NEW JERSEY SUPREME COURT.

Between

MARGARET H. DIXON,

Plaintiff,

and

CLAYTON L. ANDREWS,

Defendant.

ACTION AT LAW.

NOTICE OF APPEAL.

To Samuel K. Robbins, Esq., Attorney for Plaintiff:

Take notice, that the defendant appeals to the Court of Errors and Appeals from the judgment of affirmance entered in this cause on the 8th day of March, 1918, and from the whole of the judgment entered in this cause on the 23rd day of April, 1917.

KAIGHN & WOLVERTON,
Attorneys for Appellant.

Service duly acknowledged by Samuel K. Robbins, attorney for petitioner.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARGARET H. DIXON, Petitioner and Respondent, vs. CLAYTON L. ANDREWS, Defendant and Appellant.	APPEAL FROM SUPREME COURT. GROUNDS OF APPEAL.

The appellant, Clayton L. Andrews, states the following grounds of appeal:

1. There was no evidence to justify the order and determination that the death of John Dixon was due to an accident.

2. The testimony did not show the cause of the death of John Dixon, or that his death was due to or connected with the alleged accident.

3. There was no evidence to justify the order and determination that the death of John Dixon was due to personal injuries received in an accident arising out of his employment.

4. There was no evidence to justify the order and determination that the death of John Dixon was due to personal injuries received in an accident in the course of his employment.

5. The testimony did not show that the death of John Dixon was due to an accident resulting from a risk incidental to his employment.

6. The testimony showed that the death of John Dixon was due to an accident arising out of a risk which was not incidental to his employment, and was an en-

tirely unnecessary risk assumed by him and forming no part of his duties.

7. The order and determination were not justified for the reason that it appeared that the said John Dixon was presumably asleep at the time of the alleged accident, and therefore was not engaged at the time of the accident in doing what a man so employed could reasonably do within the time during which he was employed.

8. The testimony showed that the said John Dixon did not receive personal injuries from an accident arising out of his employment.

9. The testimony showed that the said John Dixon did not receive personal injuries from an accident arising in the course of his employment.

10. There was no evidence to justify the order and determination of the Judge of the Burlington Court of Common Pleas that the death of John Dixon, the petitioner's intestate, was due to personal injuries received in an accident arising out of and in the course of his employment.

11. The Supreme Court erred in giving judgment for the petitioner, Margaret H. Dixon.

12. By the law of the land the judgment of the Court should have been for the appellant, Clayton L. Andrews.

KAIGHN & WOLVERTON,
Attorneys of Appellant.

Service acknowledged by Samuel K. Robbins, attorney for petitioner.

NEW JERSEY SUPREME COURT.

November Term, 1917.

MARGARET H. DIXON,
vs.
CLAYTON L. ANDREWS,
Prosecutor.

Submitted December 15, 1917. Decided March 4, 1918.

ON CERTIORARI.

On August 15, 1916, the husband of the petitioner was a farm hand, whose particular employment on that day was to make a trip to Philadelphia with a truck wagon drawn by a team of mules. He left the farm between five and six o'clock in the afternoon, and at two o'clock the next morning was found dead sitting on the seat of the truck with his body crushed between the seat and the overhanging roof of a shed under which the mules were standing.

From the circumstantial details in evidence, the Judge of the Pleas determined that the decedent's death was caused by an accident and that such accident arose out of and in the course of his employment.

Before Justices GARRISON, BERGEN AND BLACK.

For the prosecutor—KAIGHN & WOLVERTON, ESQS.

For the defendant—SAMUEL K. ROBBINS, ESQ.

The opinion of the Court was delivered by

GARRISON, J.:

The Court was justified in finding that the injury of which the decedent died was not intentionally self-in-

flicted or the result of his intoxication. This left two hypotheses upon which to account for the manner in which such injury was caused, viz., that the decedent was asleep when the mules went under the low roof, or that he was negligent if he was awake. The latter hypothesis need not be considered, inasmuch as negligence is no bar to the recovery of compensation.

The main contention is that the injury was not accidental if the decedent was asleep, the argument being that sleep is not an accident. The act of going to sleep may or may not be an accident, depending upon whether or not it was designed, but the failure to wake up in time to avert a catastrophe is an accident in every sense of the word. If the going to sleep was not designed, it was accidental; if it was designed, it was negligence. In any event the undesigned failure of the deceased to wake up until he was crushed between the seat and the low roof was purely accidental in the sense in which that term is constantly and correctly employed. Falling out of bed asleep is an accident even if the sole design in going to bed was to *to* to sleep. The sole case in which falling asleep is clearly not within an employment is that of a watchman or similar service where the servant is employed expressly to stay awake. In such case the failure of the servant to do the one thing he was specifically employed to do is in effect an abandonment of his employment. Such seems to have been the recent case of *Gifford vs. Patterson, 222 N. Y., p. 4.*

The judgment of the Burlington County Common pleas is affirmed with costs.

NEW JERSEY SUPREME COURT.

MARGARET H. DIXON,
vs.
CLAYTON L. ANDREWS,
Prosecutor.
} ON CERTIORARI.

The Court having inspected the transcript and proceedings of the Judge of the Burlington County Common Pleas returned with the certiorari in this cause, the reasons for errors assigned, and read the briefs of the respective counsel thereon and maturely considered the same, do order, that the judgment of the said Judge, William D. Lippincott, Esquire, be in all things affirmed with costs; and the said record remitted to the Court below to be proceeded with according to law and the practice of said Court.

Entered March 8, 1918,

On motion of

SAMUEL K. ROBBINS,
Attorney for Defendant in Certiorari.

NEW JERSEY SUPREME COURT.

WRIT OF CERTIORARI.

NEW JERSEY: ss.

THE STATE OF NEW JERSEY, to Honorable William D. Lippincott, Judge of Common Pleas, County of Burlington, and Harry L. Knight, Clerk of said court; greeting:

(SEAL)

We being willing for certain reason to be certified of concerning a certain order, proceedings, determination and judgment made and rendered by William D. Lippincott, Esquire, Judge of the Court of Common Pleas in and for the County of Burlington, which determination was filed with the Clerk of said court on April 14, 1917, and the order for judgment thereon entered April 25, 1917, in certain proceedings brought on behalf of Margaret Dixon, widow of John Dixon, petitioner, against Clayton L. Andrews, defendant, to recover 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 employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911;

Do command you, that the said order, proceedings, determination and judgment, together with all things touching and concerning the same, as fully as before you they remain or are in your custody or control, you do certify and send, together with this writ, to our Jus-

tices of our Supreme Court of Judicature, at Trenton, on the fifth day of June, 1917, that therein may be done what of right and according to law ought to be done.

Witness, WILLIAM S. GUMMERE, Esquire, Chief Justice of our Supreme Court, at Trenton, this 19th day of May, A. D. 1917.

WM. C. GEBHARDT,
Clerk.

KAIGHN & WOLVERTON,
Attorneys.

10

ALLOCATUR.

NEW JERSEY SUPREME COURT

Margaret H. Dixon,
Defendant in
Certiorari,

20

vs.

Clayton L. Andrews,
Prosecutor.

WRIT OF CERTIORARI.

Ret'ble June Term, 1917.

30

Kaighn & Wolverton, Attys.
300 Market St., Camden, N. J.

Allocatur. May 19, 1917
To be argued June term, 1917
Samuel Kalisch
J. S. C.

RETURN TO WRIT.

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

I, HARRY L. KNIGHT, Clerk of the County of Burlington, and also Clerk of the Court of Common Pleas in and for said county, do hereby, in the schedule hereto annexed, send to our Justices of our Supreme Court of Judicature at Trenton, New Jersey, the record and proceedings mentioned in the within writ of ceritorari, together with all things touching and concerning the same, as I am within commanded.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Mount Holly, this twenty-fourth day of May, A. D. nineteen hundred and seventeen.

[SEAL OF COURT.]

HARRY L. KNIGHT,
Clerk.

PETITION FOR COMPENSATION.

The Honorable William D. Lippincott, Judge of the Court of Common Pleas of the County of Burlington:

The petition of Margaret H. Dixon, of the Township of Chester, County of Burlington and State of New Jersey, respectfully shows unto your Honor:

1. That she is a resident of the Township of Chester, in the County of Burlington, and the widow of John Dixon, deceased, who prior to the sixteenth day of August, last past, was employed by Clayton L. Andrews, a farmer residing in the said Township of Chester, County of Burlington and State of New Jersey.

2. That on the said sixteenth day of August, last past, her husband, the said John Dixon, deceased, was killed while driving a team of mules and truck wagon belonging to his employer, the said Clayton L. Andrews, with which team of mules and truck wagon he had been sent by his said employer on the evening before to the City of Philadelphia with truck, which he delivered in said city and then returned with the empty wagon and team to the farm of his said employer, Clayton L. Andrews, arriving at or about the hour of two o'clock A. M., on the morning of the said sixteenth day of August, last past.

3. That upon arriving at said farm, as aforesaid, her said husband, John Dixon, who was sitting on the seat of said truck wagon, was crushed between said seat and the projecting roof of a shed on said farm into which shed said team of mules went, presumably for water, while her husband, the said John Dixon, was presumably asleep from the fatigue of his labors, whereby her husband, the said John Dixon, was killed. Of which fact the said Clayton L. Andrews had immediate notice by finding his body.

4. That the death of the said John Dixon was not caused by any willful negligence on his part, or by his intoxication, nor was it self-inflicted.

5. That the said John Dixon left your petitioner, his widow, and four small children, to wit:

Iantha B. Dixon, who was born June 7, 1907.

Margaret Esther Dixon, who was born December 13, 1910.

Delilah F. Dixon, who was born March 31, 1912.

Edith Catharine Dixon, who was born October 17, 1914.

All of whom have been dependent on the earnings of your petitioner for their support and maintenance since the date aforesaid.

6. That the weekly wage of the said John Dixon at the time of his death was $7.25, as near as your petitioner has been able to ascertain, together with the use of a house belonging to the said Clayton L. Andrews.

7. That by virtue of the provisions of an act of the Legislature of the State of New Jersey entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an 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 4th, 1911, and the acts supplemental thereto and amendatory thereto, the said Clayton L. Andrews was bound to pa*u* the expenses of the burial of the said John Dixon not exceeding one hundred dollars, and to pay to this petitioner and her said children five dollars per week for a period of three hundred weeks.

8. That the said Clayton L. Andrews has made no payment to your petitioner or her children or to any person or persons on their behalf pursuant to the provisions of said act since the said sixteenth day of August, last past, and disputes his liability thereunder.

9. Your petitioner therefore prays that your Honor will hear in a summary manner the matters in dispute both as to the liability of the said Clayton L. Andrews and the amount of compensation to be made to your petitioner and her children aforesaid, and will direct compensation to be made either weekly or in one or more lump sums, as may appear to your Honor to be proper.

