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TESTIMONY

New Jersey Supreme Court

JAMES CASSELL, Administrator, of Michael Cassell, deceased. *Respondent-Appellant*	*Workmen's Compensation*
vs.	*On Appeal from Supreme Court*
C. F. MUELLER MACARONI COMPANY, a Corporation, *Prosecutor-Appellee*	NOTICE OF APPEAL

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To Messrs. Runyon & Autenreith,
Attorneys for Appellee:

PLEASE TAKE NOTICE, that the respondent appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

20

Yours &c.,

ALEX. SIMPSON,
Attorney for Appellant.

Dated June 14, 1922

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New Jersey Court of Errors and Appeals

JAMES CASSELL, Administrator of Michael Cassell, deceased, *Respondent-Appellant* *vs.* C. F. MUELLER MACARONI COMPANY, a Corporation, *Prosecutor-Appellee*	*On Appeal from Supreme Court.* GROUNDS OF APPEAL

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The Appellant sets down the following Ground of Appeal from the judgment of the Supreme Court, in the above entitled cause:

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The said New Jersey Supreme Court, reversed the judgment of the Hudson County Court of Common Pleas awarding compensation, whereas the said Supreme Court should have affirmed the judgment of said Hudson County Court of Common Pleas.

ALEX. SIMPSON,
Attorney for Appellant.

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New Jersey Supreme Court

November Term, 1921

C. F. MUELLER MACARON. COMPANY, a Corporation,
Prosecutor,

vs.

JAMES CASSELL, Administrator of Michael Cassell, deceased,
Respondent.

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Submitted December 1, 1921: Decided March 14, 1922.

On Certiorari, etc.,

Before Justices Trenchard, Bergen and Minturn. 20

For the prosecutor, Runyon & Autenrieth.

For the respondent, Alexander Simpson.

Per Curiam:

This is a workman's compensation case. It appears that the prosecutor operated a macaroni factory. Decedent worked for them on the third floor, feeding a noodle machine. He is supposed to have left the factory for lunch shortly after twelve 30 o'clock noon on June 14, 1917. The next thing known of him was when his dead body was found at 12.35 p. m. wedged between the elevator and the floor on the third story of the building. His administrator brought this proceeding under the Workmen's Compensation Act to recover compensation, and he was awarded compensation by the Hudson County Common Pleas Judge.

The company brought that judgment into the Su- 40

preme Court where it was set aside because there was no finding that the accident arose out of the employment. The case went back and the Common Pleas Judge made such a finding, and on the same record plus the finding, the matter is here for review.

After a careful examination of the testimony we are unable to find any evidence supporting the finding.

Decendent had punched his time out for lunch hour at 12:21 p. m. and was not due back to his work until 1:00 o'clock p.m.

No witnesses were produced to prove how he met his death, but he was found lying on the floor with his head and shoulders in the elevator shaft resting on the lower door, the rest of his boly extending out on the third floor of the building. His head had been crushed evidently between the upper and lower doors of the elevator. These doors were automatic in closing and operate in this manner: when the elevator leaves the floor, one-half of the doorway comes down from the upper part of the opening, the other half comes from the level of the floor and meets the upper door half way in the space that is open when the elevator is stationary at the floor landing.

The elevator was solely and only a freight elevator used to carry merchandise from one floor to another. A regular elevator operator was employed to run this elevator and during the noon hour it was shut down, the operator going for lunch.

At the time decedent met his death the elevator operator had not as yet returned from lunch and the elevator was shut down.

No one else in the company's employ had any authority or right to operate this elevator during the day time. The elevator was left by the operator at the *second* floor with the doors open, and indisputably was in good mcehanical condition both before and after the accident and the doors were in proper mechanical condition both before and after the accident.

The decedent had no duties whatsoever that would take him near the elevator. The noodle machine, at which he was employed, was at the opposite side of the building from the elevator; the stairway provided for employees to leave the building was likewise at the opposite side of the building from the elevator.

It was the rule of the company that employees were not permitted to ride on the elevator; that it was solely a freight elevator, and not only were all employees instructed not to ride on the elevator, but a sign was posted at the elevator doors which read: "Employees are forbidden to ride on this elevator. It is not designed for carrying passengers. Louis T. Bryant, commissioner of labor. This card is placed here by authority of the State of New Jersey and must not be mutilated or removed."

The petitioner below produced two witnesses who were operators on noodle machines, who testified that employees had used the elevator in riding from floor to floor to the knowledge of the "Production Manager" on one or two occasions, and it is argued therefrom that the prosecutor had waived the rules in this respect.

But we perceive no testimony which would justify finding that the corporation had waived the observance of the notice forbidding the use of the elevator

for passenger service, placed there by the authority of the Commissioner of Labor. The only permissible inference from the evidence is that the decedent was operating the elevator himself, for purposes of his own (not in the work of his employer) and in express violation of the notice, and was killed while attempting to leave the elevator. Certainly there was no evidence which would justify the inference that the corporation had so waived compliance with the notice as to invite or justify such use.

Such we think was the view of the trial judge, but he seems to have found that the decedent "was not operating the elevator," that "it was being operated by somebody else," and to have rested his judgment on that finding. But we find no testimony showing, or tending to show, that. On the contrary, as we have indicated, the only possible inference from the testimony is that he was operating it himself.

The judgment below will be reversed.

WRIT OF CERTIORARI

NEW JERSEY, SS:

(L. S.) The State of New Jersey to the Court of Common Pleas in and for the County of Hudson and James Cassell, Administrator of the Estate of Michael Cassell, deceased,

GREETING: 10

We being willing for reasons to be certified of and concerning a certain determination and judgment rendered on the 25th day of May, Nineteen hundred and twenty-one, by the Honorable Richard Doherty, one of the Judges of the said Court of Common Pleas in and for the said County of Hudson, in certain proceedings brought on behalf of James Cassell, Administrator of the Estate of Michael Cassell, petitioner, against C. F. Mueller Macaroni Company, 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 4, 1911, and the acts amendatory thereof and supplementary 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 20 30 40

the first day of November, Nineteen hundred and twenty-one that therein may be caused to be done what of right and according to law ought to be done.

Witness, HON. WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, this 16th day of July Nineteen hundred and twenty-one.

RUNYON & AUTENRIETH,
10 Attorneys.

ENOCH L. JOHNSON,
Clerk.

NEW JERSEY SUPREME COURT

20 C. F. MUELLER MACARONI COMPANY, a Corporation, *Prosecutor* *vs.* JAMES CASSELL, Administrator, of Michael Cassell, deceased, *Defendant*	*On Certiorari*

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ASSIGNMENT OF REASONS

C. F. Mueller Macaroni Company, presecutor, by Runyon & Autenreith,its attorneys,comes and prays that the judgment of the Court of Common Pleas in and for the County of Hudson rendered against it in an action for compensation under an act of the Legislature of the State of New Jersey entitled,
40 "An Act prescribing the liability of an employer to

make compensation for injuries received by an employe in the course of employment establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the Acts amendatory thereof and supplementary thereto, wherein the said James Cassell, Administrator of the Estate of Michael Cassell, was petitioner, and the C. F. Mueller Macaroni Company was respondent may be reversed and set aside for the following reasons:

1. That the Court refused to dismiss the petitioner's case.

2. That the Court erred in its findings and determination in favor of the petitioner.

3. That the finding and determination of facts and judgment in favor of petitioner is erroneous in that there was no evidence before the Court to find that the petitioner's intestate died from injuries which arose out of and in the course of his employment.

4. That the finding of fact that the petitioner's intestate died as a result of injuries arising out of and in the course of his said employment is illegal, because it is not based upon legal evidence produced before the Court before the trial or hearing of the above entitled cause.

5. That the determination of fact—that the petitioner is entitled to compensation and judgment therefor—is erroneous because there can be no legal determination on the evidence before the Court that the death of the petitioner's intestate was the

result of an accident which arose out of and in the course of the employment of the petitioner's intestate.

6. Because the judgment of the Court of Common Pleas was in divers other respects illegal, unjust, oppressive and contrary to law.

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RUNYON & AUTENRIETH,
Attorneys for Prosecutor.

To the Judges of the Supreme Court of New Jersey:

In obedience to the command of this writ I, Richard Doherty, one of the Judges of the Inferior Court of Common Pleas of the County of Hudson, do hereby certify and send to you, the Honorable
20 Justices of the Supreme Court, the petition for compensation, order for hearing, answer, continuance of hearing, order for hearing, answer, continuance of hearing, determination of facts and rule for judgment, together with the testimony taken upon the hearing of said cause, with all things touching and concerning the same, as fully as they remain before me by the schedule hereto annexed appears.

30 In witness whereof, I have hereto set my hand and seal in open Court this day of Nineteen hundred and twenty-one.

RICHARD DOHERTY,
Judge of Hudson County Court
of Common Pleas.

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HUDSON COUNTY COURT OF
COMMON PLEAS

JAMES CASSELL, Administrator *Petitioner,* *vs.* C. F. MUELLER MACARON. COMPANY, a Corporation, *Respondent.*	*On Petition for Compensation, &c., under Employers' Liability Act.*

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ORDER FOR HEARING

A petition having been filed in this cause by James Cassell, petitioner, praying for the compensation payable by C. F. Mueller Macaroni Company, the respondent, it is on this 13th day of June, 1918, on motion of Alex Simpson, Esq., attorney for petitioner.

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Ordered, that the hearing in said matter be and hereby is set down for June 27th, 1918, at the Common Pleas Court Room, in the City of Jersey City at ten o'clock in the forenoon or as soon thereafter as counsel can be heard.

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And it is further ordered, that a true but uncertified copy of this order, together with a copy of the petition upon which this order is based, be served upon the respondent, within six days after the date of this order.

JOHN A. BLAIR,
Judge of the Hudson County
Court of Common Pleas.

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HUDSON COUNTY COURT OF COMMON PLEAS.

