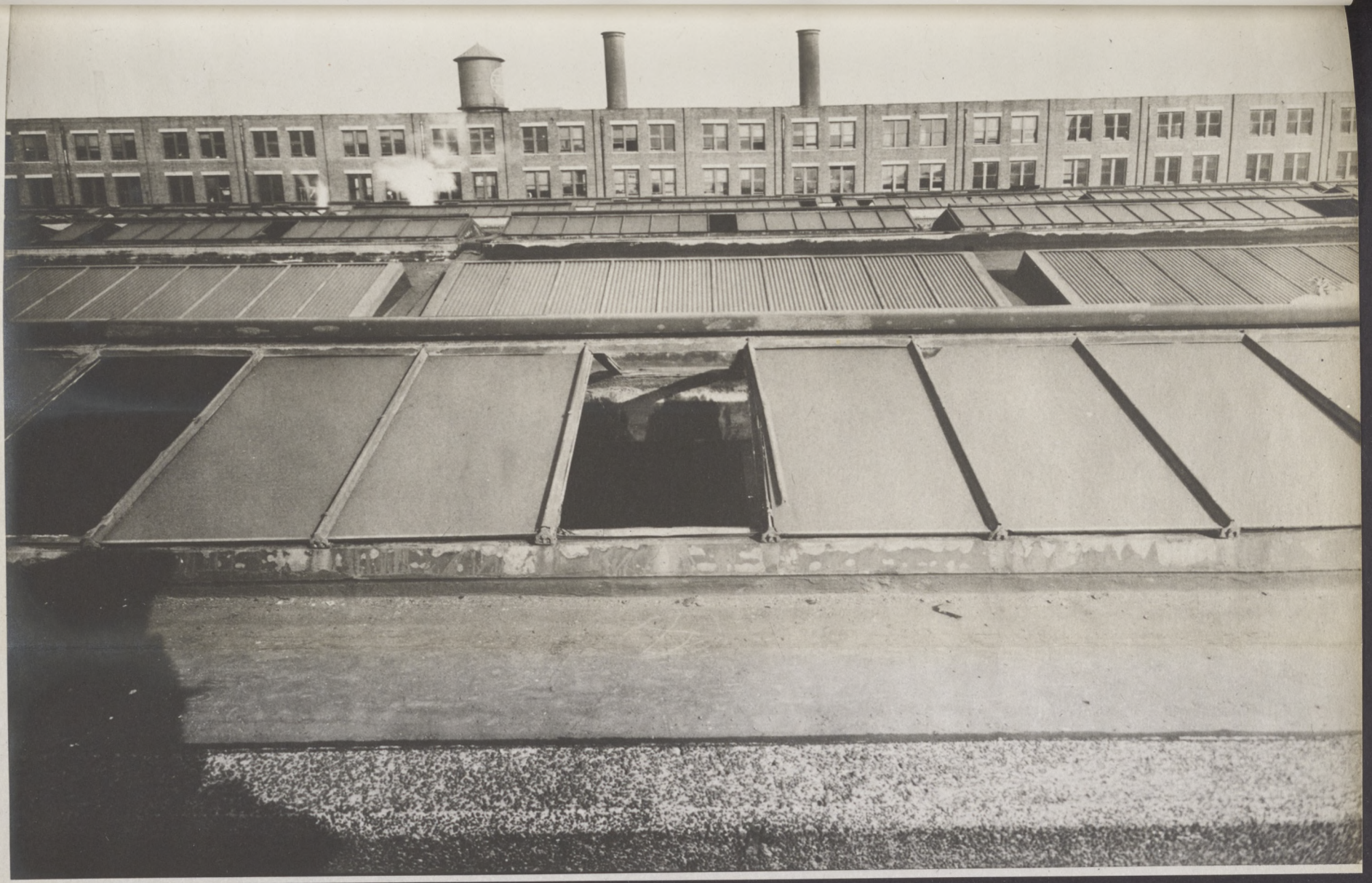
The Court having inspected the transcript and the proceedings of the Court of Common Pleas of the County of Hudson, returned with the certiorari in this cause, the reasons for reversing the judgment of said Court, the brief of Charles E. Miller of counsel, with William F. Hanlon, the attorney for the prosecutor, and Harvey Rothberg, attorney and of counsel with the defendant, and having duly considered the same.

It is ORDERED that the judgment of the Court of Common Pleas of the County of Hudson be, and the same is hereby, reversed, set aside, and for nothing holden; and it is

FURTHER ORDERED that the judgment of the Workmen's Compensation Bureau be, and the same hereby is, reversed, set aside and for nothing holden, and the record be remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered April 4, 1935.