MARGARET H. DIXON,
Petitioner.

SAML. K. ROBBINS,
Attorney.

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

MARGARET H. DIXON, being duly sworn according to law, upon oath says, that she is the petitioner in the foregoing petition named, and that the matters and things therein set forth are true according to the best of her knowledge, information and belief.

MARGARET H. DIXON.

Sworn to and subscribed this 22nd day of November, 1916.

ALBERT S. PETTIT,
[SEAL.] Justice of the Peace.

My commission expires May 1, 1918.

Filed November 24th, 1916.

WM. D. LIPPINCOTT,
Judge.

Filed Nov. 28, 1916.

HARRY L. KNIGHT,
County Clerk.

ORDER FOR HEARING.

BURLINGTON COUNTY COURT OF COMMON PLEAS.

MARGARET H. DIXON,
Petitioner,
vs.
CLAYTON L. ANDREWS,
Respondent.

ON PETITION FOR COMPENSATION.
ORDER.

Upon filing the petition of Margaret H. Dixon, the petitioner herein named, I, William D. Lippincott, Judge of the Court of Common Pleas of the County of Burlington, do order that Thursday, the twenty-first day of December, 1916, at the hour of ten o'clock in the forenoon, or as soon thereafter as the same can be heard at the Court House at Mount Holly, in the County of Burlington, be and the same is hereby fixed as the time and place of the hearing of the said petition.

And it is further ordered, that a copy of the said petition and of this order, which need not be certified, be served upon the said Clayton L. Andrews within six days after the date hereof.

Dated November 24th, 1916.

WM. D. LIPPINCOTT,
Judge.

Due and legal service of a copy of the within order is hereby acknowledged this 27th day of November, A. D. 1916.

KAIGHN & WOLVERTON,
Attys. for Clayton L. Andrews.

Filed Nov. 28, 1916.
HARRY L. KNIGHT,
County Clerk.

ORDER OF CONTINUATION.

BURLINGTON COUNTY COURT OF COMMON PLEAS.

BETWEEN

MARGARET H. DIXON,

Petitioner,

AND

CLAYTON L. ANDREWS,

Respondent.

ON PETITION, ETC.

ORDER OF

CONTINUATION.

This matter being opened to the Court by Kaighn and Wolverton, attorneys for the respondent in the above entitled cause, it is, on this 18th day of December, 1916, ordered that respondent have leave to file his answer out of time, provided the same is filed within three days from the date of this order.

And it is further ordered, that the hearing upon the petition in said cause be continued from the 21st day of December, 1916, until Thursday, the 4th day of January, 1917, at 10 o'clock in the forenoon, as the time, and the Court House at Mount Holly, in the County of Burlington, as the place for said hearing.

WM. D. LIPPINCOTT,
Judge.

We hereby consent to the making of the above order.

SAML. K. ROBBINS,
Attorney for Petitioner.

KAIGHN & WOLVERTON,
Attorneys for Respondent.

Filed Dec. 20, 1916.

HARRY L. KNIGHT,
County Clerk.

ANSWER.

BURLINGTON COUNTY COURT OF COMMON PLEAS.

BETWEEN

MARGARET H. DIXON,

Petitioner,

AND

CLAYTON L. ANDREWS,

Respondent.

ON PETITION, ETC.

ANSWER.

To the Honorable William D. Lippincott, Judge of the Court of Common Pleas of Burlington County:

The answer of Clayton L. Andrews, respondent, to the petition filed in this court on the twenty-fourth day of November, nineteen hundred and sixteen, by Margaret H. Dixon, petitioner, sets forth and shows:

1. The respondent admits the truth of what is set forth in paragraph one of said petition.

2. The respondent admits the truth of what is set forth in paragraph two of said petition, except, "the said John Dixon, deceased, was killed while driving a team of mules and truck wagon belonging to his employer," which this respondent denies.

3. This respondent has no information sufficient to form an opinion as to the cause of death of the said John Dixon and leaves the petitioner to her proof of the same, and if the said John Dixon was asleep at the time of the accident, as stated in said paragraph three, then this respondent denies that said sleep was due "to the fatigue of his labors," as stated in said paragraph, and avers that the injury to the deceased was not caused by

an accident arising out of and in the course of his employment.

4. This respondent denies the truth of what is set forth in paragraph four of said petition, and further avers that if the said John Dixon was asleep at the time of the accident that then his conduct evidenced a reckless indifference to his safety, and the cause of his death being thereby directly attributable to his own wilful negligence.

5. This respondent admits the truth of what is set forth in paragraph five of said petition.

6. This respondent admits the truth of what is set forth in paragraph six of said petition.

7. This respondent denies that there is any liability on his part to make any of the payments set forth in paragraph seven of said petition.

8. This respondent admits the truth of the statements contained in paragraph eight of said petition.

9. This respondent denies any liability for compensation as requested in paragraph nine of the petition.

The statement of the contention of this respondent with reference to the matters in dispute as disclosed by the petition are as follows:

1. The petition does not set forth any good cause of action.

2. The death of said John Dixon was not caused by an accident arising out of and in the course of his employment.

3. If the said John Dixon was asleep at the time of the accident complained of and his death was a result thereof, then the said John Dixon by his conduct evinced a reckless indifference to his safety, and his death was caused not by any actual or imputed negligence of this respondent, but was caused by the wilful negligence of

said John Dixon, and therefore no liability whatsoever is chargeable to this respondent.

CLAYTON L. ANDREWS,
Respondent.

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

CLAYTON L. ANDREWS, of full age, alleging himself to have conscientious scruples against taking an oath, and being duly affirmed according to law, on his solemn affirmation affirms and says that he is the respondent in the above entitled cause; that he has read the answer, and that the matters therein contained, so far as they are within his own personal knowledge, are true, and as to such matters as are not within his own personal knowledge he believes them to be true.

CLAYTON L. ANDREWS.

Affirmed and subscribed to before me this 18th day of December, A. D. 1916.

EDW'D H. RIGBY,
Notary Public of N. J.

Consent is hereby given to the filing of the within answer out of time.

December 18, 1916.

SAML. K. ROBBINS,
Attorney for Petitioner.

Filed Dec. 20, 1916.

HARRY L. KNIGHT,
County Clerk.

MINUTES.

MOUNT HOLLY, N. J., January 4th, 1917.

A session of the Court of Common Pleas was held on this date with his Honor, William D. Lippincott, presiding.

MARGARET H. DIXON,
Petitioner,
vs.
CLAYTON L. ANDREWS,
Respondent.
} ON PETITION FOR COMPENSATION.

This case being moved, the following witnesses were sworn and testified:

For Petitioner,	For Respondent,
s. 1—Augustus Grobler.	s. 1—Clayton L. Andrews.
s. 2—Frank G. Stroud	
s. 3—Margaret H. Dixon.	
s. 4—David Pratt.	
s. 5—Clayton L. Andrews.	
s. 6—Jackson Henry.	

The Court thereupon continued the case to January 25th, 1917, at 10 A. M.

MOUNT HOLLY, N. J., January 25th, 1917.

A session of the Court of Common Pleas was held on this date with his Honor, William D. Lippincott, presiding.

MARGARET H. DIXON,
Petitioner,
vs.
CLAYTON L. ANDREWS,
Respondent.
} ON PETITION FOR COMPENSATION.

The hearing on this application having been continued to this day and the hearing being resumed, the following witness was sworn and testified:

s.—John Jews.

The Court continued the hearing to February 8th, 1917, at 10 A. M.

MOUNT HOLLY, N. J., February 8th, 1917.

A session of the Court of Common Pleas was held on this date with his Honor, William D. Lippincott, presiding.

MARGARET H. DIXON,
vs.
CLAYTON L. ANDREWS.
} ON PETITION FOR COMPENSATION.

The Court continued the hearing in this case and all matters pertaining thereto to February 23d, 1917, at 10 A. M.

MOUNT HOLLY, N. J., February 23d, 1917.

A session of the Court of Common Pleas was held on this date with his Honor, William D. Lippincott, presiding.

MARGARET H. DIXON,
vs.
CLAYTON L. ANDREWS.
} ON PETITION FOR COMPENSATION.

The Court continued the hearing in this case and all matters pertaining thereto to March 15th, 1917, at 10 A. M.

DETERMINATION.

BURLINGTON COUNTY COURT OF COMMON PLEAS.

MARGARET H. DIXON,
Petitioner,
vs.
CLAYTON L. ANDREWS,
Respondent.

ON PETITION FOR COMPENSATION.
DETERMINATION.

Appearances:

SAMUEL K. ROBBINS, ESQ., for Petitioner.
MESSRS. KAIGHN & WOLVERTON, for Respondent.

This is a proceeding brought by Margaret H. Dixon, widow of John Dixon, deceased, petitioner, against Clayton L. Andrews, respondent, under the Workmen's Compensation Act of 1911, and the supplements thereto and amendments thereof, for compensation on account of the death of John Dixon.

The testimony shows, and I find the facts to be that John Dixon, the husband of the petitioner, on the sixteenth day of August, 1916, and for several years prior thereto, was in the employ of the respondent, Clayton L. Andrews, upon the farm of the respondent in Chester township, Burlington county, New Jersey.

At the time of his death, Dixon was employed upon said farm as a team driver. It was his duty to assist in the gathering and hauling of the produce from said farm, which produce was conveyed to the Philadelphia markets on truck-wagons, drawn by mules.

Dixon left the farm of the respondent, Andrews, between five and six o'clock, on the afternoon of Tuesday, August 15th, 1916, with a truck-wagon loaded with pro-

duce, drawn by a team of mules, and delivered the produce to a commission merchant in Philadelphia, and returned with the empty wagon and team to the farm of the respondent, arriving there about the hour of two o'clock in the morning of August 16th, 1916.

On the farm of the respondent, Andrews, on the New Albany Road, between the Church Road and Lenola, in Chester township, there is a farm yard adjoining the farm house, in which yard is erected a large packing house, to which the produce was brought from the fields and packed for market, and then loaded on to the truck-wagons to be hauled to the Philadelphia markets.

The team drivers, by direction of the respondent, Andrews, when they returned from market, placed their wagons alongside of the packing house ready to receive the next load. Beyond the packing house, at a distance of between fifty and one hundred feet, is the stable of the respondent. In front of this stable there is a shed with a slanting roof extending toward the packing house, and the doors of the stable open on this shed.

The packing house was nearer to the entrance to the farm yard than the stable, and in order to place the truck-wagon which he was driving alongside of the packing house ready to be loaded, the decedent, Dixon, would naturally drive his team around the packing house between the packing house and the stable.