JAMES CASSELL, Administrator *Petitioner,* 10 *vs.* C. F. MUELLER MACARON. COMPANY, a Corporation, *Respondent.*	*On Petition for Compensation, &c., under Employers' Liability Act.*

PETITION

20 **To His Honor, the Judge of the Court of Common Pleas of the County of Hudson and State of New Jersey:**

Your petitioner, James Cassell, respectfully shows:

1. Your petitioner is the father and next of kin of Michael Cassell, deceased, and resides at No. 452 Grand Street, in the City of Jersey City.

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2. The said Michael Cassell, who was of the age of fourteen years, was employed in his lifetime by the respondent, C. F. Mueller Macaroni Company at their place of business, No. 180 Baldwin Avenue, in the City of Jersey City.

3. That on the 14th day of June, 1917, while employed as aforesaid, the deceased was caught between the elevator and elevator doors in said 40 factory, as a result of which he died.

4. That the said respondent, C. F. Mueller Macaroni Company, had due notice of said injury and subsequent death of deceased.

5. That at the end of said injury and prior thereto, the said deceased received as compensation from the said respondent, wage at the rate of $9.00 per week. 10

6. That your petitioner is the father of said Michael Cassell, deceased.

6. Your petitioner therefore prays that your Honor will determine the amount of compensation due to your petitioner, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee 20 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 supplements thereto and amendments thereof, and to that end your Honor will fix a time and place for the hearing and that your petitioner may be awarded his costs in this proceeding and for such other and further relief as may be proper. 30

his
JAMES X CASSELL
mark
Petitioner.

STATE OF NEW JERSEY, COUNTY OF HUDSON, SS.

James Cassell, of full age, being duly sworn according to law, on his oath deposes and says: 40

I am the petitioner named in the foregoing petition and the matters and things therein set forth are true to the best of my knowledge, information and belief.

his
JAMES X CASSELL
mark

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Sworn and subscribed to before me, this 23rd day of April, 1918.

I. CHARLES LIFLAND,
Notary Public of New Jersey.

HUDSON COUNTY COURT OF COMMON PLEAS.

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JAMES CASSELL, Administrator *Petitioner.* *vs.* C. F. MUELLER MACARON. COMPANY, a Corporation, *Respondent.*	*On Petition for Compensation.*

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ANSWER

The respondent says:

1. It has no knowledge of the allegations and facts set forth and contained in paragraph one and two of the petition filed therein, and leaves the petitioner to make such proof thereof as he may deem necessary.

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2. It denies the allegations and facts set forth and contained in paragraph three and four of said petition.

3. It denies the allegations and facts set forth and contained in paragraph five and says that the wages of the said decedent were eight dollars per week.

4. It has no knowledge of the allegations and facts set forth and contained in paragraph six of the petition but leaves the petitioner to make such proof thereof as he may deem necessary.

5. It denies the allegations and facts set forth in paragraph seven and says that the said petitioner is not entitled to compensation under the act therein stated.

DEFENSES

1. That this action is brought more than one year after the happening of the said alleged accident and death of the said Michael Cassell, and therefore by reason of the Statute 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, and the supplements and amendments thereof, the said alleged cause of action is barred as it was brought more than one year from the date of the happening of the said alleged accident.

2. That the death of the said Michael Cassell was not caused by an accident which arose out of and in the course of the employment of the said Michael Cassell.

RUNYON & AUTENRIETH,
10 Attorneys for Respondent.

HUDSON COUNTY COURT OF
COMMON PLEAS

20 Between JAMES CASSELL, Administrator of Michael Cassell, deceased, *Petitioner,* *vs.* C. F. MUELLER MACARONI COMPANY, a Corporation, *Respondent.*	*On Petition for Compensation.*

30

DETERMINATION OF FACTS AND RULE FOR JUDGMENT

A petition having been filed in the above entitled 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
40 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, together with the several supplements thereto and Acts amendatory thereof, and a time and place for the hearing of said petition having been fixed and it appearing to the Court that said petition and the order fixing the time and place of said hearing having been filed by said respondent, and the hearing having been continued until the 6th day of May, 1920, and the petitioner and the respondent having appeared on said day, the petitioner being represented by Alex Simpson, as his attorney and the respondent by Messrs. Runyon & Autenrieth, as its attorneys, and the Court having heard the testimony offered in behalf of the parties hereto, and counsel having been heard,

I do find and determine from the evidence taken in this case as follows, to wit:-

First: That Michael Cassell, deceased, was, on the 14th day of June, 1917, in the employ of the respondent.

Second: That at the time of the injury the said Michael Cassell received as wages in said employment the sum of $9.00 per week.

Third: That on the 14th day of June, 1917, at the factory of the respondent, in the City of Jersey City, the said Michael Cassell was injured through an accident arising out of and in the course of his employment, whereby he was caught between the

elevator and the elevator doors of the factory of the respondent and received serious injuries.

Fourth: That the respondent herein had knowledge of said accident, or that it has had proper notice of the same.

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Fifth: That as the result of said accident the said Micahel Cassell, sustained serious injuries which resulted in his death.

Sixth: That the petitioner herein expended for expenses of accident and burial the sum of , which has not been paid by respondent.

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Seventh: That the petitioner is entitled to compensation at the rate of $5.00 per week for 300 weeks, amounting to $1,500.00 together with the costs of burial and expenses of last sickness, not to exceed $100.00.

Eighth: That the petitioner is entitled to costs in this proceeding.

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It is therefore, on this 19th day of May, 1920, on motion of Alex Simpson, attorney of petitioner, ordered, that the respondent herein pay, or cause to be paid to the said petitioner the sum of Five ($5.00) dollars per week, for a period of three hundred (300) weeks from the 28th day of June, 1917, and also the costs of this proceeding, to be taxed.

It is further ordered, that Alex Simpson, attorney for the petitioner, be and he hereby is allowed

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the sum of $200.00 dollars as counsel fee herein, the same to be paid by the petitioner out of the accumulated payments now due.

RICHARD DOHERTY,
Judge.

No objection as to form.

WORKMEN'S COMPENSATION CASE

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_____,
Attorneys for Respondent.

Workmen's Compensation Case

HUDSON COUNTY COURT OF
COMMON PLEAS

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JAMES CASSELL, *Petitioner.* *vs.* C. F. MUELLER MACARONI CO., *Respondent.*	*On Petition for Compensation.*

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ALEXANDER SIMPSON, ESQ., for Petitioner.

JOSEPH F. AUTENRIETH, ESQ., for Respondent.

This case was heard before Judge Richard Doherty, May 8, 1920.

It is stipulated that the deceased was employed by the defendant, and killed on June 14, 1917.

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JAMES CASSELL, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live? A. 452 Grand Street.

Q. How old are you? A. Sixty-four years old.

Q. Did you have a son working for the Mueller Macaroni Company in 1917? A. Yes.

Q. What was his name? A. Michael Cassell.

Q. How old was he? A. Past fourteen.

Q. How much past? A. He would be fifteen years old on the 23rd following the month he was killed.

Q. When was he killed; what day was he killed? A. I think it was on Thursday, I am not sure.

Q. You don't know the date of his death? A. It was the 14th of June.

Q. How much money did he earn when he was working A. I think it was eight dollars.

Q. And were you dependent upon him? A. Well, yes.

Q. For support—totally or partially? A. Partially; my both hands is crippled.

Q. And he would bring this money home? A. Yes.

Q. And turn it in to you? A. Yes.

Q. You don't know anything about his being killed? A. No, I don't know nothing about this killing.

Cross Examination by Mr. Autenrieth:

Q. Did he have any brothers? A. Yes, sir.

Q. Were they working? A. Well, working some, sometimes they were working and went away to work and come back again.

Q. Were they working in June, 1917? A. Yes, two of them working, I think.

Q. How much of his money did Michael give you? A. Michael used to give us all.

Q. All of it? A. All to the wife.

THE COURT—Give it to whom? A. To my wife. 10

THE COURT—To his mother? A. Yes.

Q. Then you gave him his board and bought his clothes? A. Yes, sir.

THE COURT—Are you able to work on account of your disability?

A. No, I have not worked in three years. I was a painter and burned my hands in my business. 20

BY THE COURT:

Q. How much of a family did you have? A. Have three sons living now.

Q. And all of these at this time tive with you? A. Yes.

Q. And your wife was housekeeper? A. Yes.

Q. And she disbursed the money? A. Yes. 30

Q. What did the other boys do with their money? A. Well, one that was working, both that worked, came up to the house and brought what he earned up to the house.

Q. Did the other boys contribute anything? A. Yes. They all contribute.

Q. You say Michael got eight dollars, how much did the others contribute to the household fund? A. Well, what it cost for the keep of the house. 40

Q. Can you tell how much the others gave? A. No, because they always gave it to their mother.

Re-cross Examination by Mr. Authenrieth:

Q. Were you working at the time Michael was
10 killed? A. No, I was very bad.

Q. You were not working at that time? A. No, I was hardly able to stand up when they came in.

Q. Had you been working before that? A. No, I had not been working for quite a while.

Q. Well, how long? A. Seven or eight months probably before that.

20 *Redirect Examination by Mr. Simpson:*

Q. So at the time of his death you were relying on him to contribute his wages? A. Yes.

Q. Were dependent upon that? A. Yes, was dependent upon what he brought in.

EDWARD C. JOHNSON, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live? A. 269 Fifth Avenue.
30 Q. Were you working in the Mueller Macaroni Factory when young Cassell was killed? A. No, was not working days, I was working nights.

Q. Do you know anything about the custom of running these elevators? A. Yes.

Q. What was the custom?

MR. AUTENREITH—I object. It is apparent, even if he knows any custom; this
40 boy was injured at the time he was employed

there, and until first there is a custom of some kind shown, this witness cannot testify to it anyhow.

THE COURT—I don't quite see the point.

MR. AUTENRIETH—They contend this boy was killed in the scope of his employment and was anticipating that a little bit, to show that it is not the custom in this place for anybody to run the elevators.

Q. What was your work? A. I was working a noodle machine.

Q. Did you have anything to do with running the elevators? A. No.

MR. AUTENREITH—That is either yes or no, because it is apparent he only knows about night time operations.