On motion of
WM. F. HANLON,
Attorney for Prosecutor.



Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JENNIE Y. MARTIN, *Defendant-Appellant,* *vs.* CENTRAL RAILROAD OF NEW JERSEY, a corporation, *Prosecutor-Appellee,*	*On Appeal from New Jersey Supreme Court.*

BRIEF OF DEFENDANT-APPELLANT.

Statement of Facts.

This appeal is based upon a writ of certiorari sued out by the Central Railroad of New Jersey to review the judgment of the Hudson County Court of Common Pleas affirming an award by the Workmen's Compensation Bureau, made to the petitioner-respondent, Jennie Y. Martin, as compensation for the death of her son, Joseph Y. Martin, by accident arising out of and in the course of his employment with the respondent-prosecutor. The judgment of the pleas was reversed.

The facts in this case were stipulated by the respective parties to be as follows:

> "Joseph Y. Martin was employed by the Central Railroad Company of New Jersey as a painter. On November 2nd, 1932, while engaged in repairing the skylight on the roof of the terminal train shed of the respondent at Jersey City, he sustained a fall through the skylight and onto the tracks of the railroad which fall caused his death. As shown by photograph marked R-1 in evidence, it appears that the terminal train shed sheltered the tracks and platform and the passengers alighting from the trains of the respondent

company, which trains left Jersey City for various points on respondent's railroad and which trains also came into Jersey City from points outside of the State, such as Scranton and Easton in the State of Pennsylvania. It is also stipulated that some of the trains ran wholly within the State, such as the respondent's seashore trains, which trains carried passengers in both interstate and intrastate commerce. These passengers, when they left the train of the respondent in Jersey City and were bound for New York, would board a boat of the respondent railroad for New York, this being one leg in their interstate journey. The petitioner's decedent earned 67¼c. per hour for an 8-hour day, said wages to be figured under the provisions of the New Jersey Compensation Act on the basis of 5 days a week, 10% being deducted from the wages, this being the regular deduction made by the respondent at the time of the accident. The petitioner is the sole dependent and dependency is admitted."

ARGUMENT.

The single question presented to this Court is:

Was the petitioner's decedent engaged in interstate commerce at the time of the accident, and therefore not protected by the provisions of Chapter 95, Laws of 1911, commonly called the Workmen's Compensation Act of this state?

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers, and the rights of their employees arising out of injuries sustained by the latter where *both* are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority. Con-

gress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. *New York Central R. R. Co. v. Winfield,* 244 U. S. 147, 148, 149.

The Federal Act, Section 51 of the U. S. Railroads Act, 35 Stat. 65, 45 U. S. C. A. 92, provides:

> "Every common carrier by railroad while *engaging in commerce* between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is *employed* by such carrier *in such commerce,* or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Our Court of Errors and Appeals has held that the Supreme Court of the United States is the final authority as to whether in any case the work of a railroad employee is "interstate commerce." *Herzog* v. *Hines,* 95 N. J. Law, 98. Federal decisions control in suit under the act (Federal Employers' Liability Act, 45 U. S. C. A., Sec. 51). *McGarry* v. *Central R. Co. of New Jersey,* 105 N. J. Law, 590. State Courts follow the construction

of Federal Statutes as laid down by the Federal Courts. *Cassatt* v. *First Nat. Bank, West New York*, 111 N. J. Law 536.

The United States Supreme Court has held that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate *transportation* or in work so closely related to it as to be practically a part of it?

It will be observed that the word used in defining the test is "transportation," not the word "commerce." The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether any employee at the time of his injury was engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it. *Chicago & N. W. Ry. Co.* v. *Bolle,* 284 U. S. 74, 78, 79.

Plainly, the decedent in the instant case was not engaged in interstate commerce, measuring his work by the test above outlined. At the time of his fatal fall he was engaged in work not incidental to *transportation* in interstate commerce, but purely incidental to the furnishing of means for lighting and airing the trainshed. His duty would have ended when he had repaired the trainshed skylight to that end. What the decedent pro-

duced or might have produced but for his untimely end was not to be used or intended to be used, directly or indirectly, in the transportation of anything. It is plain that his work was not in interstate transportation and was not so closely related to such transportation as to cause it to be practically a part of it. *Id.*, p. 80.