About two o'clock in the morning of August 16th, 1916, John Jews, who was also a driver employed by the respondent, Andrews, drove his team into the yard of the respondent, Andrews, and just before he got to the packing house he saw the wagon which Dixon was driving, with a lantern still lighted. Jews called to Dixon three times and received no reply from him. After calling the fourth time without a reply, Jews jumped off the wagon which he was driving and went to see what was the matter. He found that the team was still attached to the wagon and was standing under the shed, and that the team had pulled the front of the wagon under the shed.

Dixon was sitting on the seat with a blanket thrown across his lap. His body was against the lower edge of the roof, or a beam on whch the roof rested. The edge of the roof was a little higher than the bottom of the seat, and the seat was mashed back and Dixon was between the seat and the roof. The irons that went through the back of the seat were bent back and the wooden back of the seat was split, and the irons that held the top were also bent.

Upon discovering Dixon, Jews went to the house and called the respondent, Andrews. Mr. Andrews found the decedent, John Dixon, sitting on the seat with his right arm thrown over the seat, with a blanket thrown loosely over his legs. Dixon was between the edge of the roof and the wagon seat. The mules were under the shed, fast to the wagon. Dixon was so close to the roof that Andrews could not get at him without backing the team, so he backed the team which was headed toward the entrance to the stable.

The roof extended to a point a little above Dixon's waist, about the lower end of the breast bone. Dixon was not breathing perceptibly, but was not cold. His shirt was open and his breast was bare, and Andrews put his hand inside Dixon's shirt.

Dixon had a mark on the left side of his face, as if something had struck him, but the skin was not broken. He also had a bruise in a line across the front of his body, just above the waist. He also had some marks on his arms.

Mr. Andrews telephoned and in a short time Mr. Grobler, the undertaker, and Dr. Stroud arrived. When Dr. Stroud arrived Dixon was dead, but was still sitting on the seat of the wagon, in a semi-reclining position.

Dixon left him surviving his wife, the petitioner, Margaret H. Dixon, and four children, the oldest of whom was born June 7th, 1907, all of whom were dependents. Dixon received as wages at the time of his death seven

dollars and twenty-five cents per week, together with the use of a tenant house beonging to the respondent, Andrews. The cost of the burial was ninety-eight dollars.

The petitioner prays that compensation be awarded at the minimum rate of five dollars per week for three hundred weeks, besides the actual cost of burial, ninety-eight dollars.

The question to be decided by the Court is whether the death of John Dixon was caused by an accident, and if so whether the accident arose out of and in the course of his employment.

In the case of *Bryant, Administratrix, vs. Fissell, 84 N. J. L., page 72,* it was held that:

> "2. To warrant a recovery under section 2 of the 'Employers' Liability Act' of 1911 (Pamph. L., p. 134, ch. 95) from an employer for the death of an employee, it must appear that the employee's death was caused by (a) an accident, (b) arising out of, and (c) in the course of his employment. Even though the injury arose out of and in the course of his employment, if it be not an 'accident' within the purview of the act, there can be no recovery. Even if there be an accident which occurred 'In the course of' the employment, if it did not arise 'out of the employment' there can be no recovery; and even though there be an accident which arose 'out of the employment' if it did not arise 'in the course of the employment' there can be no recovery.
>
> "3. The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by an 'accident arising out of and in the course of the employment' in an action under section 2 of the 'Employers' Liability Act' of 1911 (Pamph. L., p. 134, ch. 95) rests upon the claimant.

"5. Within the purview of the 'Employers' Liability Act' of 1911 (Pamph. L., p. 134, ch. 95) an 'accident' is an unlooked for and untoward event which is not expected or designed.

"7. Within the purview of the 'Employers' Liability Act' of 1911 (Pamph. L., p. 134, ch. 95) an accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.

"8. Within the purview of the 'Employers' Liability Act' of 1911 (Pamph. L., p. 134, ch. 95) an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment as incidental to it.

"9. A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service."

The first question to be decided is as to whether the death of John Dixon was caused by an accident. No one was present when Dixon drove into the yard of the respondent, Andrews, and no one saw him at the time the team attached to the wagon on which he was seated passed under the shed.

When John Jews reached him, he was unconscious, and when the respondent, Andrews, reached him he was not breathing, but his body was not cold. The physician who was called says that he found the man dead, but he did not examine the body and did not look for any marks on it, and he could give no information whatever as to the cause of Dixon's death, but only knew that the man was dead.

Dixon, however, was sitting on the seat of the wagon when found. There was a bruise across the front of his

body in a line a little above his waist, and Mr. Andrews found him so close to the projecting edge of the roof that he could not get at his body without backing the team, and the roof extended to a point a little above Dixon's waist, about the lower end of his breast bone. The wooden back of the seat of the wagon was split, and the iron supports that held the seat were bent back a little.

After a careful examination of all the evidence relating to the finding of the body, and the circumstances surrounding it, I am of the opinion that such evidence leads directly to the conclusion that John Dixon's death was caused by his being caught and crushed between the seat of the wagon on which he was riding and the edge of the roof of the shed under which his team had passed, and that his being so caught and crushed was an accident within the meaning of the Workmen's Compensation Act.

The next question to be determined is as to whether the accident arose out of and in the course of his employment.

The testimony does not disclose the reason for the team which John Dixon was driving going under the shed instead of passing between the shed and the packing house, and going around the packing house to the place where the wagon was to be left, and no testimony can be presented on that point.

The petitioner, in her petition, sets forth "that her said husband, John Dixon, who was sitting on the seat of the said truck wagon, was crushed between said seat and the projecting edge of the roof of the shed on said farm, into which shed said team of mules went, presumably for water, while her husband, John Dixon, was presumably asleep from the fatigue of his labors."

The testimony shows that John Dixon took a load of produce from the Andrews farm to Philadelphia on the Sunday evening preceding the accident, leaving the Andrews farm on Sunday evening between seven and eight o'clock, and returning to the Andrews farm about four

o'clock on Monday morning; that he started again to Philadelphia with another load at or about eight o'clock on Monday morning and returned about four o'clock in the afternoon of the same day; that he fed his team and got something to eat and started again to Philadelphia the same evening, returning early on Tuesday morning; that after his return to the farm on Tuesday morning he rested until twelve o'clock noon on Tuesday, and went to work again on Tuesday afternoon at one o'clock and worked on the farm during Tuesday afternoon, and started to Philadelphia again with a load between five and six o'clock on Tuesday afternoon, returning to the Andrews farm at or about two o'clock on Wednesday morning, at which time he met his death.

The allegation in the petitioner's petition is that at the time of the accident John Dixon was presumably asleep. It is true that between Sunday evening, at seven or eight o'clock, and the time of his death, John Dixon had no opportunity for sleep unless it was upon his wagon, except between four and eight o'clock in the morning on Monday, and between the early hour on Tuesday morning and twelve o'clock noon on Tuesday, and it may well be that under such circumstances, and after having been upon his wagon driving his team since between five and six o'clock on Tuesday afternoon, he may have been asleep when he entered the yard of the Andrews farm about two o'clock in the morning on Wednesday, August 16th.

But, assuming that he was asleep at the time of the accident, can it be said that it was not an accident arising out of and in the course of his employment?

If he was awake at the time of the accident, there can be no doubt whatever that the respondent, Andrews, is liable under the Workmen's Compensation Act for compensation on account of his death. He might have used bad judgment in driving the mules under the shed. He might have underestimated the height of the roof of the shed above the ground, but the fact of such bad judg-

ment or his underestimating the height of the roof cannot relieve the respondent from liability under the act. If he was asleep when the mules entered the shed, his being asleep was nothing more nor less than a species of negligence, and even wilful negligence on his part would not relieve the respondent, Andrews, from liability for compensation on account of his death.

There is no evidence in the case which shows that the injury was intentionally self-inflicted, or that intoxication was the natural and proximate cause of the injury.

A very elaborate and exhaustive brief has been presented on the part of the respondent, in which were cited a number of English cases, but I am of the opinion that for the principles to be applied to the decision of this case we must go back to the case of *Bryant, Administratrix, vs. Fissell,* above cited.

Applying the principles of that case to the case at bar, in my opinion the conclusion is inevitable that the death of John Dixon was caused by an accident arising out of and in the course of his employment.

I will therefore allow compensation on account of the death of John Dixon, as provided for under the act. There were five dependents, and as the wages were but seven dollars and twenty-five cents per week, together with the use of a house, compensation will be allowed at the minimum rate of five dollars per week for three hundred weeks. A further allowance will be made to the petitioner for the expenses of the burial, amounting to ninety-eight dollars.

An order will be made directing payment by the respondent of compensation at the rate of five dollars per week during three hundred weeks, and also for the payment of ninety-eight dollars for the expenses of burial. Petitioner is also entitled to costs.

WM. D. LIPPINCOTT,
Judge.

Filed April 14, 1917.

HARRY L. KNIGHT,
County Clerk.

JUDGMENT.

BURLINGTON COUNTY COURT OF COMMON PLEAS.

MARGARET H. DIXON, Petitioner, vs. CLAYTON L. ANDREWS, Respondent.	ON PETITION FOR COMPENSATION UNDER EMPLOYERS' LIABILITY ACT. DETERMINATION OF FACTS AND RULE FOR JUDGMENT.

A petition having been filed in the above stated matter, praying for the compensation to which the petitioner may be entitled by virtue of the terms and provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by 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 4th, 1911, together with the several supplements thereto and Acts amendatory thereof, and a time and place for the hearing of the 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 have been duly served upon the respondent on the twenty-seventh day of November, 1916, and the hearing of the said petition having been by consent of counsel continued by the Court from the twenty-first day of December, 1916, to the fourth day of January, 1917, and an answer having been filed by the said respondent by consent on or about the eighteenth day of December, 1916, and the petitioner and respondent having appeared on the said fourth day of January, 1917, the date to which said

hearing herein had been continued as aforesaid, the petitioner being represented by Samuel K. Robbins, Esq., as her attorney, and the respondent by Kaighn & Wolverton, as his attorneys, and the Court having heard the testimony offered on behalf of the parties hereto, both on the date last named and on the twenty-fifth day of January, 1916, to which last named date the said hearing was further continued by the Court, and counsel having been heard, and the same having been further continued by the Court by successive adjournments to the fifteenth day of March, 1917;

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

First. That John Dixon, deceased, (the husband of the petitioner), on the sixteenth day of August, 1916, and for several years prior thereto, was in the employ of the respondent, Clayton L. Andrews, upon the farm of the respondent, situate in Chester Township, Burlington County, New Jersey, in the capacity of a team driver, and that it was his duty to assist in the gathering and hauling of the produce from said farm, which produce was conveyed to the Philadelphia markets on truck wagons drawn by mules.