MR. SIMPSON—I simply want to prove that there was an elevator there and what he knows about the evenings.

THE COURT—I will listen to evidence that tends to show that this boy was expected to run this elevator by implication of probable custom of the shop.

MR. SIMPSON—During the time he worked.

THE COURT—Yes, during the period he was employed there.

MR. AUTENREITH—What is the matter of fact, what goes on in the night time and in the day time?

THE COURT—I don't know what the conditions are, but I will allow this question.

Q. (Repeated by stenographer:) A. No, sir.
Q. You were not present at the time he was killed, were you? A. No, sir.

MR. SIMPSON—I withdraw this witness.

MR. AUTENREITH—I will concede that, that his head was between—or inside the elevator shaft, his body being caught between the elevator and the floor.

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MR. SIMPSON—That's my case.

THE COURT—That during the period of his employment here.

MR. AUTENREITH—I don't concede it was during the course of his employment; it was while he was working in the factory some time or other.

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THE COURT—He was employed in the factory.

MR. SIMPSON—Yes.

THE COURT—What time was his body found?

MR. SIMPSON—12.35 noon time.

THE COURT—Noon time?

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MR. SIMPSON—Yes.

MR. AUTENREITH—I think if that is Mr. Simpson's case the Court has only to dismiss it. It does not show the accident was due to his employment, as far as the record goes now.

THE COURT—There is nothing in the case to show that his business was connected with the elevators, the burden of proof is on

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the petitioner. There was a macaroni factory, equipped with an elevator. This boy worked in that factory. His employment furnished the occasion for his being in the building, and while so engaged and while so on the premises, he was found dead on the elevator, presumably in connection with the transaction of the business. It is very flimsy 10

Your point then is that the petitioner has failed to disclose what the duties of this boy were.

MR. AUTENREITH—My point is that the proof of the death of the boy is not shown or established to be the result of the accident they rest on, and not in the course of the boy's employment. 20

THE COURT—That is right, and you have not shown the scope and nature of the employment, and its causing the death.

MR. ZIMMERMAN, sworn.

Direct Examination by Mr. Autenreith:

Q. Mr. Zimmerman, in June, 1917, what was your occupation? A. My occupation was manager, production manager of the plant. 30

Q. What plant? A. C. F. Mueller's plant.

Q. And did you know Michael Cassell in his lifetime? A. Yes, I engaged him.

Q. Do you know what his work was? A. I do.

Q. And on June 14, what was he employed to do? A. He was employed to feed a noodle machine?

Q. Just what is meant by feeding a noodle ma- 40

chine? What does a boy do A. It is a tray about two or three feet long and goes into the machine that is run by belts.

Q. And how does he feed the machine with that tray? A. He just takes the end of the tray and sticks it in the belt way and the belt carries it along.

10 Q. Did he have anything else to do about running the elevator? A. No, sir.

Q. Did he have anything to do with the elevator? A. No, sir.

Q. How far away from the elevator was this noodle machine? A. Within fifty feet of it.

Q. Was it the other side of the building or not? A. Way this side.

Q. Within fifty feet of it? A. Yes.

20 Q. And was not anywhere near the elevator? A. No, sir.

Q. Or on the elevator? A. No, sir.

Q. Did you at that time have any rule or regulation regarding employees being on the elevator? A. Yes.

Q. And what was that rule? A. The rule was no employee allowed to ride on the elevator, it was a freight elevator.

30 Q. Did you have signs posted? A. Yes.

Q. Have you got a copy of that sign with you? A. Yes (witness produces sign).

Q. Is that sign which you show me now the same as the sign that was posted there at that time? A. This is the way the sign was hanging on the elevator.

Q. Is this the sign itself? A. Yes, sir.

MR. AUTENREITH—I offer it in evidence.

40 Q. Mr. Zimmerman, was there anything in con-

nection with the running of this noodle machine that would take this boy on the elevator? A. No, sir.

Q. How long before this accident had the boy worked in your place? A. About three days.

Q. And did any of the employees working on noodle machines use the elevator? A. No, we had a regular elevator man to run it. 10

Q. You have a regular elevator man to run it? A. Yes, sir.

MR. AUTENREITH—The sign offered in evidence reads as follows: "Employees are forbidden to ride on this elevator. It is not designed for carrying passengers. Louis T. Bryant, commissioner of labor. This card is placed here by authority of the State of New Jersey, and must not be mutilated or removed." 20

Q. At twelve o'clock noon, Mr. Zimmerman, at the time this boy was hurt, is the elevator kept running? A. No, sir.

Q. What happens to the elevator? A. The elevator is left on the second floor.

Q. Left on the second floor? A. Yes. 30

Q. By whom? A. By the elevator man.

Q. And when is this put in operation again? A. One o'clock.

Q. And meanwhile was there any occasion for this boy in the course of his employment to go on or around or operate the elevator in any way? A. Absolutely had no business to.

Q. Between twelve and one was the boy's lunch hour? A. Yes. 40

THE COURT—Was the elevator run in a specially constructed shaft?

THE WITNESS—Yes.

THE COURT—Doors in it?

THE WITNESS—Automatic doors.

10 Q. Automatic doors which close when the elevator leaves the floor? A. Yes.

Q. I show you a card purporting to be a time card of Michael Cassell is that a time card kept in your plant? A. That is our system.

Q. And can you say whether or not this is Michael Cassell's card? A. The only way I can tell this card is the name on it and on the punching.

Q. How did the employee punch the card. A. 20 Well, coming in the morning or A. M. and then at twelve noon it is punched again and one P. M. when they come in the building again and they punch it at night.

Q. And are all employees of your company required to punch these cards in their work? A. Each and every one.

THE COURT—Where was the clock, at the entrance?

30 THE WITNESS—Yes.

Q. Anywheres near the elevator? A. No.

Q. Was there any occasion for Michael Cassell to go in the elevator, to leave his machine, to go outside or to punch the clock? A. No. sir.

THE COURT — You shut down at twenve o'clock.

THE WITNESS—Between twelve and one, 40 yes.

THE COURT—Always.

THE WITNESS—Well,, one time, a year we did, we ran through noon time.

THE COURT—This time?

THE WITNESS—This time we shut down between twelve and one. 10

MR. AUTENREITH—I offer this time card.

Q. Now, on the day, Mr. Zimmerman, that Michael Cassell was found dead, do you know what time the body was found? A. I know what time the body was found but I was not there, I was out for dinner.

Q. Did you come back before one o'clock? A. Just about one.

Q. After the accident happened? A. Yes. 20

Q. You don't know what time the accident happened? A. No, sir.

Cross Examination by Mr. Simpson:

Q. What was the first you knew about the accident? A. When I came in, they were telling me about finding a man that was killed in the elevator.

Q. Who told you? A. Everybody told me, everybody knew it in the place. 30

Q. Name one. A. The boss, Mueller.

Q. Mueller told you? A. Yes.

Q. And this boy fed dough to the machine? A. Fed the tray.

Q. Where did he get the dough? A. Right within three feet of the machine.

Q. What floor did he work on? A. Third floor

Q. Were you on that floor? A. I am all over the plant. 40

Q. Well, were you on that floor? A. I am on all floors.

Q. What was your business? A. Production manager, I had charge of the manufacturing.

Q. And you say you had a regular man to run the elevator, what is his name? A. His name at that time was—I can't think of it just now.

10 Q. Is he here? A. No, sir.

Q. What was the elevator used for? A. Used for freight.

Q. What kind of freight? A. Well, bringing up dough and bringingup trays.

Q. Who brought up dough and trays? A. The elevator man.

Q. The elevator man? A. Yes.

Q. Did other employees bring up trays and 20 dough? A. No, sir.

Q. You never saw anybody running that elevator but the elevator man, did you,during all the time you were working there? A. I saw men riding on it, yes.

Q. What were they riding on it for? A. That is the man who was bringing up macaroni on a truck, he came on the elevator with the truck.

Q. Well, other people besides the man who brought the macaroni on the truck, other people 30 rode on the elevator? A. That is all except myself.

Q. You rode on it? A. Yes.

Q. Although the sign on it was that it was not for passengers, you rode on it yourself? A. Yes.

Q. You paid no attention to the sign, you rode on the elevator? A. I figured I had that pjrivilege.

Q. Yes, you took the privilege and you saw 40 other people riding on the elevator too? A. Yes.

Q. You were there when John was working there, did you see John there at any time? A. I did in the evening.

Q. And you saw him running the elevator? A. No.

Q. You say that you saw other people riding on this elevator? A. One man as far as I know. 10

Q. Who is he? A. I don't know his name just now.

Q. But you say the man who was regularly employed to run the elevator is not here? A. No.

Q. Where is he? A. Man that ran the elevator went to France, and I don't know what became of him.

Q. Is the man that runs the elevator now here? A. No. 20

Q. Do you know the name of the man who ran the elevator when he was killed? A. I remember it if I heard it.

Q. How much a day did he get, do you know? A. What his salary was a day I don't know.

Q. And the dough, where would the dough come from that was fed to this machine? A. Second floor.

Q. How many floors in the building? A. Four.

Q. Where did the trays come from? A. The trays came from the third floor. 30

Q. And when this man would leave at noon to go to lunch, how would you leave, by elevator or stairs? A. By stairs.

Q. You saw him every day sitting by the stairs? A. I could not see him twenty minutes after twelve because I left the building five after.

Q. You don't know how he left this day? A. No. 40

Q. How many days was he working in there? A. Three days.

Q. Now, three days did you see him in the elevator? A. No.

Q. You know who I am talking about? A. Yes.

Q. You did not see him in the building at all? 10 A. No, sir.

Q. Now, isn't it a fact that it was the common custom there for employees to ride on the elevators, and didn't you see lots of them riding on the elevators, notwithstanding the sign? A. No, sir; they never rode on the elevators when they saw me.