The dominant thought underlying the question of whether in a given case an employee was or was not engaged in "interstate commerce" is this:

Would the performance of the act in which the employee was engaged directly and immediately tend to facilitate the movement of interstate commerce, or, conversely, would the failure to perform the act directly and immediately interfere with or hinder the movement of such commerce? *Morrison* v. *Chicago, M. & St. P. Ry. Co.* (Wash.), 175, page 325.

The repairing of the skylight in the instant case did not tend to facilitate interstate commerce, or, conversely its failure directly or immediately interfere with or hinder the movement of such commerce. *Id.*, page 327.

The cases of Vincelli v. Central Railroad Co., and Culp v. Atlantic City Railroad, are not binding precedents upon this Court.

The cases of *Vincelli* v. *Central Railroad Co.*, 98 N. J. Law 726, 100 N. J. Law 187, and *Culp* v. *Atlantic City Railroad*, 93 N. J. Law 244, might defeat recovery in the present case, were it not for the effect of decisions of the United States Supreme Court, and of other decisions by our state courts.

In *Vincelli* v. *Central Railroad Co.*, 98 N. J. Law 726 (affirmed, 100 N. J. Law 187), the fol-

lowing principles were laid down: The determining factor is whether the structure upon which the employee is working is an instrumentality used by the carrier in its interstate business. If subject to such use then an employee working upon such instrumentality is engaged in interstate commerce. The test is not whether any employee is at the time of the accident engaged in work indispensable to the functioning of the railroad as an interstate carrier, but whether the employee is working upon some instrumentality used by the carrier in its interstate business.

In *Culp* v. *Atlantic City Railroad,* 93 N. J. Law, 244, the Court of Errors and Appeals, *per curiam,* affirmed the opinion of Mr. Justice GARRISON, wherein, speaking for the Supreme Court, he says:

> "The petitioner was injured while painting a baggage-room used by the prosecutor at its Cape May terminal for the reception and storage of both interstate and intrastate baggage. Whether or not the petitioner was engaged in interstate commerce depends upon whether the baggage-room was an instrumentality used by the carrier in the handling of its interstate business. If it was such an instrumentality, the fact that it was also used for intrastate business, and the circumstance that at the time of the accident there was no interstate baggage in the building, are alike immaterial.
>
> "The state of the case shows that the baggage-room was an instrumentality of interstate commerce; the Pleas, therefore, was without jurisdiction and its judgment is reversed, with costs."

A. As to the United States Supreme Court decisions.

We have already adverted to the principle declared by our Court of Errors and Appeals, that the Supreme Court of the United States is the final authority. *Herzog* v. *Hines,* 95 N. J. Law 98. It is a necessary corollary of this doctrine that federal court decisions, conflicting with those of the state courts, control on questions involving the interpretation of the Federal Employers' Liability Act. *Texas & N. O. R. Co.* v. *Webster* (Tex. Civ. A), 53 S. W. (2d) 656.

Since the decision of our Court of Errors and Appeals, on the question of the binding and overruling effect of the decisions of the United States Supreme Court on the decisions of all state courts in matters pertaining to interstate commerce and the like, is to the effect that the federal Supreme Court is the final arbiter to which all state courts must yield, then we are not to follow the decisions of the Court of Errors and Appeals of this State when overruled or plainly in conflict with the decisions of the United States Supreme Court. We have a right to presume, and our Court of Errors and Appeals has in effect told this Court to presume, that it will, at the first opportunity, make its decisions conform to the decision of the federal courts in such matters. *St. Louis S. W. Ry. Co. of Texas* v. *Spring River Stone Co.* (Mo.), 154 S. W. 465.

The *Culp* and *Vincelli* cases have evidently failed to recognize the essential distinction implied in the Federal Employers' Liability Act as pointed out in the decisions of the Federal Supreme Court.

In so far as its words are material here, the Employers' Liability Act declares that "every

common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," if the injury results in whole or in part from the negligence of the carrier or any of its officers, agents or employees. Thus it is essential to a right of recovery under the act *not only that the carrier be engaged in interstate commerce at the time of the injury but also that the person suffering the injury be then employed by the carrier in such commerce. Shanks* v. *Del., Lack. & West. R. R.,* 239 U. S. 556, 557.

The Federal Act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, indeed, are necessary to it, *but so are all attached to the railroad company, official, clerical or mechanical.* Against such a broad generalization of relation, we however, may instantly pronounce, and successively against lesser ones, until we come to the *relation to the employment to the actual operation of the instrumentalities* for a distinction between commerce, and no commerce. In other words, we are brought to a consideration of degrees, and the test declared, that the employee at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal Act. *Industrial Commission* v. *Davis,* 259 U. S. 182, 187, 188.