Second. That at the time of his death the said John Dixon received as wages in said employment the sum of seven dollars and twenty-five cents ($7.25) per week, together with the use of a house, and left him surviving his wife, the petitioner, Margaret H. Dixon, and four children, the oldest of whom was born June 7th, 1907, all of whom are dependents.

Third. That on the morning of said sixteenth day of August, 1916, about two o'clock, the said John Dixon, while in the course of his employment and engaged in the work of returning from the Philadelphia market with the mule team and truck wagon of the respondent, with which he had been sent to said market by the respondent with produce from the farm of the respondent, on the preceding afternoon, was caught and crushed be-

tween the seat of the wagon on which he was riding and the edge of the roof of a shed on the farm of the respondent, under which shed said team had passed; and that being so caught and crushed was an accident arising out of and in the course of his employment.

Fourth. That the respondent herein had actual knowledge of said accident.

Fifth. That as a result of said accident the said John Dixon did, on the said sixteenth day of August, 1916, depart this life.

Sixth. That the petitioner herein has paid or incurred expense for the burial of the said John Dixou amounting to the sum of $98.00, which has not been paid for by the respondent.

Seventh. That the petitioner (together with her four children above mentioned) is entitled to compensation at the minimum rate of five dollars per week for three hundred weeks.

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

It is, therefore, on this twenty-fifth day of April, 1917, on motion of Samuel K. Robbins, attorney of the petitioner, ordered that the respondent herein do pay or cause to be paid to the said petitioner, the sum of ninety-eight dollars ($98.00) for the burial expenses of the said John Dixon, and the further sum of five dollars ($5.00) per week for a period of three hundred (300) weeks from the thirtieth day of August, 1916, and also the costs of this proceeding, amounting to the sum of thirty-eight dollars and ten cents.

It is further ordered that Samuel K. Robbins, the attorney for the petitioner, be and he hereby is allowed the sum of one hundred dollars, as counsel fee herein, and the same to be paid by the petitioner out of the accumulated payments now due.

WM. D. LIPPINCOTT,
Judge.

Filed April 27, 1917.

HARRY L. KNIGHT,
County Clerk.

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

I, HARRY L. KNIGHT, Clerk of said county, and Clerk of the County Court thereof, do hereby certify that the foregoing is a true copy of the petition filed November 28, 1916; order filed and entered November 28, 1916; order filed and entered December 20, 1916; answer filed December 20, 1916; minutes of court entered January 4, 1917; January 25, 1917; February 8, 1917, and February 23, 1917; determination filed and entered April 14, 1917, and judgment entered April 27, 1917, in re Margaret Dixon, petitioner, vs. Clayton L. Andrews, defendant, as the same is taken from and compared with the original record now remaining in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at Mount Holly, the twenty-fourth day of May, A. D. nineteen hundred and seventeen.

HARRY L. KNIGHT,
Clerk.

[SEAL OF COURT.]

ORDER TO CERTIFY.

NEW JERSEY SUPREME COURT.

MARGARET H. DIXON, Defendant in Certiorari, vs. CLAYTON L. ANDREWS, Prosecutor.	WRIT OF CERTIORARI. ORDER TO CERTIFY.

On behalf of the prosecutor in this matter, it is ordered, that the Judge of the Court of Common Pleas of the county of Burlington, to whom the writ of certiorari herein is directed, on or before the fifth day of June, 1917, do certify to this Court the testimony taken before him at the hearing of the petition therein.

SAMUEL KALISCH,
J. S. C.

Rule entered this 23rd day of May, A. D. 1917.

On motion of
KAIGHN & WOLVERTON
Attorneys of Prosecutor.

AFFIDAVIT OF LOSS OF TESTIMONY.

NEW JERSEY SUPREME COURT.

MARGARET H. DIXON,
Defendant in Certiorari,
vs.
CLAYTON L. ANDREWS,
Prosecutor.

AFFIDAVIT.

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

WILLARD F. LIPPINCOTT, being duly sworn according to law, on his oath says: that at the direction of the Burlington County Common Pleas Court he attended the several hearings held by said Court in the matter of the petition for compensation under the Employers' Liability Act filed by Margaret H. Dixon, petitioner, against Clayton L. Andrews, defendant, and took down stenographically the testimony of the several witnesses produced upon the part of the petitioner and the defendant; and that subsequently your deponent was directed by the Honorable William D. Lippincott, Judge of the Burlington County Court of Common Pleas, to reduce the said stenographic notes to writing in order that the said Court could certify to the New Jersey Supreme Court the testimony so taken, as directed by an order made on the twenty-third day of May, A. D. 1917, by the Honorable Samuel Kalisch, Justice of the Supreme Court; but that this deponent has been unable to comply with such direction for the reason that he has as yet been unable to locate the said stenographic notes; and that until the same are located it is impossible for this deponent to inform the said Court of Common Pleas of the testimony so taken, in

order that said Court can comply with the order aforesaid.

Deponent does not believe that said notes have been lost, but that they have been misplaced, and that there is therefore a possibility that he will be able to locate them; and that he will be diligent and painstaking in his efforts to locate them.

WILLARD F. LIPPINCOTT.

Sworn and subscribed to before me this twenty-sixth day of June, A. D. 1917.

WM. A. FORMAN, JR.,
Notary Public of N. J.

[SEAL.]

STATE OF CASE SETTLED BY COURT.

NEW JERSEY SUPREME COURT.

Margaret H. Dixon, Petitioner and Defendant in Certiorari, vs. Clayton L. Andrews, Respondent and Prosecutor in Certiorari.	On Writ of Certiorari. State of Case Settled by Court.

Samuel K. Robbins, attorney of petitioner and defendant in certiorari.

Kaighn & Wolverton, attorneys of respondent and prosecutor in certiorari.

The stenographic notes of the testimony taken in the matter of Margaret H. Dixon, petitioner, vs. Clayton L. Andrews, respondent, in the Burlington County Court of Common Pleas, having been lost or mislaid, and the attorneys of the respective parties having been unable to agree upon a statement of the facts proven in said case, and having applied to me, the Judge of said court, within the time limited by law, I do hereby certify the following to be the facts proven before me in the trial of said cause, to wit:—

John Dixon, the husband of the petitioner, on the sixteenth day of August, 1916, and for several years prior thereto, was in the employ of the respondent, Clayton L. Andrews, upon the farm of the respondent, in Chester Township, Burlington County, New Jersey.

At the time of his death, Dixon was employed upon said farm as a team driver. It was his duty to assist in the gathering and hauling of the produce from said farm, which produce was conveyed to the Philadelphia markets on truck wagons, drawn by mules.

Dixon left the farm of the respondent, Andrews, between five and six o'clock, on the afternoon of Tuesday, August 15th, 1916, with a truck wagon loaded with produce, drawn by a team of mules, and delivered the produce to a commission merchant in Philadelphia, and returned with the empty wagon and team to the farm of the respondent, arriving there about the hour of two o'clock in the morning of August 16th, 1916.

On the farm of the respondent, Andrews, on the New Albany Road, between the Church Road and Lenola, in Chester Township, there is a farm yard ~~and~~ adjoining the farm house, in which farm yard is erected a large packing house, to which the produce was brought from the fields and packed for market, and then loaded on to the truck wagons to be hauled to the Philadelphia markets.

The team drivers, by direction of the respondent, Andrews, when they returned from market, placed their wagons alongside of the packing house ready to receive the next load, after which it was the custom to unhitch the teams and take them to the stable. Beyond the packing house, at a distance of between fifty and one hundred feet, is the stable of the respondent. In front of this stable there is a shed with a slanting roof extending toward the packing house, and the doors of the stable open on this shed.

The packing house was nearer to the entrance to the farm yard than the stable, where the deceased was found. In order to place the truck

wagon which he was driving alongside of the packing house, where he usually left it ready to be loaded, the decedent Dixon could have entered the farm yard by either of two entrances. If he entered by the main entrance, he would, in order to reach the customary place for leaving his wagon, drive his wagon to the left of the packing house and turning to the right, pass between the packing house and the stable. If he entered by another entrance, he could have reached the customary place for leaving his wagon without passing between the packing house and the stable. On the night in question the wagon was found with the mules standing quietly under the shed and with the wagon at right angles to the stable. The tracks of the wagon showed that it had entered the farm yard by the main entrance, and passed to the left of the packing house without turning to the right after passing the packing house, but had gone directly to the stable where it was found.

On behalf of the respondent it was shown that the deceased was familiar in every way with the conditions of the farm yard. It was shown that an electric light was burning at the entrance to the farm yard, and in addition it was also shown to be a bright moonlight night, and that objects about the yard were visible. That the shed in question was only a few inches higher, not over twelve, than the seat of the wagon. It was not the custom at any time to place the wagons under the shed and the presence of the wagon in this place, instead of at the platform where the employes of respondent had been directed to leave them, was not explained by the testimony.

About two o'clock in the morning of August 16th, 1916, John Jews, who was also a driver employed by the respondent, Andrews, drove his team into

the yard of the respondent, Andrews, and just before he got to the packing house he saw the wagon which Dixon was driving, with a lantern still lighted. Jews called to Dixon three times and received no reply from him. After calling the fourth time without a reply, Jews jumped off the wagon which he was driving, and went to see what was the matter. He found that the team was still attached to the wagon and was standing under the shed, and that the team had pulled the front of the wagon under the shed.

Dixon was sitting on the seat with a blanket thrown across his lap. His body was against the lower edge of the roof, or a beam on which the roof rested. The edge of the roof was a little higher than the bottom of the seat, and the seat was mashed back and Dixon was between the seat and the roof. The irons that went through the back of the seat were bent back and the wooden back of the seat, which extended about twelve or fifteen inches above the bottom of the seat, was split, and the irons that held ~~up~~ the top were also bent. The evidence showed that the back of the seat was in good condition immediately before the date of the alleged accident and was not split or bent back as it was found to be on that morning.

Upon discovering Dixon, Jews went to the house and called the respondent, Andrews. Mr. Andrews found the decedent, John Dixon, sitting on the seat with his right arm thrown over the seat, with a blanket thrown loosely over his legs. Dixon was between the edge of the roof and the wagon seat. The mules were under the shed, fast to the wagon. Dixon was so close to the roof that Andrews could not get at him without backing the team, so he backed the team, which was headed toward the entrance to the stable.

The roof extended to a point a little above Dixon's waist, about the lower end of the breast bone. Dixon was not breathing perceptibly, but was not cold. His shirt was open and his breast was bare, and Andrews put his hand inside Dixon's shirt.

Dixon had a mark on the left side of his face, as if something had struck him, but the skin was not broken. He also had a bruise in a line across the front of his body, just above the waist. He had also some marks on his arms.