Q. But you yourself rode on it? A. Yes.

Q. You didn't see this man's body after he was 20 crushed, did you? A. I seen him, yes.

Q. Where was it when you saw it? A. On the third floor.

Q. What part of the third floor? A. Right near the elevator shaft.

Q. How near the elevator shaft was he lying? A. I guess within ten feet.

Q. What was the condition of the body, was his 30 head crushed? A. He was covered up at that time, I just lifted up the cloth like.

Q. Can you describe this elevator? A. Why, it was the same as any other ordinary freight elevator.

Q. What kind of gates did it have on the third floor, have any or open shaft? A. Self locking doors.

Q. That is, doors that would lock when the elevator was not there? A. Right. 40

Q. And when the elevator came up would the doors go up? A. No, you would have to open up the doors.

Q. From the elevator? A. Yes, man that operates it.

FERDINAND AUTENREITH, sworn.

10

Direct Examination by Mr. Autenreith:

Q. Mr. Autenreith, on June 14th, 1917, did you work in the Mueller Macaroni Company? A. Yes.

Q. And what was your job? A. Engineer.

Q. Do you remember being called in at the time this Michael Cassell was killed? A. Yes, I was notified.

Q. What did you do? A. I raised the car.

Q. Raised the elevator? A. Yes.

20

Q. Was the elevator man there? A. No, sir.

Q. What time of the day was it that you raised the car? A. About one o'clock I raised it.

Q. When you came in and saw the body? A. Twelve forty-five, something like that.

Cross Examination by Mr. Simpson:

Q. Where did you see the boy? A. Third floor.

Q. What was his position when you saw him? A. Face down.

30

Q. Lying on the elevator? A. Facing the car.

Q. As though the car down and struck him on the head? A. Yes.

Q. And where were the safety gates when you saw his body? A. The gates were even with the floor.

Q. Then how could he get in that position? A. I don't know how he got there, the doors were down and the car was even with the landing.

40

Q. Where was the rest of the body? A. On the third floor.

Q. But these gates raise? A. The gates go into the shaft, half goes up and half goes down.

Q. Was his body between these gates? A. No, he was between the car and the door.

10 Q. I don't understand you. The body was on the floor and his head in the car and you saw the safety gates there, what was his position in reference to the safety gates? A. I could not see how the gates were,

Q. What was his position when you got there? A. Laying on his stomach.

Q. On the floor? A. Yes.

Q. With his head in the elevator? A. Yes.

20 Q. And the elevator resting on his head? A. Yes.

Q. Did that elevator go any higher than the third floor? A. It goes to the fourth.

Q. So it could have been in motion and coming down and struck him when he was looking down the shaft? A. That is the way it got.

Q. When did you lift the car? A. About one o'clock.

Q. You don't know who lifted the car? A. I

30 raised the car.

Q. You don't know who started the car in motion when it struck him? A. No, sir.

Q. Who called your attention to his body? A. The telephone operator.

Q. What is his name? A. It's a lady, I think it was, I don't recall her name now, the telephone operator, I have a 'phone home and I was just notified.

40 Q. She called you up and told you? A.Yes.

By the Court:

Q. I don't understand your explanation of the gates. Did you say they are divided, one half of which raise and the other lowers? A. Yes.

Q. It was a solid door? A. Yes.

Q. And the other half goes up? A. Yes. 10

Q. And the other half was sunken into the floor? A. That is into the shaft.

Q. Well, the top of them was level with the floor at the time you saw the boy? A. Yes. The doors opened from the inside. They had to be opened by the man who is operating the elevator and the gates close when the car is not there. They have to be opened by a catch on the inside of the car.

Q. If these gates were in good working order, 20 they would be closed when the elevator was above the third floor? A. Yes.

Q. So it would be impossible for anybody to get the shaft while the elevator was up above? A. Yes.

Q. If they were in good working order? A. Yes.

Recross Examination by Mr. Autenreith:

30

Q. If they are open, they must be opened from inside as the elevator reaches the landing? A. Yes.

Q. They don't open automatically. A. No.

Q. They have to be opened from the inside? A. Yes.

THE COURT—But they close automatically?

THE WITNESS—Yes. 40

HENRY CASSELL, sworn.

Direct Examination by Mr. Simpson:

Q. Did you work in this macaroni factory? A. Yes.

Q. When did you work there? A. I worked there for about six months.

Q. Prior to your brother's death? A. After it.

Q. And were you working there when your brother was killed? A. No, sir.

Q. Well, when you worked there, what was the custom of operating the elevator?

MR. AUTENREITH—Three months, sometime prior, may we have it when this three months period was for? I object to the question, it is immaterial, we don't know when it was.

Q. When was it you worked there, in reference to your brother's death? A. I don't remember, I was working there to his death.

Q. You were working there at the time of his death? A. At the time of his death.

Q. What was the custom at that time?

MR. AUTENREITH—I object to what the custom was.

THE COURT—It is part of your case, you introduced evidence as to custom.

MR. AUTENREITH—No I didn't. What I did in my case was to prove that this boy's occupation was with a noodle machine and that he had no business with the elevator, I did not attempt to show any custom.

THE COURT—I will allow it.

(Exception allowed and sealed.)

Q. What was the custom? A. No custom, any body could use it.

Q. Well, did they use it, any employee could use the elevator?

10

MR. AUTENREITH—Same objection.

A. Yes.

Q. And did the boss ever object to the different employees going up and down in the elevator? A. Not that I saw.

MR. AUTENREITH—I object to that question on the ground first that we do not know who this boss is that is indicated by this witness and that it is a conclusion as to whether he did or did not object, I object otherwise as it being immaterial and irrevelent.

20

Q. This production manager who has been on the stand, just the name I do not recall, you have seen him there in charge? A. Yes.

Q. Did he ever object during the three months you were there, to anybody going up and down the elevator?

30

MR. AUTENREITH—Same objection.

A. No, sir.

Q. If this production manager says that nobody would ride on the elevator, is that true? A. No, sir; he rode down with me one day.

Q. On the elevator?

MR. AUTENREITH—Same objection.

A. Yes.

40

Q. And what kind of business was conducted there? A. On the floor!

Q. In the factory? A. Making noodles and macaroni and different things.

Q. And what was your work there? A. I was on the same machine my brother was, he relieved me in the daytime.

10 Q. What kind of work did you do on this machine? A. Feed it.

Q. What did you have to do with the elevator? A. Nothing.

Q. What did you do with the elevator?

MR. AUTENREITH—No objection if he said he had nothing to do with it.

20 MR. SIMPSON—If it was the custom there that would prove that this boss allowed the employees to use this elevator and they had used it for passage then what he did do would be quite important if he did it in the course of his business.

THE COURT—You can say general course, conduct would be different, that's specific.

Q. Now, as to your using the elevator during 30 the three months you were there, how often would you see it in the presence of this boss; you say he rode with you once? A. Yes.

Q. Now, what other times did you use it while you were there? A. Mostly every morning.

Q. Did he see you do it? A. He was around there.

Q. Did he ever object? A. No, sir.

Q. And at the time he rode down the elevator 40 with you, did he tell you not to do it? A. No, sir.

Q. Did you while you were there see various employees using the elevator besides this man? A. Yes, I cannot place them.

Q. Did you see any of the workers? A. Yes.

Q. Can you tell us about how many you saw use it? A. Well, the whole crowd there was passengers.

Q. Would you say all the employees, taking the general sense of the word employees? 10

MR. AUTENREITH—I object unless the witness gives us some percentage.

THE COURT—Can you tell us what percentage used that?

A. I cannot.

Q. Would you say that all use it or only one-half, what proportion of them used it? A. As many as wanted to. 20

Q. How many wanted to? A. I saw while I was there one-half of them.

Q. And there was always there a man who ran that elevator, is that true? A. Not while I was there.

Q. Who would run the elevator? A. Anybody that wanted to use it.

Q. And when you wanted to use it was there a special man there? A. Not while I was there. 30

Q. And when did you work, days or nights? A. I worked from seven at night until the next morning, something like that.

MR. AUTENREITH—That raises the same objection I made before regarding the operation of this plant at night.

THE COURT—There is no proof that there is any difference. 40

MR. AUTENREITH—We will show it.

THE COURT—You have not done it.

MR. AUTENREITH—We will.

Q. And the same machine as your brother? A. Yes.

Q. You relieved your brother? A. He relieved me.

Q. He came at seven o'clock? A. And I would go away at eight.

Q. What did you do between seven and eight? A. Sweep the floor and other things.

Q. These safety gates, did you ever see them operate? A. Yes.

Q. How did they operate? A. Well, one comes down and one goes up, they meet in the middle and the gates close inside.

Q. How was it possible for your brother's head to be under the elevator when the gates were as you say automatic gates; how could it be possible for his head to be under the elevator unless his head was between the gates and the floor?

MR. AUTENREITH—I object.

Q. According to you, the gates were closed when the elevator was away? A. Yes.

Q. How could the gates be open when the elevator was not there? A. Yes.

Q. How? A. The doors could be opened.

Q. They did not fasten? A. No.

Q. Any one on the floor could open them on the outside? A. They could be opened.

Q. From where? A. That is when the elevator goes down the doors could be opened.

Q. You mean if the elevator was not there still the doors could be opened? A. Yes.

Cross Examination by Mr. Autenreith:

Q. How do you open them? A. I don't know how they opened, but the doors could be opened.

Q. How do you open them when the elevator is gone? A. The elevator could go down and the doors opened. 10

Q. You mean the elevator could work and saw the doors were opened most of the time.

Q. You mean did not close full? A. Yes.

Q. You did not work at this plant except during night time, did you? A. I was there until about eight o'clock in the morning. 20

Q. Well, everything you saw was up to eight o'clock in the morning? A. Mostly every night.

Q. And most of the employees were at work? A. About half of the people were using the elevator, at any time at all, that was around eight o'clock.

Q. There was no regular elevator operator at the time you were there? A. No, sir.

Q. You don't know what there was in the daytime, do you? A. Not after eight o'clock. 30

Q. And your brother's working time started in after seven and ended when? A. Six in the afternoon.

Q. You don't know what happened during that time, in regard to the operation of this elevator? A. Only that hour in the morning, seven to eight.