The Federal Supreme Court entirely disagrees with the *Culp* and *Vincelli* decisions when they hold that an employee is engaged in interstate

commerce if he is *merely working upon* a structure which is an instrumentality used by the carrier in its interstate business. That is not enough. For an employee to be engaged in interstate commerce, it is not sufficient that he is *merely working upon* an instrumentality used in interstate transportation, but his work must relate to its actual operation. *Industrial Commission* v. *Davis, supra.*

The refinement sometimes resorted to by some of the courts in applying the provisions of the act to the facts of a particular case is extremely subtle, and oftentimes almost appears too technical for the attainment of substantial justice. But when we remember that Congress has no power to deal with the question except under its power to regulate interstate commerce, the utmost precision in applying the provisions of the Act is perhaps justifiel. *Perez* v. *Union Pac. R. Co.* (Utah), 173 P. 236, 240.

During the same day railroad employees often and rapidly pass from intrastate to interstate employment and the courts are constantly called upon to decide close questions as to the dividing line between the two classes of employment. Each case must be decided in the light of its particular facts. *N. Y. Central R. R.* v. *Carr,* 238 U. S. 260.

In *Illinois Cent. R. Co.* v. *Rogers,* 221 F. 52, an employee of a railroad company was hurt while cleaning stencils used by the company to mark cars owned and used by it in interstate commerce. In holding that he was not engaged in interstate commerce, the Circuit Court of Appeals, on page 54, says:

> "Was such cleaning of stencils a part of interstate commerce? It seems to us that to so hold would be an unwarranted expansion

of the doctrine announced by the Supreme Court, and we do not think that the principle is susceptible of such indefinite extension."

B. As to other New Jersey decisions.

The *Culp* and *Vincelli* cases irreconcilably conflict with other decisions of our high courts.

I respectfully maintain that in determining whether an employee is engaged, or, more technically, *employed,* in interstate commerce, the true test is not the nature of the *instrumentality* he is working upon, but the nature of the *work* he is doing upon the instrumentality. The correctness of this test is borne out in the cases of *Pierson* v. *N. Y., S. & W. R. R. Co.*, 83 N. J. Law 661, and *Granger* v. *Penna. Railroad Co.*, 84 N. J. Law 338.

In the *Pierson* case, the late Chief Justice GUMMERE, speaking for the Court of Errors and Appeals, says, on pages 664 and 665 of 83 N. J. Law:

> "The purpose of the statute is 'to secure the safety of interstate transportation and of those who are employed therein.' Mondou *v.* New York, New Haven and Hartford Railroad Co., 223 U. S. 1, 51. As was said by Mr. Justice Buffington in Pederson *v.* Delaware, Lackawanna and Western Railroad Co., 197 Fed. Rep. 537, speaking for the United States Circuit Court of Appeals (Third Circuit): 'Interstate transportation by the carrier is the act which constitutes the engaging of the statute; and the persons for whose benefit the liability is created are those employees who have a real and substantial part in effecting such transportation. The final test is the relation of the employee's work to interstate transportation at the time of the injury.'

> "* * * Nor was the work of installing the new rails in the track an engaging in interstate commerce. The *repairing* of an instrument of commerce, which is used sometimes in interstate and sometimes in intrastate transportation, whether it be the *roadbed* of a railroad, or a car or an engine which is run over it, is not an *engaging* in commerce, but a *preparation* for engaging therein in the future."

In the *Granger* case, BERGEN, J., speaking for the Court of Errors and Appeals, says, on page 340 of 84 N. J. Law:

> "So far as the occupation of the plaintiff is disclosed by the testimony, he was simply *repairing* an instrument of commerce which 'is used sometimes in interstate and sometimes in intrastate transportation,' and this we have held is not an engaging in interstate commerce."

If the Supreme Court of the United States is the final authority as to whether in any case the work of a railroad employee is "interstate commerce" (*Herzog* v. *Hines, supra*) and if we are not to follow the decisions of the Court of Errors and Appeals of this State when overruled or plainly in conflict with the decisions of the United States Supreme Court (*St. Louis S. W. Ry. Co. of Texas* v. *Spring River Stone Co., supra*), then it follows that we are clearly authorized to treat as binding precedents the decisions of the Court of Errors and Appeals of this State which are plainly in accord with the decisions of the United States Supreme Court.