Mr. Andrews telephoned, and in a short time Mr. Grobler, the undertaker, and Dr. Stroud arrived. When Dr. Stroud arrived, Dixon was dead, but was still sitting on the seat of the wagon, in a semi-reclining position. Dr. Stroud testified that he did not examine the body and did not look for any marks on it, and he could give no information whatever as to the cause of Dixon's death, but only know that the man was dead. Upon being asked whether he died from natural causes he replied that he did not know, that the only accurate way to determine cause of death was a post mortem, and he could not say whether he died of natural causes or not, and that he did not think you could tell without a post mortem.

It was testified that the health of Dixon had been good prior to the 16th day of August, 1916, with the exception of a slight attack of la grippe in the spring of that year.

The testimony showed that no service had been required of Dixon from about Saturday at noon until he took a load of produce from the Andrews farm to Philadelphia, on the Sunday evening preceding the accident, leaving the Andrews farm on Sunday evening between seven and eight o'clock, and returning to the Andrews farm about four o'clock

on Monday morning; that he started again to Philadelphia with another load at or about eight o'clock on Monday morning, and returned about four o'clock in the afternoon of the same day; that he fed his team and got something to eat and started to go to Philadelphia again the same evening, returning early on Tuesday morning; that after his return to the farm on Tuesday morning, which was about one or two o'clock, he rested until twelve o'clock noon, on Tuesday, and went to work again on Tuesday afternoon at one o'clock and worked on the farm during Tuesday afternoon, and started to Philadelphia again with a load between five and six o'clock on Tuesday afternoon, returning to the Andrews farm at or about two o'clock on Wednesday morning, at which time he was found dead.

Dixon left him surviving his wife, the petitioner, Margaret H. Dixon, and four children, the oldest of whom was born June 7th, 1907, all of whom were dependents. Dixon received wages at the time of his death, seven dollars and twenty-five cents per week, together with the use of a tenant house belonging to respondent, Andrews. The cost of the burial was ninety-eight dollars.

In witness whereof, I have hereunto set my hand this twenty-seventh day of October, nineteen hundred and seventeen.

WM. D. LIPPINCOTT,
Judge.

REASONS.

NEW JERSEY SUPREME COURT.

MARGARET H. DIXON, Petitioner and Defendant in Certiorari, vs. CLAYTON L. ANDREWS, Respondent and Prosecutor in Certiorari.	WRIT OF CERTIORARI. REASONS.

The prosecutor herein files the following reasons upon which he will rely for the reversal of judgment in this case:

1. There was no evidence to justify the order and determination that the death of John Dixon was due to an accident.

2. The testimony did not show the cause of the death of John Dixon, or that his death was due to or connected with the alleged accident.

3. There was no evidence to justify the order and determination that the death of John Dixon was due to personal injuries received in an accident arising out of his employment.

4. There was no evidence to justify the order and determination that the death of John Dixon was due to personal injuries received in an accident in the course of his employment.

5. The testimony did not show that the death of John Dixon was due to an accident resulting from a risk incidental to his employment.

6. The testimony showed that the death of John Dixon was due to an accident arising out of a risk which was not incidental to his employment, and was an entirely unnecessary risk assumed by him and forming no part of his duties.

7. The order and determination were not justified for the reason that it appeared that the said John Dixon was presumably asleep at the time of the alleged accident, and therefore was not engaged at the time of the accident in doing what a man so employed could reasonably do within the time during which he was employed.

8. The testimony showed that the said John Dixon did not receive personal injuries from an accident arising out of his employment.

9. That testimony showed that the said John Dixon did not receive personal injuries from an accident arising in the course of his employment.

10. There was no evidence to justify the order and determination of the Judge of the Burlington Court of Common Pleas that the death of John Dixon, the petitioner's intestate, was due to personal injuries received in an accident arising out of and in the course of his employment.

KAIGHN & WOLVERTON,
Attorneys of Prosecutor.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MARGARET H. DIXON, Petitioner and Respondent, vs. CLAYTON L. ANDREWS, Defendant and Appellant.	ON APPEAL FROM NEW JERSEY SUPREME COURT. BRIEF OF APPELLANT.

An action was brought by Margaret H. Dixon, as the wife of the deceased, John Dixon, under the provisions of Section 2 of the Employers' Liability Act of 1911 (P. L. 1911, p. 134).

The allegations of the petition (p. 4) as to the circumstances surrounding the death, are as follows:

"2. That on the said sixteenth day of August, last year, her husband, the said John Dixon, deceased, was killed while driving a team of mules and truck wagon belonging to his employer, the said Clayton L. Andrews, with which team of mules and truck wagon he had been sent by his said employer on the evening before to the City of Philadelphia with truck which he delivered in said city and then returned with the empty wagon and team to the farm of his said employer, Clayton L. Andrews, arriving at or about the hour of two o'clock A. M. on the morning of the said sixteenth day of August, last past.

"3. That upon arriving at said farm, as aforesaid, her said husband, John Dixon, who was sitting on the seat of said truck wagon, was crushed between said seat and the projecting roof of a shed on said farm, into which shed said team of mules went, presumably for water, while her husband, the said John Dixon, was presumably asleep from the fatigue of his labors, whereby her husband, the said John Dixon, was killed. Of which fact the said Clayton L. Andrews had immediate notice by finding his body."

FACTS.

The stenographic notes of the testimony, taken at the trial, having been lost or mislaid, it was necessary for the Court to settle the facts proved at such trial. (Page 27.)

The facts are that the deceased had been in the employ of the appellant for several years as a farm hand whose duty it was to work in the field, or about the farm, and drive a truck wagon with produce to the market in the City of Philadelphia, as occasion required.

The deceased was found about two o'clock in the morning, dead. He was sitting on the seat of his wagon in close proximity to the edge of a shed roof extending out over the barn door and which was only a few inches higher than the bottom of the seat, and under which shed it would be impossible to drive or even to attempt to drive a wagon. The team was still attached to the wagon and was standing quietly under the shed, with the wagon immediately outside, when found. It was shown that there was no reason whatever for the wagon to be at such a place, as not only the custom but the order of the employer delivered to deceased and all of the drivers was to leave the wagons, upon the return from market, at the

packing platform, ready for the next day's loading. The packing platform was about fifty to seventy-five feet nearer the entrance to the farm yard than the place where the deceased was found, and was passed by him in reaching the place where the wagon was found. The presence of the wagon in such an unusual and uncalled-for place was not in any way explained by the petitioner, except by the statement in the petition that the mules had gone into the shed "presumably for water, while her husband, the said John Dixon, was presumably asleep from the fatigue of his labors." On behalf of the ~~respondent~~ employer it was shown that the deceased was familiar in every way with the conditions about the farm yard, as a result of his three or four years of service, and that everything in the yard was visible not only for the reason that there was an electric light burning at the entrance to the farm but in addition to this it was shown to be a bright moonlight night, and that the shed in question was so low that no one would think of even attempting to drive beneath it, as a person sitting on the seat of the wagon would be higher than the roof of the shed.

There was no evidence submitted to prove that deceased was asleep at the time of the alleged accident, or whether he was unconscious or dead from other or natural causes, but, in support of the allegation that he was presumably asleep from the fatigue of his labors, the petitioner sought to show that the deceased had been overworked. The proof on this question (pages 33-34) was that he had reported for work on Tuesday afternoon about one P. M. and was found dead about two A. M. Wednesday morning. Prior to reporting at one P. M. on Tuesday he had not worked since about one A. M. Tuesday. The testimony being, and the facts showing, that his regular hours

were twelve on and twelve off, and that prior to his immediate service he had been off twelve hours and had then worked twelve hours, and that on his arrival home on the night in question he was then entitled to go to his home, the same being a house provided by the employer on the said farm and located about one-quarter to one-half a mile distant, and rest until noon the next day and report at one P. M. for work. The petitioner, however, sought to show that Dixon, the deceased, reported for work on the Sunday previous at five P. M. and worked, with the exception of a few hours off, until Monday midnight or possibly one A. M. Tuesday morning, and that, notwithstanding he then went home for a twelve hours' rest before reporting as above stated on Tuesday at one A. M., that this was the cause of his sleeping as alleged in the petition. The respondent, however, showed that previous to his reporting for work Sunday night as stated, no service had been required of him by the employer from about Saturday at noon, and that during the Monday spoken of he had had an opportunity of having four or five hours' rest during the morning of that day. It appeared that prior to the twelve hours' service rendered by him prior to his death he had had twelve hours' rest, and from Saturday noon until the time he was found dead he had worked about thirty-nine or forty hours and had been off forty-six or forty-seven hours.

As to the cause of death, whether from natural or unnatural causes, there was no evidence whatever, nor was there any evidence either to show that injuries ascribed to the deceased were sufficient to have resulted in death. The testimony in this particular (page 33) was as follows:

"Dr. Stroud testified that he did not examine the body and did not look for any marks on it, and he could give no information whatever as to the cause of Dixon's death, but only knew that the man was dead. Upon being asked whether he died from natural causes he replied that he did not know, that the only accurate way to determine cause of death was a post mortem, and he could not say whether he died of natural causes or not, and that he did not think you could tell without a post mortem."

The Trial Court decided that the petitioner was entitled to compensation, and so ordered, and this judgment was affirmed by the Supreme Court. (page IV).

Specification of Reasons Relied Upon for Reversal of Judgment.

1. There was no evidence to justify the order and determination that the death of John Dixon was due to an accident.

2. The testimony did not show the cause of the death of John Dixon, or that his death was due to or connected with the alleged accident.

3. There was no evidence to justify the order and determination that the death of John Dixon was due to personal injuries received in an accident arising out of his employment.

4. There was no evidence to justify the order and determination that the death of John Dixon was due to personal injuries received in an accident in the course of his employment.

5. The testimony did not show that the death of John Dixon was due to an accident resulting from a risk incidental to his employment.

6. The testimony showed that the death of John Dixon was due to an accident arising out of a risk which was not incidental to his employment, and was an entirely unnecessary risk assumed by him and forming no part of his duties.

7. The order and determination were not justified for the reason that it appeared that the said John Dixon was presumably asleep at the time of the alleged accident, and therefore was not engaged at the time of the accident in doing what a man so employed could reasonably do within the time during which he was employed.

8. The testimony showed that the said John Dixon did not receive personal injuries from an accident arising out of his employment.

9. That testimony showed that the said John Dixon did not receive personal injuries from an accident arising in the course of his employment.

10. There was no evidence to justify the order and determination of the Judge of the Burlington Court of Common Pleas that the death of John Dixon, the petitioner's intestate, was due to personal injuries received in an accident arising out of and in the course of his employment.

11. The Supreme Court erred in giving judgment for the Petitioner Margaret N. Dixon

12. By the law of the land the judgment should have been for the Appellant Clayton L. Andrews

~~POINTS OF LAW.~~

Points of Law.

THREE ELEMENTS NECESSARY TO RECOVERY.