Q. Only for that one hour? A. Yes. 40

Q. And you want us to believe that during that one hour you yourself saw at least half of the people in this factory riding on that elevator?

MR. SIMPSON—I object to that question on the ground that it is improper, asking for a witness's concusion and it is not in proper form.

10

THECOURT—I think I will allow that question, it is worth while answering.

Q. I mean that they used it all night up until eight o'clock in the morning?

By the Court:

Q. When did you have occasion to use the elevator? A. I had to a few times.

20

Q. Where were you going? A. Down stairs.

Q. For what purpose? A. To the superintendent.

Q. What is the elevator used for? A. Taking trays up and down.

Q. Did you ever use it when you were quitting? A. Yes, sir.

Q. Did you ever use it when you worked at night? A. Yes.

30

Cross Examination by Mr. Autenreith, continued:

Q. There is a stairway there? A. Yes.

Q. And the employees used the stairway A. Some of them did.

Q. What did the rest of them do? A. Used the elevator, that is those that came in on the night shift.

Q. Operating the noodle machine has nothing to do with the elevator, has it? A. No.

40

EDWARD JOHNSON, Recalled—Direct

Q. Was there anybody there at all nights?

Q. You have no instructions or orders to use the elevator in the operation of the noodle machine? A. No, sir.

Q. And your brother worked at the same machine you were working on, that right? A. Yes. 10

By Mr. Simpson:

Q. Now, this operation that you say by the day shift started in at seven o'clock? A. Yes.

Q. And you were there until eight? A. Yes.

Q. Now the part of this shift that you saw that were working between seven and eight, is the work carried on any different than the night shift, as far as you can see? A. Yes.

Q. How? A. In regard to myself, I would 20 have to sweep up.

Q. What I am asking is this, that, was the suctom of working any different so far as the elevator was concerned as to the day and night shift? A. No, sir.

Recross Examination by Mr. Autenreith:

Q. Well, did you ever see your brother—you relieved him? A. Yes. 30

Q. Did you ever see him sweep up? A. No, sir.

EDWARD JOHNSON, recalled.

Direct Examination by Mr. Simpson:

You have already testified that you worked at this macaroni factory, when did you work there? A. I only worked there about three weeks after he got killed. 40

Q. From what time to what time? A. About a year; I could not say what time that was.

Q. Were you working there at the time this boy got killed? A. Yes.

Q. How long after? A. About a month.

Q. How long before he was killed did you work there? A. I worked there a year.

10 Q. In the year did you become familiar with the use to which the elevator was put? A. Yes, they did not have any sign there.

MR. AUTENREITH—I object on the ground that he was not familiar with the running of the elevator and it is not material.

MR. SIMPSON—The point simply gives weight to the testimony.

20 THE COURT—There is nothing in the case to involve conclusion, there is no conclusion.

MR. SIMPSON—Yes, Mr. Zimmerman said there was a regular elevator operator on and at night time there was none.

THE COURT—I will allow it.

MR. AUTENREITH—Exception.

30 Q. (Repeating). You know how the elevator was used, you used it? A. Yes.

Q. You saw it and what class of persons used it? A. Everybody used it in the night and in the day time.

MR. AUTENREITH—I ask the day time be stricken out.

THE COURT—Strike out day time.

Q. You say you saw it used in the day time,
40 what class of persons used it?

MR. AUTENREITH—Same objection as to the other question.

Q. Just answer that, will you, you saw it used, what class of employees used it? A. Mostly all the fellows that worked there, everybody.

Q. In what way did they use it? A. To go upstairs and down and bring stuff up.

Q. And did they use it in full sight of the boss? A. Sometimes.

Q. Did the boss ever object?

MR. AUTENREITH—Who was the boss?

THE COURT—I don't know.

Q. There were bosses there when you worked there? A. Yes.

Q. And they never objected to this use of the elevator? A. No, sir.

MR. AUTENREITH—Same objection.

Q. Did they ever object to your using the elevator?

MR. AUTENREITH—What difference does it make now?

Q. State whether or not you heard any objection from the bosess in regard to the use of the elevator? A. No, sir.

Cross Examination by Mr. Autenreith:

Q. You never saw signs there? A. There were no signs there when I was there.

Q. What year were you there? A. About three years ago.

Q. No such sign as that around the elevator? A. No, sir.

Q. Sure about that? A. Yes.

Q. You didn't work during the day time, did you? A. About an hour.

Q. Well, you were on the night shift? A. Yes.

Q. And this hour that you have been talking about so much one hour at the end of the night shift in the morning? A. I worked a couple of days
10 after.

Q. One hour of your night shift? A. Yes, sir.

Q. You were what is known as the night shift, weren't you? A. Yes.

Q. You didn't know what happened during the day time shift, what the elevators were used for? A. Only what I saw in that hour.

Q. That was not the day time shift? A. Yes, they started at seven and I stopped at eight.

20 Q. What did you do in that hour? A. Swept up and take the stuff what I swept up down stairs.

Q. What was your work, working a noodle machine? A. Yes.

Q. The same as young Cassell? A. Yes.

Q. Your duty did not take you on the elevator? A. No, sir, but one day Mr. Zimmerman told me to run it.

Q. What were your duties? A. On a noodle
30 machine at night.

Q. And operating the noodle machine you did not have to use the elevator, did you? A. No, sir.

Q. Now, you worked alongside the other Cassel who was on the same floor? A. Yes.

Q. Neither one of you work there now? A. No, sir.

Redirect Examination by Mr. Simpson:

Q. This noodle machine was not operated by
40 elevator power, was it? A. No, sir.

Q. But I understand you to say that you used the elevator to go up and down? A. Yes.

Q. You say Mr. Zimmerman told you to use it? A. Yes, sir, one time.

Q. That was the man who was on the stand and said nobody used it? A. Yes.

Q. What did he tell you to use it for? A. He told me to take him downstairs to the second floor and I had something to take down to the bottom floor. 10

Q. Now in regard to the special employee question, did you ever see any special employee use it while you were there? A. No, sir, not while I was there.

Mr. Zimmerman, recalled.

Direct Examination by Mr. Simpson: 20

Q. Mr. Zimmerman, the lunch hour was between twelve and one? A. Yes, sir.

Q. Would many of the employees stay on the floor and eat their lunch there? A. Yes.

Q. Stay there? A. Yes

Q. And then go back to work. What time did you leave the building this day? A. About five minutes after twelve.

Q. Who did you leave in charge? A. Practically nobody in charge, it was noontime. 30

Q. Well, is there anybody here that was foreman of the third floor or had a position of that kind? A. No.

Q. Is there anybody here that knows any more about the accident than you know? A. The man that found him, Mr. Autenreith, the fellow that raised the elevator.

Q. Mr. Autenreith is the engineer? A. Yes. 40

Q. Is he the only one that you have here that knows anything about how this accident happened? A. The only one that is here now, yes, sir. Mr. Schmidt is here.

Q. What was Mr. Schmidt's position in the factory? A. Mr. Schmidt was advertising agent or manager.

10

Q. And you know it was customary in the noon hour that they did not work between twelve and one and would sit there and eat their lunch or use the time as they like? A. Yes.

WILLIAM SCHMIDT, sworn.

Direct Examination by Mr. Simpson:

Q. Were you in this macaroni factory the day of this boy's death? A. Yes.

20

Q. Do you know anything about the accident? A. All I know is that I came in about twelve thirty and about twelve thirty-five or forty a young man came running down to my office and notified me that some one was found caught in the elevator, that is the elevator shaft.

Q. What did you do then? A. The first thing I done was to tell the operator to call up the hospital and I went up there immediately and saw his body.

30

Q. Where was the body when you saw it? A. On the third floor.

Q. Was it in the elevator shaft? A. Partly.

Q. What part of it was in the shaft? A. The head to the middle of the chest.

Q. Was it laying face down or what? A. Face down.

40

Q. What was the position of the safety gates? A. The top gate was down to the bottom of the floor.

Q, The top gate was down and the lower gate had moved up? A. The lower gate was forced down to ease the body.

Q. The body was in between the two gates? A. Yes. 10

Q. You don't know the principle of the operation of the gates, do you? A. No. I am not a mechanical employee, but I just say his arms were inside the shafting.

Q. Was the body in such a position as it would have been if the elevator had descended and struck him and knocked his down?

MR. AUTENREITH—I object to that 20

THE COURT—That calls for a conclusion.

A. Evidently

MR. AUTENREITH—I think it calls for a speculation as to how this happened.

Q. Who is this young man who notified you? A. He is known by the name of Charlie.

Q. Is he here? A. I don't know him.

Q. Would you recognize him now? A. I would not, it is three years ago. 30

Q. Do you see anybody in the court room that knows anything about the accident at all? A. No, I don't remember him.

Cross Examination by Mr. Autenreith:

Q. Did you see any sign such as the one that is offered in evidence? A. I think I have.

Q. Were they there at that time? A I do not recall; we were conducting some kind of a safety 40

first campaign at that time and these signs were gotten up by myself and hung up by myself, written by myself.

Q. You don't remember whether or not there were signs warning employees not to ride on the elevator? A. I can't recall that but I know we wanted to make much out of this safety first campaign or drive.

Q. That was right around this time? A. Yes.

Q. Did you ever see employees riding on the elevator? A. No, I cannot say that I have, because I was mostly in the office, very seldom in the factory.

MR. SIMPSON—That is all, your Honor.

WILLIAM GARDINER, sworn.

Direct Examination by Mr. Autenreith:

Mr. Gardiner, what was your position with the Mueller Macaroni Company in June, 1917? A. I was in charge of the office.

Q. And do you recall the time of the death of Michael Cassell? A. I do, yes.

Q. At that time or prior thereto were there signs such as exhibit P-1 regarding the employees riding on the elevator? A. I cannot remember that identical time, but I know it was the practice then for employees not to ride on the elevator. I have been there a good many years and I would know if they rode on them.