There is a secondary reason to refuse to treat the *Culp* and *Vincelli* cases as binding precedents. The doctrine of *stare decisis* has no application where there is a conflict in the decisions. *Daughty* v. *Northwestern R. Co. of South Carolina* (*S. C.*),

75 S. E. 553. It can only be sustained when the decisions are uniform and consistent. 15 C. J. 955; *Patterson* v. *McCormick* (*N. C.*), 99 S. E. 401, 405. But I am content to rest entirely upon the primary reason.

The Courts of our neighbor States have held in similar instances that the workmen were not engaged or employed in interstate commerce.

The work must be reasonably close to a movement in interstate transportation—a train movement in some form. It must not be acts in *preparation* for, or expectation of, but in actual furtherance of, interstate transportation.

Smith v. *Philadelphia & R. Ry. Co.*, (*Pa.*), 135 A. 648, 649.

In *McCarthy* v. *New York, N. H. & H. R. R.*, 189 N. E. 30, decided on February 13, 1934, Crosby, *J.*, speaking for the Supreme Judicial Court of Massachusetts, says, on page 31:

> "It appears from the undisputed evidence that at the time the plaintiff received his injury he was engaged in painting posts at the roundhouse in which were housed and repaired locomotives engaged in interstate transportation. It may be assumed that a roundhouse is an essential part of a railroad's system necessary in the operation of the railroad and in carrying on interstate commerce. It does not necessarily follow therefrom, however, that an employee engaged in painting parts of such a building is so far engaged in work so clearly related to interstate transportation as to practically be a part of it. We are of the opinion that the work in which the plaintiff was engaged was too remote so to hold."

The case of *Gasser* v. *Central R. Co. of New Jersey,* 171 A. 97, is the latest and most nearly analogous case in point. In that case, Judge

PARKER, speaking for the Superior Court of Pennsylvania, says, on page 98:

> "In this workmen's compensation case the only question involved is one of law as to whether it comes within the terms of the Federal Employers' Liability Act (45 USCA., secs. 51-59) or is controlled by the Pennsylvania Workmen's Compensation Act (77 PS., sec. 1 *et seq.*).
>
> "There is no dispute as to the facts, which we will briefly state. William Gasser had been in the employ of defendant for a number of years and at the time of an accident which caused his death was engaged as station agent for the company at Walnutport, Pa. The company was regularly engaged at the place of employment in both interstate and intrastate commerce and transportation. Decedent's employment consisted of 'general oversight of the station, the handling of interstate and intrastate shipments, the selling of tickets, acting as telegrapher, the recording of passing trains,' and janitor service in and about the depot and platform. On July 24, 1931, at about 8:35 a. m., he was sweeping the platform at the depot and while so engaged came near the tracks and was struck and injured by a passing train; the injury resulting in his death the same day. It was shown that on that day he had handled several items of interstate freight and that he regularly performed services in both interstate and intrastate transportation.
>
> "On the question involved, the decisions of the Supreme Court of the United States are controlling. Mayers *v.* Union Railroad Co., 256 Pa. 474, 100 A. 967; and the question is one of law; Martini *v.* Director General, 77 Pa. Super. Ct. 529. While the case is near the border line, we are all of the opinion (1) that the employee was not participating in the actual movement of traffic; and (2) that his service was not so related to an instrumentality of transportation as to be practically inseparable from the use of that instrumentality in moving traffic."

And on pages 99 and 100:

> "Applying the test to the case in hand, it is manifest that Gasser was not 'employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation.' Shanks *v.* D. L. & W. R. Co., *supra,* 239 U. S. 556, 559, 36 S. Ct. 188, 190, 60 L. Ed. 436, L. R. A. 1916C, 797. (Italics ours.) He was performing ordinary janitor service about an instrumentality not then in actual use in transportation. There has been manifest tendency in the recent decisions of the United States Supreme Court to exclude from the benefit of the Federal Employers' Liability Act (45 USCA, secs. 51-59) those who are only remotely concerned in interstate commerce and where they were not at the time of the accident actively engaged in work closely related to such transportation so as to be practically a part of it. In a remote sense, facilities for the reception, housing, and delivery of interstate freight, and fuel to be used in connection with such commerce, are instrumentalities of interstate commerce, but frequently they are not so closely related thereto as to bring the employees engaged therein under the protection of the Federal Employers' Liability Act rather than a state compensation law. The work which Gasser was doing in this case was not different from scrubbing station floors, washing the station windows, lighting the stove, firing the boiler, or similar janitor service."

The case of Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, is not controlling.