It is the contention of Andrews, the employer, that the claimant should not recover for the reason that it has not been shown that the death was caused by an accident arising out of and in the course of his employment. Thus

there are three elements that must be shown before there can be a recovery, as was said by the Court in the case of *Bryant vs. Fissell, 84 N. J. L., 72*, "To warrant a recovery, it must appear that Bryant's death was caused by (a) an accident, (b) arising out of, and (c) in the course of his employment. Even though the injury arose out of and in the course of the employment, if it be not an 'accident' within the purview of the act, there can be no recovery. Even if there be an accident which occurred 'in the course of' the employment, if it did not arise 'out of the employment,' there can be no recovery; and even though there be an accident which arose 'out of the employment,' if it did not arise 'in the course of the employment,' there can be no recovery."

Burden of Proof on Claimant.

The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by "an accident arising out of and in the course of his employment" rests upon the complainant. *(Bryant v. Fissell, supra).*

A. *Claimant must show that the accident was the cause of death.*

It is respectfully submitted that the claimant has not shown in this case that the deceased died as a result of being squeezed between the edge of the shed and the wagon; in fact, there was no evidence to even show that it was sufficient to cause the death. (Page 33). The death might have resulted from some other cause, either natural or unnatural, incidental or otherwise, to the employ-

ment. The deceased may have been dead before he reached the farm yard or came in contact with the shed in question. The burden was not on the employer to prove that death did not result as claimed, but was on the claimant to prove that it did so result. The very location in which deceased was found indicates that in all probability he was not conscious at the time it occurred, either due to the fact that he was asleep or that possibly death had previously come from some sudden natural cause. That he was unconscious at the time there can be no doubt, because (1) there was no reason for him to be there, as the orders of the employer were to leave the wagon elsewhere; (2) no man awake or in the possession of his senses would have attempted to drive where the deceased was found, for the reason that there was no possibility of being able to drive beneath the shed; it could not even be due to merely bad judgment for the reason that there was only a few inches between the seat and the shed, and the body and the head of the driver would be far above the shed; and (3) the natural position in which he was found gave no indication of a struggle, even the blanket about his knees being undisturbed. It is difficult to assume that the accident would have happened, as claimed by the petitioner, without at least some resistance upon his part. All of the facts shown by the claimant are as consistent with the theory that he was already dead as that he was merely asleep. The mere fact that he had had no illness since having la grippe in the spring does not prove that he did not die from natural causes. It also appeared in the testimony that the side of his face was bruised, and yet there has been no attempt to show how this came about. There was nothing in the testimony to indicate that it was received

from the shed for the reason that his head would have been far above the top of the shed. It may have been the result of a fight, or a fall in no way connected with his employment. It is therefore urged that the claimant has utterly failed (p. 33) to show that the alleged accident was the cause of the death; and the Court is not required to base its judgment on guess of conjecture. See *Honor vs. Painter, 4 Butterworth's Workmen's Compensation Cases, 188:*

A carman fell from his van and sustained injuries. He died three weeks later. No evidence was produced to show the connection between the accident and death, the doctor who had attended the man being abroad. Held, reversing the decision of the County Court Judge, that there was no evidence that the death was due to the accident.

Cozens-Hardy, M. R. In this case, two points are taken by the appellants, either of which, if successful, would be fatal to the claim; first, that the accident did not arise out of the employment, and second, that the death was not due to an accident. With regard to the first, we do not say anything about it, because we are of opinion that the appeal must succeed on the second point.

The man was taken away to the hospital, after having fallen off his cart, in what looked like a fit—it may not have been—and he died three weeks later. The dependents have to make out that the death was due to an accident. There was no medical evidence as to what he died from, and none of the witnesses was in a position to say that his death was due to the fall from the cart, and it seems impossible for us to get over that. We said yesterday, and it is not necessary that we should say it again, that the applicant in cases of this kind must not merely ask the Court to guess that the accident was the cause of the death, must not merely say that probably

it was, but must either prove it by evidence, or by legitimate inference, to be drawn from the facts proved or admitted.

Barnabas vs. Bershaw Colliery Co., 3 B. W. C. C., 216; 4 B. W. C. C., 121:

The plaintiff must prove his case, and, although he may establish a state of facts which lead one to think that his version is a quite possible version of what took place, he must do something more than show a state of facts which is consistent either with one view or with another view.

Powers vs. Smith, 3 B. W. C. C., 470:

Whilst a workman was driving a cart the horse fell, the shaft broke and the man apparently was thrown out. He went to an adjoining farm to borrow a cart. He was very shortly afterwards found dead in the road at the top of a hill. The medical testimony showed that he died of heart failure, but it was impossible to say to a certainty what caused it. Held: that the dependent had not discharged the onus of proving that the death was caused by the accident.

Barnabas vs. Bersham, 3 B. W. C. C., 216:

A collier died of apoplexy during working hours in a mine. The collier's work that day was to build a "pack," but there was no evidence that the apoplexy came upon him when he was incurring a strain. Held: that as the evidence as to the cause of death was equally consistent with an accident and with no accident, the applicants had not discharged the onus of proof that was upon them.

Thackway vs. Connelly & Sons, 3 B. W. C. C., 37:

A bus driver was sitting on the box of his bus, a thud was heard, and he was found to have fallen from it; there was evidence of an abnormal condition of the heart, but there was no direct evidence as to whether the deceased fell after and in consequence of a sudden fatal heart attack, or whether he died in consequence of a fall and from a fatal concussion of the brain. Held: that the applicant must prove that the accident (that is, falling off box) arose "out of" as well as "in the course of" the employment . . . . that in all these cases it is incumbent upon the claimant to make out that the accident, in respect of which the compensation is claimed, arose out of and in the course of the injured man's employment; *not upon the employer to prove the contrary.*

B. *Claimant must show that the accident "arose out of" the employment.*

(1) *Unexplained accidents constitute no basis for recovery.*

Bender vs. Owners S. S. Zent, 2 B. W. C. C., 22:

While a ship was on the high seas the cook fell overboard and was drowned. The weather was perfectly calm at the time; it was daylight, and the ship was steady. There was no evidence to show how the deceased had fallen overboard. Held: that the dependent had failed to discharge the onus upon her of proving that the accident arose "out of and in the course of the employment," there being no justification for inferring that the accident arose "out of" the employment, because it was admitted that it happened "in the course of" it.

Marshall vs. Owners of Ship Wild Rose, B. W. C. C., 76; 3 B. W. C. C., 514:

A sailor having gone on deck from his cabin in the course of his employment on a hot night for the purpose of getting some fresh air, disappeared, and the next day his body was found in the tidal basin close to the ship. Held: that the applicant had not satisfied the onus resting upon her of proving that the accident arose out of as well as in the course of the employment. The fact of a seaman's disappearance from his vessel and his unexplained drowning does not raise a prima facie inference that he met with an accident arising out of as well as in the course of his employment.

O'Brien vs. Star Line, 1 B. W. C. C., 177:

A seaman, when his ship was lying in Glasgow harbor, went ashore without leave, and returned to his ship late in the evening in a state of intoxication. He went to his bunk and was found next morning lying injured at the bottom of No. 1 hold. He subsequently died from the injuries. No evidence was forthcoming as to how the man got to the place, but it was suggested he might have been intending to visit a lavatory situate in that part of the ship. To enable him to reach the hold he would have had to pass through a door which had been locked but which was found broken or forced open, by whom, there was no evidence to show.

Held: that there was no evidence that the accident arose out of the employment. It was said: "I am unable to see how that can be said to be an accident arising out of his employment. I am not disposed to speculate as to how the accident might have happened, or how the door might have come to be open, because it is for the claimant to prove how that happened, if he can show that it happened in such a way as to bring the cause within the scope of the act, and he has failed to prove it."

Bines vs. Guerett, 6 B. W. C. C., 120:

It appeared that the deceased workman was barge boatman. He had been talking to a fellow boatman on the wharf and then walked away, carrying a boat-hook, to take his own full barge down to the dock. Six or seven minutes later, the fellow boatmen saw the deceased's body in the water ninety yards from the spot where they had parted and about twenty yards from his barge. Court said that he was not satisfied that the death was due to an accident arising out of and in the course of the employment. On appeal, it was sustained.

Ayr Steam Shipping Co. vs. Lendrum, 6 B. W. C. C., 326:

The deceased workman was cook on a ship lying at harbor. He was lying in his bunk at four P. M., when he was told by the captain to prepare tea. At five-thirty the chief officer, on going to see why he did not bring the tea, could not locate him. He was found the next day drowned at the spot where his ship had been lying at harbor. It was held that there was no evidence that the death was due to an accident arising out of the employment.

Morgan vs. Cynon Colliery Company, 8 B. W. C. C., 499:

A collier was found asphyxiated in a stall where the men had been warned not to go, because of the gas being dangerous. No explanation was forthcoming as to why he went there. Held: that the onus on the dependent of proving that the deceased met his death by accident out of and in the course of his employment had not been discharged.

Smith vs. Stanton, 6 B. W. C. C., 231:

A lad was employed to control a motor engine by means of a switch which was eighteen feet away from the engine. It was also his duty, when so ordered, to clean the engine when it was stationary. For some unknown reason, he left the switch-board, got through the fence when the engine was in motion, and was killed by being caught in a cog-wheel. Held: The dependent had not discharged the onus of proving the accident arose out of and in the course of the employment. The Court said: "All we know about the accident it that for some reason he got away a considerable distance from the place where his work lay. Nobody saw him go, nor do we know why he went there." Various suggestions were offered in explanation, but the learned judge found they were not supported by any evidence, and amounted only to "surmise, conjecture, or guess."

(2) *It must appear that the risk out of which the accident grew was incidental to the employment.*

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

"For an accident to arise out of and in the course of the employment, it must result *from a risk reasonably incidental* to the employment. . . . . The words 'out of' point, I think, to the *origin and cause* of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place. . . . The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. *It must be an accident resulting from a risk reasonably incident to the employment.* . . . .

"We conclude, therefore, that an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable

person, when entering the employment, as incidental to it.

"A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service."

It is therefore respectfully submitted that the claimant cannot recover in this case because it does not appear that the accident arose out of any risk which was incidental to the employment. If the alleged accident was not the result of death from natural causes then it must have been as a result of the "sleeping" of the employee at the time of the accident. It needs no argument to sustain the position that sleeping while in charge of a team of mules was not any part of his employment. The mere statement of the proposition is sufficient answer to it. The deceased had no reason whatever to go where the alleged accident occurred and in the second place would not have attempted to go where he was if in possession of his faculties, for the reason that it could be seen that it was utterly impossible to drive a wagon beneath the shed.