Q. Did you ever ride on them? A. No.

Q. There were signs posted but you don't know whether this is the exact time? A. No, I could not tell.

Q. Do you remember the time of day this accident happened? A. Yes, I remember coming back at one o'clock and hearing of the death of this boy.

Cross Examination by Mr. Simpson:

Q. Who did you hear it from? A. No reponse.

10

Further Direct Examination by Mr. Autenreith:

Q. Just a minute, was there a regular elevator operator there? A. Yes, there has always been a regular elevator operator.

Q. That is during the day time? A. Yes.

Q. And during the night time, what is the difference? A. The general operation ceases at six o'clock, five o'clock now, and we have a certain class of goods that have to be manufactured and they have to have people there to do that. There is constant or continuous operation going on there on account of the drying in this case, goods are being dried all the time the machines are working and it keeps us busy getting these goods dried or they would be getting too hard or something like that.

20

Q. Is there a regular elevator operator there in the night shift? A. That I could not say.

30

Cross Examination by Mr. Simpson:

Q. Who was the regular man operator on the day of the death of this man? A. Well, I could tell if I have my payroll, but I haven't it.

Q. Is he here now? A. That I could not tell.

Q. Did he work between twelve and one on this elevator? A. Our plant stops at twelve o'clock for lunch hour and the elevator is not running.

40

Q. So in your opinion there would be no regular operator between twelve and one on the elevator? A. No.

Q. Who was the person that told you about this accident? A. I cannot say who he was, everybody was talking about it.

Q. You say there were signs in the elevator? A. There were signs on the floor.

Q. You mean at the time of his death? A. I could not tell whether the sign was there then. there are signs—

Q. I know there are signs there now, would you say at the time of his death the signs were there on the elevator? A. I cannot say that. But five years ago when I came to the plant I know the elevator was not supposed to be used by the employees, only for freight.

Mr. Simpson—I ask that that be stricken out as not reponsive, the question is do you know whether at the time of the accident there were signs and he says he does not.

Mr. Autenreith, recalled.

Direct Examination by Mr. Autenreith:

Q. Mr. Autenreith, during June, 1917, did you see employees using this elevator? A. No, sir.

Q. And you were on the day shift, were you? A. Day shift, yes, sir.

Q. At any time prior to June, 1917, did you observe employees using this elevator? A. Not that I know of.

Q. Well, you didn't see any? A. No, sir.

Q. And you have occasion to use the elevator off and on during the day? A. I inspect the elevator week after week.

Q. And observe it in operation? A. Always in operation.

Q. Well, did you see it in operation during the day Cassell was injured? A. Yes.

Q. Did you know then that Cassell was injured? A. No, sir.

Q. Are you familiar with the operation of the elevator? A. No, sir. 10

Q. Were there signs like this sign, employees forbidden to ride, posted at the time? A. Yes, it was on the elevator; I could not say whether that was one or not.

Q. A sign like that? A. Yes.

Q. And you say you were the man that inspected the elevator? A. Yes.

Cross Examination by Mr. Simpson: 20

Q. When you found the body it was not in such a position as it had been riding on the elevator? A. It was off the elevator.

Q. How was this elevator moved, by rope? A. Yes.

Q. And steam? A. Electricity.

Q. And you pulled the rope down to make it go up or where? A. You pulled the rope down to make it go up. 30

Q. And you pulled it up to make it go down? A. Yes.

Q. How many floors? A. Four.

Q. When you found the body, was there any elevator attendant there that you know of? A. No sir.

Q. And what was it that stopped the elevator, do you know? A. The body, the cables were slack and it was resting on the body. 40

MR. AUTENREITH—That is our case.

THE COURT—On this evidence I will rule that the body was not operating the elevator; it was being operated by somebody else. The accident happened during the lunch hour which he spent in the factory with the approval of his employer. I will allow three hundred weeks' compensation, minimum of five dollars a week, and maximum of twenty-five per cent.

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HUDSON COUNTY COMMON PLEAS

JAMES CASSELL, Administrator of Michael Cassell, deceased, *Petitioner*, *vs.* C. F. MUELLER MACARONI COMPANY, a Corporation,	*Respondent*, *Empoyers' Liability*

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30 RUNYON & AUTENREITH, ESQ., for the petitioner.

ALEXANDER SIMPSON, ESQ., for the respondent.

Before DOHERTY, J., May 19, 1921.

JUDSON MABEE, sworn.

By Mr. Autenreith:

Q. Mr. Mabee, do you remember the time this Cassell boy was killed at the macaroni factory? A. Yes, sir.

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Q. And what was your job there at that time? A. Oiler.

Q. Have anything to do with the elevator? A. Very little, oil it up and take care of it.

Q. And do you recall whether or not there were any signs about the elevator? A. Yes, sir.

Q. Regarding employees using it? A. Yes, sir.

Q. I show you a sign, will you say whether that sign was on the elevator? A. Yes, sir. 10

Q. On all floors? A. Also a larger one.

Q. Was it on all floors? A. On the elevator.

Q. Was it seen on the elevator or on the shaft, this sign, was it on the elevator itself or was it on the shaft? A. It was on the floor, and there is another one on the elevator.

Q. Was there one like that on each floor? A. I don't see on each floor. 20

THE COURT—What do you mean, on the floor? Where was it hung up?

THE WITNESS—There was one on the floor and one on the elevator.

Q. I know, but where abouts was it on the wall? A. On the wall.

Q. Where with respect to the elevator? A. What? 30

Q. Where with respect to the elevator was it, alongside of the elevator or out in the yard somewhere?

A. Alongside of the elevator?

Q. You didn't see this boy killed, Mr. Mabee? A. Didn't see him killed.

Q. Did you see him afterwards? A. Saw him afterwards. 40

Q. And where was he when you saw him? A. On the third floor.

Q. Third floor? A. On the third floor.

Q. Near the elevator or where? A. Not very far from the elevator; they had him covered up.

Cross Examination by Mr. Simpson:

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Q. You didn't see his body when it was caught in the elevator? A. Seen—

Q. You did't see his body when it was caught in the elevator? A. No, no.

Q. You simply saw it after the accident? A. I was at lunch when it was caught.

Q. What was your position there? A. Oiler.

Q. Where, in the cellar or on the roof? A. I

20 was all over the building.

Q. Did you ever ride on the elevator? A. Very seldom.

Q. When you did what did you ride for? A. To get to the top of the elevator to oil the elevator.

Q. Did you see the sign? A. Many a time, I had to.

Q. You often seen men ride on that elevator, haven't you? A. Very seldom.

30 Q. Have you ever seen people ride on the elevator? A. I have, yes.

Q. When was this sign put on the elevator? A. I don't know, it was there when I came there.

Q. Where was this sign on the elevator, the back or front, or bottom, or where? A. On the side, one on the side here.

Q. One on each side of the elevator? A. Yes.

Q. One on each side? A. Yes, one on each

40 side.

WAGE SCHEDULE

Week Ending, Wednesday: JUN 20, 1917

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Regular Dept. .....

Day	Morning In	Noon Out	Noon In	Night Out	Overtime In	Overtime Out	Total
	7 05	12 21					

TOTAL TIME ..... HRS.

RATE .....

TOTAL WAGES FOR WEEK $ .....

New Jersey Court of Errors and Appeals

C. F. MUELLER MACARONI COMPANY, a corporation, Prosecutor-Appellee, vs. JAMES CASSELL, administrator of the estate of Michael Cassell, deceased, Respondent-Appellant.	On Appeal.

BRIEF ON BEHALF OF PROSECUTOR-APPELLEE.

This matter is before the Court on an appeal taken from the judgment of the Supreme Court reversing the judgment and determination of the Hudson County Court of Common Pleas in the above entitled action. The opinion of the Supreme Court was filed March 14th, 1922.

Facts.

The defendant's intestate, Michael Cassell, was employed by the C. F. Mueller Macaroni Company on June 12th, 1917, as an operator on a noodle machine (page 20). His duties consisted of lifting trays of a preparation to be made into noodles and placing them upon a receptacle that carried them into the machine (p. 25-26). He had no other duties to perform (p. 26). He received in wages the sum of eight dollars per week.

On June 14th, 1917, he was found dead at the entrance to the elevator shaft on the same floor upon which he worked at about quarter to one P. M. (p. 33).

He had punched his time out for lunch hour at 12:21 P. M. and was not due back to his work until 1:00 o'clock P. M. (pp. 28-29, Ex. P-57).

No witnesses were produced to prove how he met his death, but he was found lying on the floor with his head and shoulders in the elevator shaft resting on the lower door, the rest of his body extending out on the second floor of the building. His head had been crushed evidently between the upper and lower doors of the elevator (p. 34). These doors are automatic in closing and operate in this manner: When the elevator leaves the floor, onehalf of the doorway comes down from the upper part of the opening, the other half comes from the level of the floor and meets the upper door half way in the space that is open when the elevator is stationary at the floor landing. The elevator doors could only be opened by the person operating the elevator, as they had to be opened from the inside (p. 35).

The elevator is solely and only a freight elevator used to carry merchandise from one floor to another (p. 26). A regular elevator operator is employed to run this elevator (p. 27) and during the noon hour this freight elevator is shut down and the operator goes for lunch (p. 27).

At the time Michael Cassell met his death the elevator operator had not as yet returned from lunch and the elevator was shut down (p. 27).

No one else in the company's employ had any authority or right to operate this elevator during the day time (p. 27). The elevator was left by the operator at the second floor with the door

open (p. 27), and indisputably was in good mechanical operation both before and after the accident and the doors were in proper mechanical operation both before and after the accident.

The decedent had no duties whatsoever that would take him near the elevator (p. 26). The noodle machine, at which he was employed, was at the opposite side of the building from the elevator; the stairway provided for employees to leave the building was likewise at the opposite side of the building from the elevator (p. 26).

It was the rule of the company that employees were not permitted to ride on the elevator; that it was solely a freight elevator (p. 27) and not only were all employees instructed not to ride on the elevator, but a sign was posted at the elevator doors which read "All employees are forbidden to ride on the elevator" (p. 27).