In *Chicago & N. W. Ry. Co.* v. *Bolle,* 284 U. S. 74, Mr. Justice Sutherland, speaking for the United States Supreme Court, says, on page 79:

> "Since the decision in the Shanks case, the test there laid down has been steadily ad-

> hered to, and never intentionally departed from or otherwise stated. It is necessary to refer to only a few of the decisions. In Chicago B. & Q. R. Co. *v.* Harrington, *supra,* an employee engaged in placing coal in coal chutes, thence to be supplied to locomotives engaged in interstate traffic, was held not to have met the test. In Illinois Central R. Co. *v.* Cousins, 241 U. S. 641, as appears from the decision of the state court (126 Minn. 172; 148 N. W. 58), an employee was engaged in wheeling a barrow of coal to heat the shop in which other employees were at work repairing cars that had been, and were to be, used in interstate traffic. The state court held that the employee came within the act, on the ground that the work which he was doing was a part of the interstate commerce in which the carrier was engaged, and cited *Pedersen* v. *Delaware, L. & W. R. Co.,* 229 U. S. 146. *This court, however, repudiated that view, and reversed in an opinion per curiam on the authority of the Shanks case.*"

Consequently, the case of *New York Central Railroad Company* v. *Porter,* 249 U. S. 168, is also without binding effect, as appears from the language of the court:

> "Considered in connection with our opinions in Pedersen *v.* Delaware, Lackawanna & Western R. R. Co., 229 U. S. 146; Southern Ry. Co. *v.* Puckett, 244 U. S. 571; and cases there cited, we think the circumstances here presented make it quite clear that when killed, Porter was employed in interstate commerce."

The case of *Missouri Pac. R. R.* v. *Aeby,* 275 U. S. 426, referred to on pages 3 and 4 of prosecutor's brief, is a very weak precedent. In that case there is nothing that shows exactly what type of commerce was carried on at the station wherein the employee was injured. For aught that appears it might have been entirely interstate commerce. Therefore, in the absence of en-

lightening facts, the decision in that case holding the employment to be interstate in character is far from binding.

A reading of the case of *Stiedler* v. *Pennsylvania Railroad Co.*, 94 N. J. Law, 197, shows plainly that it was based entirely upon the then controlling effect of the *Pedersen* case, *supra.*

In the *Stiedler* case, MINTURN, *J.*, speaking for the Court of Errors and Appeals, says:

> "The cases there referred to, and particularly Pedersen *v.* D., L. & W. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153, present the rationale which evince the distinctions upon which the provisions of that act are called into operation and become applicable to the case at bar. Nothing can be gained by a further elaboration of the subject, except to remark that upon the test laid down in the Pederson case, and the cases which have followed it, this plaintiff was engaged in work upon the upkeep and preservation of an instrumentality of interstate commerce."

Not only has the Supreme Court of the United States expressly repudiated the doctrine enunciated in the *Pedersen* case (*Chicago & N. W. Ry. Co.* v. *Bolle,* 284 U. S. 74), but it has also abandoned its adherence to the test therein applied, viz., engaging in work upon the upkeep and preservation of an instrumentality of interstate commerce. Under the test currently recognized and enforced by the United States Supreme Court, it is no longer sufficient that the employee is *merely working upon* an instrumentality used in interstate transportation, but his *work* must have a real and substantial relation to such transportation. It is not enough that there is a remote connection between his work and the operation of the instrumentality in the interstate movement.

One step removed from interstate transportation or movement of trains is the logical boundary line, else the basis of distinction may wander into the realm of fantasy.

It is therefore respectfully urged that the judgment of the Supreme Court on certiorari be reversed, and that the judgments of the Workmen's Compensation Bureau and the Hudson County Court of Common Pleas be affirmed in all respects.

Respectfully submitted,

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Harvey Rothberg

New Jersey Court of Errors and Appeals

JENNIE Y. MARTIN,

Defendant-Appellant,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Prosecutor-Appellee.

On Appeal from New Jersey Supreme Court.

BRIEF FOR PROSECUTOR-APPELLEE

Jennie Y. Martin filed a petition under the provisions of the Workmen's Compensation Act of the State of New Jersey, to recover compensation for the death of her husband, Joseph Y. Martin, who met with his death while in the employ of The Central Railroad Company of New Jersey at Jersey City, New Jersey, on November 2nd, 1932.

An answer was filed, denying the jurisdiction of the Workmen's Compensation Bureau, and alleging that decedent was employed in interstate commerce.

A hearing was had on May 1st, 1933, on said petition, by the Workmen's Compensation Bureau, which rendered a judgment and award of compensation under the State Act.