Very much the same situation is presented in the case of *Rose vs. Morrison & Mason, 4 B. W. C. C., 277.*

The deceased was employed as a laborer in the work of extending Portsmouth Dockyard. About eleven o'clock on the night of July 8, 1910, the gang in which he was received orders to proceed to another part of the works. The men on their way walked in single file past some machine called a "hoist." The deceased, who was last in the file, called to the man in front of him that he was going to ease himself, and fell behind. The gang went on, and after some time, the deceased not having rejoined them, the other man went back to look for him. He was found lying dead inside the hoist, having apparently been crushed

by the machinery. It appeared that, although the deceased was probably not aware of the danger of entering the hoist, the place was sufficiently well lighted for him to see where he was going, and that he could not get into the hoist at all without stooping. The County Court Judge, holding that the accident arose in the course of, but not out of, the employment, awarded for the employers.

Cozens-Hardy, M. R., (after stating the facts): We cannot say that the County Court Judge was wrong in coming to the decision he did. The deceased could not have got into the hoist by accident, because from the evidence it appears that the place was sufficiently well lighted for him to have seen the peculiar nature of the structure, and because, on account of the cross-bars fixed across the entrance, he would have had to stoop to get into the hoist. The accident happened about eleven o'clock at night, and in my opinion the man had no right to go into the place he did and to expose himself to a wholly unnecessary risk. The accident did not arise out of the employment, as the deceased acted unreasonably in going where he did. The appeal therefore fails.

The question of an accident occurring in an unexplained way but presumably while the employee was asleep in a dangerous place or under dangerous circumstances was considered by the Court in the case of Marshall vs. Owners of Ship Wild Rose, 3 B. W. W. C., 514, and the Court said:

"Sir Robert Finlay, in an illustration of his argument, took the case of a female domestic servant who was obliged to live in her master's house, as the seaman is obliged to live on his ship, and assumed that she was seen to enter her bedroom some hot and sultry night and next morning the window of her room was found open and her lifeless body found on the pavement beneath. She might have thrown herself out, or dozed asleep and fallen out, or over

balanced herself while awake and fallen out. On the principle for which the appellant contends it should be presumed she was killed by an accident arising out of and in the course of her employment, because in the course of her employment she was undoubtedly entitled to rest and to breathe fresh air; but it does not appear to me to be either a reasonable, ordinary, or proper way of resting or taking fresh air to lean out of a window at night, at a time when sleep may readily overtake her. It could not be assumed that she or her master ever contemplated such a risk as attended upon her service when she entered upon it. The peril to her was, I think, a new peril arising out of her own careless and reckless act, and not a peril incident to, or connected with, the performance of the duties of her employment, or the enjoyment in a reasonable and proper manner of those rights and privileges to which she might be entitled as preparations for her active work in a reasonable and proper manner. The accident caused by that new peril could not, in such a case, I think, be held to arise out of her employment. The only difference between that case and the present lies in the fact that this seat was said to be an accustomed seat, but does that make any real difference?

A workman may be bound or entitled to frequent a certain place or do a certain thing, under certain conditions, and if an accident happened to him while frequenting that place or doing that thing, under those conditions, it might well be held that that accident arose out of his employment; but it by no means follows that the same result should be arrived at if the conditions were entirely changed before he attempted either to do the particular thing or frequent the particular place * * * The alteration in the conditions may have made that perilous which was theretofore safe, so perilous, indeed, that in the absence of actual proof it could not be presumed that the employer or workman ever contracted or contemplated that the peril should or might be encountered as one of the risks con-

nected with the employment. Even, therefore, if this seat on the bulwarks, near the fishboard, was one which the crew, with the express or implied permission of the master of the ship, used in their waking moments, so as to cause an accident arising from its use at such times to be rightly held to have arisen out of the employment, it by no means follows that the risk attending the use of the same seat for sleeping on at night was ever contemplated by the parties as a risk incident to the employment.

Even, therefore, if it had been proved, which it was not, that the deceased when he left his bunk sat upon this seat, then, having regard to the time at, and the circumstances under, which he did it, and the great probability that he would drop asleep, it does not, in my opinion, at all follow that the risk of falling into the water was a risk incident to or connected with his employment while his ship was in port and at such a time and under such circumstances, or his drowning an accident arising out of his employment, though it may well be that the risk of being blown or swept overboard or of falling overboard while the ship was at sea was such a risk.

One cannot help feeling sympathy for the applicant, but if any force is to be given to the words of the statute, she must, in my opinion, be held to have failed to discharge the burden of proof resting upon her.

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

The deceased man left his sleeping berth and went on deck and the nearest conjecture to an inference that was placed before this House was that he had seated himself on the side of the ship, and fallen asleep and overboard. No one would attribute misconduct to him in selecting that place, or even the rigging, to rest upon during the night rather than in his berth, and, of course, it is argued that since he was under engagement and doing no wrong, the accident to him arose in the course of his employment. But how it can be said to have arisen out of it, I do not understand. *It arose out of some voluntary act of the deceased, in no way springing from his employment, necessary to his employment or usual in his employment.*

It is said that the accident was due to the man's sitting on the rail of the ship and falling from it. I think this is probably true, although I fail to find any legal evidence in support of the statement. *But I do not see how it can reasonably be said that to sit on the rail of the ship was in any sense connected with the man's employment.* I agree with Sir Robert Finlay that it would be as reasonable to say that to sit on the end of the bowsprit would be an act connected with his employment, *and if sitting on the rail was no part of his employment, falling from it cannot be an accident arising out of his employment.* I do not overlook the statement in the case that the engineers were in the habit of sitting on this rail. I can well believe it to be true. *But that the men were in the habit of doing a thing which was not an incident of their employment cannot, in my view, bring any resulting accident within the meaning of the act.*

It is further urged that not only does the petitioner's case fail because it does not show that the accident arose out of a risk incidental to the employment, but likewise because the risk (i. e., sleeping) out of which it is alleged it did arise was an entirely unnecessary risk assumed by the employee, forming no part of his duties, and for the

consequences of which the employer cannot be held responsible. See *Millers vs. North British Loco. Co., 2 B. W. C. C., 80.*

Deceased was employed as a crane-man, but his presence on the crane where he was killed was unaccounted for. Held: "This case belongs to a class of which there have been several examples in the Courts here and in England, the case of a person being found dead, evidently as the result of an accident, and the question is whether the accident arose 'out of and in the course of' his employment."

"We do not know what motive led Miller to undertake that unfortunate and perilous visit to the upper part of the crane, but it is quite evident from the findings that it had nothing to do with the employers' business. His duty was to remain at his post until he got a signal to work the crane, though if he left it for an innocent purpose and took no risk, a Court of law might come to the conclusion that an accident happening to him arose out of his employment. But the facts here show that Miller, by climbing on to the crane, did expose himself to serious and unnecessary risk. I therefore come without difficulty to the conclusion that the Sheriff's finding is right upon the facts which he has found proved." Appeal dismissed.

Price vs. Tredegor Iron Co., 7 B. W. C. C., 307:

The deceased was going home by train provided by the company for which he worked, and attempted to alight at a place nearer his home about one hundred yards before the train reached the special platform provided, in order to save himself the time of walking back. He fell beneath the wheels and was injured. It was held that the accident did not arise out of the employment. The Court said: "I think the true view here is that it was no part of the man's employment to get out at any point between the colliery and the collier's platform. As Mr.

Holman Gregory put it, 'He ought to ride on the train; that was the course of his employment; but how can it be said that the accident arose out of his employment? His ordinary course would have been to remain on the train until it stopped. This was an action of his own. . . . In my opinion, the accident did not arise out of his employment; it really arose from an added peril—jumping from the train in motion—to which the plaintiff by his own conduct exposed himself, with a view of reaching his home quickly. It was not by any peril involved by his contract of service. The peril involved of his contract of service was to travel by the train in the ordinary way, and this peril which caused the accident was an added peril that he simply risked for his own personal convenience, and did not in any way further his master's interests."

Revie vs. Cumming, 5 B. W. C. C., 483:

The duties of the deceased required him, upon being so directed, to apply the brakes to a heavily loaded wagon at the rear wheels. On the morning in question he was riding with the driver, where he should not have been, and upon being directed to apply the brakes jumped from the wagon to do so and fell and was run over by the truck. It was held that the accident did not arise out of the employment. The Court using the language of *Brice vs. Lloyd, 2 B. W. C. C., 26*, said, "The test is whether the risk of the accident is one which may be reasonably looked upon as incidental to the employment. I think it was not incidental to the employment. I think it was an added risk. It seems to me that a workman has no right by his own conduct for his own purpose to add a risk which is not incidental to the employment in which he is injured. The employment in this case was to attend to the brakes and the whole risks incidental to that employment did not involve the risk of having to jump down from the front part of the lorry while it was in motion.

Being on the front part of the lorry and jumping down was no part of his employment. He had no business to be there."

M'Larin vs. Caladonian Railway Co., 5 B. W. C. C., 492:

A canal overseer employed by a railway company was returning to his office after having been in the course of his duties, to a railway station. He took a short cut along the line instead of going around by the road, which was the proper way. He was killed by a passing freight. Held: the accident arose in the course of, but not out of the employment. It was said, "Now, whenever you are about your master's business, the question of whether an accident which comes about arose out of your employment or not may be tested—I would not say decided—but it may be tested, by putting the question: 'was the accident which happened one of the ordinary risks which a person in that employment is subject to?' or—'Has the servant by this action increased the risks of his employment?' "

Herbert vs. Fox, 8 B. W. C. C., 94:

A boy was employed to assist in shunting operations by walking in front of the moving wagons to keep the proper look-out. On the day of the accident he rode on the buffer of the front wagon. He knew it was against the rules to do this. He slipped from the buffer and was seriously injured. Held: that the accident did not arise out of and in the course of the employment. The Court, in speaking of the decision in *Barnes vs. Nunnery Collier Co., 5 B. W. C. C., 195*, said, "Lord Atkinson puts it in this way: 'The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service directly or indirectly in-

volved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment; and that is the crucial test. It has been many times adopted.' He lost his life entirely through this new and added peril which by his own conduct he exposed himself to, but not through any peril which his contract of service obliged him to encounter. . . . . And in the present case, the act which the lad was doing was different in form from what he was employed to do, and in my opinion he was outside the sphere of his employment as soon as he began to ride on the buffer of the wagon."

Gibb vs. Chore Company, 8 B. W. C. C., 152:

A foreman in the employment of builders had to travel daily by train to inspect building jobs, and was expected to return before six P. M., in time to report on the work being done. To do this, he had to catch a train leaving at five twenty-six P. M. Work ended at five P. M. and left him ample time to catch the train. On the day in question, however, he arrived at the station late and found the train already moving out, but ran to try and get inside it. He slipped and fell between the train and the platform, receiving injuries from which he died. Held: the accident did not arise out of the employment. The Court said, "The ground upon which my opinion in this case is decided is that the risk attaching to the attempt to board the train in motion was not a risk reasonably incident to the deceased's employment. * * * The peril involved by the deceased's contract of service was to travel by the train in the ordinary way and he was not doing anything incidental to the proper performance of his duty when the accident happened. He exposed himself to an added risk, a peril which was not incidental to his employment, an added peril due to the conduct of the man himself."