The petitioner below produced two witnesses who were operators on noodle machines, employed however, in the night time when no regular elevator operator was provided, and when the elevator was shut down (p. 41). They testified that employees had used the elevator in riding from floor to floor to the knowledge of the foreman on one or two occasions, and that during such part of their employment, which lapped over an hour into the day crew, they had seen on one or two occasions, employees riding on the elevator in the presence of the foreman, and thereby attempted to raise an issue as to whether or not the prosecutor had not waived the rules in this respect.

On this testimony the Court below found that the decedent had met his death as a result of an accident which arose out of and in the course of his employment, and it is upon the determination in this respect that these proceedings to review the same are taken.

The points raised, therefore, are comprehended in this—that on the proofs before the Trial Court the evidence did not establish that the decedent died from injuries which were the result of an accident which arose out of and in the course of his said employment.

This case was argued at the November, 1920, term of the Supreme Court and decided by the Supreme Court and decided by the Supreme Court's opinion, filed March 1st, 1921, *per curiam,* as follows:

> "There is no finding that the accident arose out of the employment. This is fatal. *Dunnewald* vs. *Steers, Inc.,* 89 N. J. Law, 601. Let the judgment be reversed with costs."

The case was retried and the printed state of case on appeal offered in evidence as the Trial Court determined he would re-decide the case the same way and insert a finding that the accident did arise out of the employment.

Therefore this Court has the same record before it with the additional finding in it.

The opinion of the Supreme Court on the second appeal dealt extensively with the facts and determined that there was no evidence in the case from which it could be legally inferred that the accident arose out of the employment (p. 3).

Decedent met his death in direct violation of an employer's orders.

The question of whether or not the death of the decedent came from an accident which arose out of and in the course of his employment should be resolved against the decedent upon two theories:

One is that the death of the decedent was in the use of the elevator with respect to which there

was an express violation of the master's orders by the decedent's use thereof, and the other that there is no evidence in the case to show that the decedent was performing any work for the master at the time of his death.

It is undisputed that there was posted on the elevator door, at the place where the decedent was found dead, a sign stating that employees were forbidden to use the elevator, and that the elevator was, by its design, size and construction, a freight elevator.

The employer notified all employees, and also it was the rule of the factory that employees were forbidden to use the elevator.

The decedent was found dead, a part of his body in the elevator shaft and part of it extending out of the floor which leads to the conclusion that he was in some manner crushed in the use of the elevator.

It is well settled in this State that where the accident occurred while the servant was doing an act which he was expressly forbidden by the master to do the accident does not arise out of and in the course of employment.

Smith, admx. vs. *Corson,* 87 N. J. L. 118.

In the case above cited the decedent was forbidden to go up upon a scaffold, but in violation of orders did so and met his death as a result of a fall from the scaffold. The Court held that the accident did not arise out of and in the course of his employment.

In the case of *Reimers* vs. *Proctor Publishing Co.,* 85 N. J. L., 441, an employee was forbidden to use an automobile with which he had previously had an accident while operating it, and the

Court held in that case that the accident did not arise out of and in the course of employment.

See also case of *Schelf* vs. *Kishpaugh,* 37 N. J. L., 173.

There can be no question that the use of the elevator by the decendent was in disobedience of orders and not a mere violation of instructions in the method of doing his work.

The decedent was employed on a noodle machine, which was removed some distance from the elevator (pp. 26-27). He had no duties whatsoever on the elevator nor any duties that would take him in it or near it (p. 28), his duties being confined strictly to attending to the noodle machine. The use of the elevator by him would be the use of an instrumentality not contemplated by the employer in hiring him as a helper on a noodle machine.

The only instructions that he ever received regarding the elevator was not to use it. A regular operator was provided to run the elevator and this operator had shut the elevator down during the lunch hour and did not return until after the decedent's body was found.

With relation to the question of violating orders, we find the following rule:

> "There are two kinds of prohibitions to be considered in these cases: Prohibitions which limit the sphere of employment and prohibitions which only deal with the conduct within the sphere of employment. A transgression of a prohibition of the former class will result in compensation being refused while violation of a prohibition of the latter class will not prevent compensation."

Plumb vs. *Cogdon Flour Mills Co.,* Gordon's W. C. Reporter (1914), p. 49.

It will be noted that the order forbidding employees to use the elevator was a prohibition which limited the sphere of the decendent's employment and did not deal with a prohibition in the manner in which he should carry out his employment.

There are many illustrations in the text books concerning the question of violation of instructions.

In the case of *Hopley* vs. *Pool,* Larrimer & Tabberei, Brit. W. C. C., 512, a boy was employed to work at the back of a machine, his duty being to take the bundles of yarn as they came through and put them on a rack. He was ordered not to touch the rollers.

It was held that he took himself out of his employment by going around to the front of the machine and attempting to take fluff or loose wool from the rollers.

In the case of *Herbert* vs. *Samuel Fox & Co., Ltd.,* 9 Brit. W. C. C. 164, a servant, whose duty it was to walk ahead of a train on a private railway to keep a lookout, violated his instructions and orders by riding on the buffers of the front car in violation of instructions to that effect, and the accident did not arise out of and in the course of his employment.

See also *Leggett* vs. *Gibbons,* 9 Brit. W. C. C. 354.

The petitioner produced two witnesses to prove that while they were employed in the same factory in the night shift they had ridden up and down on the elevator; that the night shift took in an hour of the day shift, at which time the decedent was at work, and that the employer's foreman made no objection to this practice, thereby attempting to prove a waiver on the part of the employer of this rule.

The difficulty with the petitioner's proof in this respect is that the decedent, who had only worked in the factory two days when he met his death, is not shown to have had any knowledge of any one riding on the elevator and it does not appear that the decedent observed any one in the presence of the foreman or superintendent using the elevator, from which the defendant might assume that he also had that privilege, and it also does not appear that those employees who did ride in the elevator in the presence of the foreman, were not doing so in the course of their employment or rather had no employment whatsoever in the elevator at the time.

Furthermore, unless the habit or practice of employees in riding in the elevator had become so frequent as to become a practice for employees to do that, then it could not, as a matter of law, be presumed that the master had waived not only orders and instructions to employees to the contrary, but also the printed notice on the elevator door forbidding employees to use the elevator.

It cannot be inferred that because the superintendent of the factory rode on the elevator the decedent as an operator on a noodle machine would have a like privilege, nor, because the operator of the elevator himself or such other employees whose express business required their presence on the elevator rode on the elevator, could it be assumed that operators of noodle machines and the employees generally had the privilege or right to use the elevator or that the master had waived his orders and instructions in respect thereto.

It would only encourage vexatious litigation to permit a Court to find that printed and posted

signs bearing the rules of the company may be considered as waived by some slight variations therefrom; and in the case at bar the evidence showing that others used the elevator in the night employees' shift, certainly cannot be considered, as a matter of law, to waive the unquestioned rule that employees were forbidden to use the elevator; otherwise rules, posted in conspicuous places of any factory, would amount to little or nothing.

The findings of the Trial Court that the decedent met his death from an accident which arose out of and in the course of his employment is without support of legal evidence.

The last known of Michael Cassell being alive was when he punched his time out at 12:21. Presumably he left the building. There is no evidence to indicate what happened to him but it is more probable to infer that in punching the time clock as out for lunch that he left the building rather than that he stayed in the building or continued to perform any work. He was found dead at quarter of one. He was not due back in the building to resume his work until 1 o'clock (p. 29).

The place where his body was found was not where the performance of his duties would cause him to be, but on the contrary it was a place where he could only be by the violation of the rules and instructions regarding the use of the elevator.

Three things are essential in order to warrant a recovery:

1. There must be an accident; 2. It must arise out of; 3. In the course of his employment, and

all three of these facts must be established to justify an award of compensation.

Bryant vs. *Fissell,* 84 N. J. L., 72.

In the case above cited it is held that an accident arose "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. An accident arose "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.

The question arises therefore in what respect does the case at bar come within the terms of the definition of the jurisdictional clauses in the act as above mentioned.

The decedent was employed as an operator on a noodle machine. He had been working only two days prior to the accident. He had punched the time clock at 12:21 as being out during the lunch hour. It does not appear that any other operator of a noodle machine was in the factory building during lunch hour or did anything with the elevator during lunch hour, nor in fact had any duties in connection with the elevator.

It is undisputed that the decedent had no duties with the elevator whatsoever. No one knows what the decedent was doing at the time he met his death and at best it can only be inferred from evidence and circumstances, and if the facts and circumstances do not in law give rise to a legal inference which necessarily must be a reasonable inference, of what the decedent was doing at the time he met his death, then the proof fails to

establish that the accident arose in the course of his employment.

Can it be said that, if the decedent had stopped work during the lunch hour and was found dead a half hour later on the floor where his work was conducted but partly in the elevator shaft, and nothing in the course of his duties to bring him in that position, and no reason for his being there, that this employee was doing what a man so employed might reasonably do within a time during which he is employed?

The inference that the accident arose out of his employment is no greater than an inference that he was doing something for his own personal convenience. The decedent had not punched the time clock on returning to work again. He evidently had no intention of doing so until one o'clock when he was due to resume work. He was not at a place where his work was performed, but was in another part of the building, where the elevator was situated.

Can the employer be held to assume that his contract of employment with the decedent was such that he might reasonably be at the place where he was found dead and still be in the course of his employment?

Inferences as to employment or as to the decedent being on his own personal convenience or pleasure are equally good, for in either event all the Trial Court could do was to guess, and when the Court hazards a guess at the situation it abandons the legal rules of evidence.

A greater difficulty, however, is found when one attempts to say from the evidence that the accident "out of" the employment. What is there about the facts and the situation surrounding the finding of the body from which anyone could say

that his death or injury was something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it?

Certainly when the decedent was hired as an operator on a noodle machine, the duties of which confined his presence to the machine, he could not be presumed to think that his duties would take him into the elevator, for he had no work to perform at the elevator; he had no duties which connected his duties as an operator on this machine with the elevator whatsoever.