The Railroad Company then appealed to the Court of Common Pleas of Hudson County, which affirmed the award of the Compensation Bureau (Rec. pp. 17, 18, 19, 20).

By writ of certiorari the Railroad Company then removed the case to the Supreme Court for review.

The Supreme Court rendered judgment reversing the judgments of the Hudson Pleas and the Workmen's Compensation Bureau. From this action of the Supreme Court Jennie Y. Martin takes the present appeal.

Statement of the Case

Martin was employed by the railroad company as a painter and at the time he was injured was engaged in repairing a skylight on the roof of the train shed which shelters the platforms and tracks of the railroad terminal. The railroad company was engaged in interstate commerce. Some of its trains come in to the Jersey City Terminal from points outside of the State. Others come from points within the State but carry passengers who disembark and travel to New York by means of the railroad company's ferryboats. These facts were stipulated (Rec. pp. 22, 23, 24).

The Issue Involved

The Workmen's Compensation Bureau and the Court of Common Pleas both held that the petitioner below was entitled to compensation under the State Act and the decedent was not employed in interstate commerce.

The sole issue in this case is whether at the time of the accident decedent was employed in interstate commerce.

ARGUMENT

POINT I

The decedent was employed in interstate commerce.

It is well settled that if decedent was engaged in interstate commerce his sole remedy is under the Federal Employers' Liability Act. *Rounsaville vs. The Central Railroad Company of New Jersey,* 90 N. J. L. 176. *New York Central Railroad Company vs. Wnifield,* 244 U. S. 147.

The rule of law has likewise been firmly established that the facilities used for the conduct of interstate commerce are instrumentalities of such commerce within the meaning of the Federal Employers' Liability Act.

In *Missouri Pacific Railroad Co. vs. Aeby,* 275 U. S. 426, the facts were as follows:

Aeby was the station agent of the railroad company, having charge of the station, doing book work, selling tickets, handling mail, baggage, express, etc. She was the only person regularly performing station work and for some time before the accident she lived in the station building. A depression had been made by rain water and the passage of people going to and from the waiting room, causing water to run off and drain past the steps leading into the waiting room. On the night before the accident it had snowed and ice had formed under the snow immediately in front of the steps. Before the accident the injured employee had moved a baggage truck from the end of the station building to a place near the track. On her way back she slipped on the ice and was

injured. Holding that the station platform was an instrumentality of interstate commerce the Court said:

> "The Act makes the carrier liable for injuries resulting to its employees by reason of any defect or insufficiency due to its negligence in 'its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.' The language is broad and includes things and places furnished by the carriers to be used by their employees in the performance of their work. The platform was intended to be and was used by respondent to do station work. Having regard to the beneficent purposes of the Act it would be unreasonable to hold that when so used a station platform is not covered by the word 'works' in the above quoted provision. The Supreme Court rightly held that the clause applied." *Missouri Pacific Railroad Company vs. Aeby,* 275 U. S. 426, 427-428.

See also, *Eng. vs. Southern Pacific Co.,* 210 Fed. 92, wherein it was held:

> "Now, freight sheds, depots, and warehouses or other facilities provided and used by a carrier for receiving, handling, and discharging interstate freight are, I take it, instrumentalities used in interstate commerce under the doctrine of the cases, and are so closely connected therewith as to be a part thereof, for the purposes of the Federal Employers' Liability Act" (p. 94).

To the same effect is *Culp vs. Atlantic City Railroad Co.,* 93 N. J. L. 244.

In the instant case, the terminal train shed, on the roof of which decedent was working, was clearly an instrumentality in interstate commerce.

One engaged in the upkeep or repair of an instrumentality of interstate commerce is employed in such commerce. *Kinzell* vs. *Chicago, M. & S. P. Ry.,* 250 U. S. 130-133; *Shanks* vs. *D. L. & W. R. R.,* 239 U. S. 556; *Pederson* vs. *D. L. & W. R. R.,* 229 U. S. 146.

In the *Pederson* case, *supra,* the United States Supreme Court said:

> "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to intersate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the

> statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See *McCall* vs. *California,* 136 U. S. 104, 109, 111; *Second Employers' Liability Cases, supra,* 6, 59; *Zikos* v. *Oregon R. & Navigation Co.,* 179 Fed. Rep. 893, 897, 898; *Central R. Co. of N. J.* v. *Colasurdo,* 192 Fed. Rep. 901; *Darr* v. *Baltimore & O. R. Co.,* 197 Fed. Rep. 665; *Northern Pacific Ry. Co.* v. *Maerkl,* 198 Fed. Rep. 1."

In *New York Central Railroad Company* vs. *Porter,* 249 U. S. 168, the facts were as follows:

The decedent while engaged in shovelling snow between the tracks and a platform, was struck by a passing engine and killed. The Court said:

> "Considered in connection with our opinions in *Pederson* v. *Delaware, Lackawanna & Western R. R. Co.,* 229 U. S. 146; *Southern Ry. Co.* v. *Puckett,* 244 U. S. 571; and cases there cited, we think the circumstances here presented make it quite clear that when killed Porter was employed in interstate commerce."

In *Culp* vs. *Atlantic City Railroad Company,* 93 N. J. L. 244, the petitioner was engaged while painting a baggage room used by the company at its Cape May Terminal for both interstate and intrastate commerce. The Court of Errors held that the plaintiff was employed in interstate commerce, saying:

> "Whether or not the petitioner was engaged in interstate commerce depends upon whether the baggageroom was an instrumentality used by the carrier in the handling of its interstate business. If it was such an instrumentality, the fact that it was also used for intrastate business, and the circumstance that at the time of the accident there was no interstate baggage in the building are alike immaterial."

In *Stiedler* vs. *Pennsylvania Railroad Co.,* 94 N. J. L. 197, plaintiff was employed by defendant as a painter and at the time of the accident was engaged in painting a metal pole used by defendant for the purpose of carrying its electrical wires between New York City and its Manhattan Transfer Station in New Jersey, by means of which the defendant's cars were operated. The Court of Errors and Appeals held that plaintiff was engaged in interstate commerce, saying:

> "this plaintiff was engaged in work upon the upkeep and preservation of an instrumentality of interstate commerce" (p. 198).

In the instant case the railroad company was admittedly engaged in interstate commerce. At the time of the accident decedent was engaged in keeping in a usable condition an instrumentality

of such commerce. He was, therefore, employed in interstate commerce.

The Compensation Bureau and the Common Pleas based the award of compensation on the authority of three recent cases in the United States Supreme Court, *Chicago & Northwestern Ry. Co* vs. *Bolle,* 284 U. S. 74; *New York, New Haven & Hartford R. R. Co.* vs. *Bezue,* 284 U. S. 415, and *Chicago & Eastern Illinois Railroad Co.* v. *Industrial Commission of Illinois, et al,* 284 U. S. 296. An analysis of these cases clearly distinguishes them from the case at bar.

In these cases the Court pointed out that commerce means transportation and for a person to be employed in interstate commerce the employment must be connected with interstate transportation or with work so closely allied to it as to be practically a part of it.

In *Chicago & Eastern Illinois Railway Co.* vs *Industrial Commission, supra,* the United States Supreme Court reviewed its decisons in *Shanks* vs. *D. L. & W. R. R.,* 239 U. S. 556; *Chicago, Burlington & Quincy R. R. Co.* vs. *Harrington,* 241 U. S. 177, wherein the test was held to be, "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" and, being unable to reconcile the decisons in the *Harrington* and *Shanks* cases with those of *Erie Railroad* vs. *Collins, etc.* and *Erie Railroad* vs *Szary,* the Court overruled the *Collins* and *Szary* cases. But there is nothing in these cases indicating that the Court was departing from the rule laid down in the *Pederson* case and the long line of cases both in the Supreme Court and in the State and lower Federal Courts following it.

In the instant case *Martin* vs. *C. R. R. Co. of N. J.*, 115 N. J. L., page 11, Justice Heher for the Supreme Court reviewed many cases on this subject and those cited by the appellant and reached the obvious conclusion when he says:

> "A terminal train shed is an indispensable adjunct of interstate passenger transportation; it is clearly an instrumentality used in the conduct of such commerce. That being so, it is incumbent upon the railroad to keep it in repair, and to adopt the measures necessary to safeguard its users, and it is a corollary of this that the work done in the performance of this duty, while it is used in such commerce, is so closely and immediately related to interstate transportation as to be, for all practical purposes, a part of it."

and again:

> "So here, the deceased was engaged in work vitally essential for the safe conduct of the railroad's interstate transportation business. The train shed was indisputably an instrumentality of interstate transportation. The work of maintaining this shed was an intimate and integral part of the safe conduct of the railroad company's interstate transportation business.

We respectfully submit that a terminal train shed which shelters passengers from the wind and rain is just as much a facility of interstate transportation as the platform upon which they disembark or as the very cars on which they have made their journey and one engaged at the time

of an accident in keeping such instrumentality in a usable condition is employed in interstate commerce.

POINT II

The judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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