The mere finding of his body there indicates that he was not only away from the noodle machine, where his employment kept him, but he was doing something entirely beyond the scope of his employment. Just what he was doing nobody knows.

He had assumed to do something with the elevator for which another man, to-wit: a regular elevator operator, had been employed.

> "The only permissible inference from the evidence is that the decedent was operating the elevator himself, for purposes of his own (not in the work of his employer and in express violation of the notice, and was killed while attempting to leave the elevator."
>
> (Opinion of Supreme Court.)

All the witnesses agree that an operator on a noodle machine has no duties to take him on the elevator. The only evidence as to other employees using the elevator is by witnesses who worked at night. The evidence as to the practice at night time, when no operator was provided, was admitted by the Court over objection and the Court's decision must necessarily have been based on that evi-

dence. No operator of the noodle machines had anything to do with the elevator.

> Q. What did you have to do with the elevator? A. Nothing (p. 38, l. 12).

Both witnesses, called by the petitioner below admitted that as operator on a noodle machine he had nothing whatever to do with the elevator (p. 43-46).

To sum up the situation, therefore, we find that admittedly a noodle machine operator had no business on the elevator in carrying on his work; that during the daytime an operator was employed whose duty it was to run the elevator; that during the night time no elevator operator was employed.

The testimony of the two witnesses as to the use of the elevator by other employees relates to the night shift, for no witness attempts to say that any person operated this elevator or rode on it at noontime during the day, when the plaintiff's intestate was found dead.

If any weight at all is given to the testimony of the witnesses who worked on the night shift, the best that can be said is that a different practice prevailed during the night shift, and inasmuch as both of these witnesses were operators on the same kind of a machine as plaintiff's intestate, and both concede that their duties as such operators in no manner took them to the elevator, the difficulty which then arises is this—how can it be inferred by reasonable, or we may say legal inference, that the decedent in the case at bar was in the course of his employment or that his accident arose out of the employment at the time he met his death?

Presumably he had punched his time clock out for lunch hour. His duties or hour of work had

stopped until one o'clock. It is by far the greater inference to say that he was not engaged in any kind of employment during this period.

The best that can be said of the witnesses who worked on the night shift is that their evidence tended to show a waiver of the rules forbidding the use of the elevator during the night time, but even if it is proof of that fact still the use of the elevator by others, who have many different kinds of employment in this building, does not establish by legitimate proof that the decedent in the course of his employment could have any duties to perform in or about the elevator, and if he had no duties to perform at that place and was killed during a time when the elevator admittedly was shut down during noon hour, how could the master as a reasonable man be supposed to assume that he was killed at a place where he might reasonably be in course of his work?

In the case of *Steers* vs. *Dunnewald,* 85 N. J. L., 449, the decedent's body was found in Newark Bay. His employment had been on a trestle over the Hackensack River near the junction of Newark Bay.

In order to get to his work, the decedent had to cross over the trestle or tracks of the Central Railroad bridge to reach his work.

The Trial Court found that he was killed in the course of his employment either by falling from the trestle or from the derrick on his way from the mainland to work.

The Supreme Court, however, in discussing the facts stated that such a finding could be nothing more than conjecture or a likely guess; that the finding was not the result of logical inference and so, in the case at bar, the Trial Court could with equal certainty say that the decedent was engaged

in some personal business of his own in using the elevator, but neither such a finding not a finding that the accident arose out of the employment can be made with certainty of logical inference.

Most of the English cases on similar questions hold that if a man is found dead at a place where his work would require him to be in the course of his duties, that then an inference might be drawn that it arose out of and in the course of his employment, and so the corrollary of this rule must be true, to wit: that if a man is found dead at a place where his duties and work did not require him to be, then the accident did not arise out of and in the course of his employment.

Counsel for appellant in his brief is not quite accurate in his view of the facts. He states there is evidence from which it might be concluded that the petitioner's intestate stayed in the building to eat his lunch. The undisputed proof is that the time clock was punched on leaving the building at 12:21, by the petitioner's intestate. He draws the inference that the elevator was left unguarded during lunch hour. The undisputed proof is that the elevator was shut down during lunch hour (p. 27). The appellant thereupon argues that there could be a legal inference that the petitioner's intestate was killed while eating lunch on the premises of his employer, or while attempting to use the elevator. It certainly cannot be presumed that he ate his lunch on the elevator, and the clear and undisputed proof is that his occupation, and his duties did not in any way require him to attempt to do anything with the elevator. The opinion of the Supreme Court discusses the legal inference from the proof quite extensively (pp. 3-6, State of case).

The legal inferences that can be drawn from the evidence are fully expressed in the Supreme

Court's opinion. With respect to the authorities cited by the appellant, we believe it sufficient to say that none of them are in point as they all come within the principle that there was evidence from which a legal inference could be drawn as to the accident arising out of the employment.

It is respectfully submitted, therefore, that the proof fails to show that the decedent came to his death as a result of an accident which arose out of and in the course of his employment, and that the judgment below should be affirmed.

AUTENRIETH & GANNON,
Of counsel with Appellee.

New Jersey Court of Errors and Appeals

JAMES CASSELL, *Administrator* of Michael Cassell, deceased, *Respondent-Appellant.* *vs.* C. F. MUELLER MACARONI COMPANY, a Corporation, *Prosecutor-Appellee*	*On Appeal from Supreme Court*

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BRIEF FOR RESPONDENT-APPELLANT

This is an appeal from a judgment of the Supreme Court reversing an award made by the Common Pleas Court for the death of Michael Cassell. The Judge of the Court of Common Pleas made a finding that Michael Cassell was killed in an accident arising out of and in the course of the decedent's employment. The Supreme Court reversed this on the ground that there was no evidence which would justify any such finding. The evidence showed that Michael Cassell, 14 years of age on the 23rd of July preceding his killing, was employed in feeding a noodle machine. He had been working three days in the place when he was killed. The boy was found on the third floor, face down, lying on the elevator, as though the car had struck him on the head and the car was even with the landing (S. C. pp. 33, 34, 35). The elevator was used by employees (S. C. pp. 38, 39). The gates could have been opened when the elevator was not at the floor

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(S. C. page 40). Elevator was used by employees without objection (S. C. pp. 42, 43, 44). There was evidence from which it might be concluded that the boy with other employees (p. 47) stayed in the building to eat his lunch. While in the building, his body was found caught in the elevator shaft. The factory is open day and night, and while there is regular operator there until five o'clock, he was not there at the night shift nor at the lunch hour; the elevator being left unguarded during the lunch hour. Upon this testimony, the Common Pleas Court awarded compensation, finding that the decedent had been killed in an accident arising out of his employment. The Supreme Court said there was no evidence to warrant such finding.

ARGUMENT

It was clearly for the trial court to find from the evidence that the decedent, while in the building, working for the defendant, had his lunch hour off and way staying there to eat his lunch in connection with his employment, and that for some reason, either because the doors were open and he was trying to close them, or that he wanted to use the elevator, which had been used without objection of the defendant by employees, or while he was trying to find out where the elevator was, he was killed. If this was a fact, it was for the trial court to say whether he was killed in an accident arising out of and in the course of his employment. LEVITAN EMBROIDERY WORKS v. LAMATINA, 111 Atl. 648 and cases cited; NEW YORK SWITCH CO. v. MULBACH, 92 N. J. L. 254; LUNDY v. BROWN 93 N. J. L. 107, affirmed 93 L. 469, 108 Atl. 252. Also collection of numerous elevator cases in 20 Negligence Cases, p. 532: GRANT v. FLEMING, an Iowa case, 176 N. W. 640; also list of deaths in elevator cases held to be accidents in the course of employment, 12 Negligence Cases, 486 to 492.

If there was any testimony to support the determination, the finding of the court would not be reviewable. FOLEY v. HOME RUBBER CO. 39 N. J. L. J. 115. An accident arises out of the employment when it is something the risk of which might have been contemplated when entering upon the employment as incidental to it. FOLEY v. HOME RUBBER CO. 39 N. J. L. J. 115.

And if this elevator was used, as the testimony showed, by the employees without objection by the defendant and the custom grew up of using it, surely it was the risk contemplated.

Even where an accident occurs in the public street, it may arise out of the employment. WEBER v. MAHER, 42 N. J. L. 207.

For an accident to arise out of the employment, it is not necessary that the employment be the proximate cause of the accident. It is enough if the employment be a cause in the sense that but for the employment the accident would not have happened. SCHMOL v. WEISBROD, 38 N. J. L. 180.

Even where a boy against the established rules of the employer rode on a crane and was killed, a recovery was sustained. PERRY v. SUBMARINE BOAT CORP. 42 N. J. L. J. 370.

A night watchman killed in course of brawl, held accident arose out of employment. WEBER v. MAHER, 42 N. J. L. 207.

An accident arises in the course of the employment, if it occurs while the employee is doing what a man so employed may reasonably be doing, within a time during which he is employed and while at a place where he may reasonably be during that time. OLIVER v. SMITH, 38 N. J. L. J. 148. MADDEN v. WITHAM, 38 N. J. L. J. 113, A recovery allowed where employee was on his personal business at the place of employment.

Where factory employee was injured by having her hair caught in the machinery while she was combing it after work was finished. TERLECKI v. STRAUSS, 89 Atl. 1023; 85 N. J. L. 454.

Mere disobedience to orders will not take employe out of the scope of his employment. LYNCH v. NEWMAN, 37 N. J. L. J. 58.

In the TERLECKI CASE, Mr. Justice Swayze, writing the opinion of the Supreme Court, said that going to or coming from work was part of the employment; so by analogy, was the eating of lunch on the premises of the employer. Also see cases collected in the Supplement to Parker's Digest, Vol. 9, page 1474, section 191.

It is respectfully argued that the Supreme Court was in error when it said there was no evidence to find that this accident arose out of and in the course of the employment, while the proof would warrant the inference that the man was killed while eating lunch on the premises of his employer, either while attempting to use it or looking for the elevator which was in common use by the employees.

Respectfully submitted,

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