Pritchard vs. Torkington, 7 B. W. C. C., 719:

The deceased workman arriving at the railroad station alighted from the train and instead of taking the bridge, which was the proper means of crossing, went to the end of the platform and crossed the tracks in front of the standing engine. He did not see an express train which was coming on the next set of rails, and he was knocked down and killed. The Court held that the workman had exposed himself to an added risk which was not incidental to the employment, and that therefore the accident did not arise out of his employment.

The Court said: "It is almost the same class of test which was put by Kennedy, L. J., in *Brice vs. Edward Lloyd, Ltd. (1909), 2 K. B., 804; 2 B. W. C. C., 26,* namely: Has the servant by his action increased the risks of his employment? Well, I think a man who instead of walking along the public road, which is the natural way to go, chooses to take a short cut for himself along a railway line where the path is so near the rails that he is liable to be knocked down by a passing engine does increase the risks and if something happens to him in that position, the accident is not one which arises out of the employment."

The deceased here did not cross by the bridge but in the way I have mentioned, and in so doing lost his life. He had gone on his employer's business, and the train he had taken and the business he was on were in the ordinary course of his employment. The only question is—did the accident arise out of the employment? In other words, was it an ordinary risk? The test is applied by Lord Dunedin in *Plumb vs. Dobden Flour Mills, 1913, ante p. 1,* and he answers it with the concurrence of the other members of the House of Lords in the following words: "The risk is not incidental to the employment when either it is not due to the nature of the employment or it is an added peril due to the conduct of the man himself." That, it seems to me, is entirely applicable to the present case. It

was entirely owing to the added peril of crossing the line instead of passing over the bridge that the accident occurred. Mr. Shaw has urged upon us that a workman might take a short cut and the mere fact that he takes a short cut does not prevent him from recovery. But that does not involve taking a short cut in front of a standing engine and over four lines of metals where you cannot see whether there is a train coming. It was not only taking a short cut reasonably incidental to the employment, but added a new and entirely unnecessary risk to the employment. I think the appeal should be allowed." Appeal allowed.

It is further urged that the danger of accident from sleeping while in charge of a team was so obvious and so far outside the scope of employment as to preclude claimant from any recovery whatever.

Hopley vs. Poole, et al., 8 B. W. C. C., 512:

A lad was employed to stand behind a machine and take skeins of wool as they came from some rollers and put them in a basket. On the day of the accident, contrary to express orders, he went to the front of the machine and picked off the bits of fluff from the rollers. While doing this, his hand was drawn in between the rollers and his arm was so crushed that it had to be amputated. Held: that the accident arose from an act outside the sphere of his employment and that there was no liability on the employers.

Morris vs. Rowbotham, 8 B. W. C. C., 157:

A carter employed by a firm of contractors who were engaged upon building operations at several railway stations was told to go from one station to another to fetch some mortar from the mortar mill there. He was told that he could not take the mortar without a permit from

the foreman. His duty was to remain with his horse and cart; but instead he backed them against the railway embankment, left them and went on with the lime to see if he could find the foreman. He was then killed by a passing train. Held: the accident did not arise out of the employment. The Court said: "It is clear that it is not essential to show that the act which the workman is doing at the time of the accident is a necessary part of his employment, but you must show that he is doing an act which is reasonably incidental to his employment and he had not been doing that in this case. He had no business to leave his horses and cart and in so doing he left entirely the sphere of his employment and when he met with his accident he was outside the sphere of his employment and was engagd in doing something which was outside of the scope of his employment. His death was not, therefore, caused by anything reasonably incidental to his employment, which was that of a carter."

Williams vs. Wigam C. & I. Co., 3 B. W. C. C., 65:

Workman attempted to board an engine while moving five miles per hour; missed footing and sustained personal injuries. Held: that the attempt to board the engine whilst in motion was obviously dangerous and wholly unnecessary, and that the accident did not arise out of and in the course of the employment. (He needlessly exposed himself to a risk which could not be fairly said to have arisen out of his employment.)

The attention of the Court is also called to the language used in *Bryant vs. Fissel* in construing the words "in the course of the employment." Trenchard, J., said, "We conclude, therefore, that an accident arises 'in the course of the employment' if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place

where he may reasonably be during that time." The accident in this case, if it happened as alleged in the petition, was while the employee was engaged in driving a team of mules and occurred presumably because of the driver having gone to sleep in the discharge of his duties. Is sleeping while engaged as a driver "Doing what a man so employed may reasonably do within a time during which he is employed?" Or when we consider that the employee had only been on duty the usual twelve hours after having had a rest of twelve hours, and out of the preceding eighty-six hours had been on duty forty hours and off duty forty-six hours, and was entitled to go to the house provided by the employer for his rest and refreshment, immediately after arriving at the farm from the Philadelphia trip, can it be said that the sleeping of the employee was at a "time" or "place where he may reasonably be during that time?"

In conclusion, it is respectfully submitted that the claimant has totally failed to make out any case of liability on the part of the employer; first, for the reason that it has not been shown that the cause of death was due to the accident alleged in the petition. The testimony of the doctor being very plain and emphatic when he testified "That he could give no information whatever as to the cause of Dixon's death," and that he did not know whether he died of natural causes or not. Second, because it does not appear from the facts submitted that the accident, if it did happen, as alleged, "arose out of" the employment, for the reason that the risk incidental to the accident, to wit, of sleeping while in charge of a team, is not a risk which is incidental to the employment, but entirely outside the scope of the employment, an unnecessary part, thereof, and in no way connected with

the duties of the employment. It is also an obvious danger, in no way connected with the employment; and in the third place, applying the test given in the case of *Bryant vs. Fissel,* the accident as alleged did not arise in the course of the employment.

For all of which reasons it is prayed that the judgment of the Supreme Court affirming the judgment of the Burlington County Court of Common Pleas be reversed.

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I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

MARGARET H. DIXON,
Petitioner and Respondent,

vs.

CLAYTON L. ANDREWS,
Defendant and Appellant.

On Appeal from New Jersey Supreme Court.

BRIEF
for Petitioner and Respondent.

This is a proceeding under Section II of the Workmen's Compensation Act (Pamph. L. 1911, p. 134, as amended by Pamph. L. 1913, p. 302), brought before William D. Lippincott, Judge of the Burlington County Common Pleas Court, to recover compensation for the death of petitioner's husband.

The Judge by his determination filed in the cause found, *inter alia,* "that the death of John Dixon (husband of the petitioner) was caused by an accident arising out of and in the course of his employment." (See Printed Book, p. 21, l. 18.)

The judgment of the Court of Common Pleas in favor of the petitioner was affirmed by the Supreme Court on certiorari—see *Dixon vs. Andrews,* 103 Atl. 410.

From this judgment of affirmance the defendant below appeals to this court.

The grounds for reversal relied upon by the appellant are summarized in his brief on page 27 and are three in number, viz.:

> "*First,* for the reason that it has not been shown that the cause of death was due to the accident alleged in the petition."
>
> "*Second,* because it does not appear from the facts submitted that the accident, if it did happen, as alleged, arose out of the employment, for the reason that the risk incidental to the accident, to wit, of *sleeping* while in charge of a team, is not a risk which is incidental to the employment," etc.
>
> "*Third,* the accident as alleged did not arise in the course of the employment."

POINTS.

I.

"The findings of the Judge of the Court of Common Pleas on questions of fact in workingmen's compensation cases, if there be evidence to support them, are final, unless the Judge has misdirected himself in point of law."

Hulley vs. Moosbrugger, 88 N. J. L. 161-163;
Employers' Liability Act, Paragraph 18.

II.

The Death of Dixon Was Caused by the Accident Set Forth in the Petition.

It is respectfully submitted that the conclusion of the Judge "that John Dixon's death was caused by his being caught and crushed between the seat of the wagon on which he was riding, and the edge of the roof of the shed under which the team had passed, and that his being so caught and crushed was an accident within the meaning of the Workmen's Compensation Act" (see "Determination," Printed Book, p. 19, l. 10), was a conclusion abundantly supported by the facts on which it was predicated and the only inference that could be legitimately drawn from the evidence.

Bryant, Adm'x, vs. Fissell, 84 N. J. L. 72-75.

It was not incumbent upon the petitioner to prove death by accident beyond a reasonable doubt or to the exclusion of every other hypothesis.

There was no evidence before the Court to warrant the inference that the death of John Dixon was, or even might have been caused in any other way.

Re: Von Ette, 223 Mass. 56, L. R. A. 1916 D. 641.

The body of Dixon, when found by his employer, was between the edge of the shed roof and the broken back of the seat on which he was still sitting and *"his body was not cold."* (See "Determination," Printed Book, p. 18, l. 30, and "State of Case Settled by Court," Printed Book, p. 33, l. 4.) The cause of his death was so evident to the appellant, that he raised no question about its being due to accident until after the filing of the petitioner's petition in this cause.

III.

The Death of Dixon Was Caused "by Accident Arising Out of and in the Course of His Employment."

> "The words 'out of and in the course of his employment'—are used conjunctively—. The words 'out of' point to the origin or cause of the accident; the words 'in the course of' to the time, place and circumstances under which the accident takes place."
>
> *Fitzgerald vs. W. G. Clarke & Son* (1908), L. R., 2 K. B. 796;
>
> Cited in *Hulley vs. Moosbrugger, supra,* at p. 167.

It was held in *Bryant, Adm'x, vs. Fissell, supra,* at p. 77:

> "An accident arises 'in the course of the employment' if it occurs while the employee is doing what a man may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time."

The findings of fact in this case justify the conclusion that the accident to Dixon occurred "in the course of his employment." He was bringing his team home from market where he had been sent by the respondent. He was seated on the seat of the wagon where it was his place to be and came to his death, while in that position, on the premises of the respondent, where it was his duty to bring the team. *See* "Determination," Printed Book, pp. 14-21; "Judgment," ditto, pp. 22-24, and "State of Case Settled by Court," ditto, pp. 29-34.

It was further held in *Bryant, Adm'x, vs. Fissell, supra,* pp. 78-79:

> "that an accident arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it. * * * A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service. * * * A risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected with the employment owing to the special nature of the employment."
>
> See also *Hulley vs. Moosbrugger, supra; Foley vs. Home Rubber Co.,* 89 N. J. L. 474-477.

The strenuous character of the service which Dixon was required to perform appears in the findings of fact as determined by the Judge.

> (Printed State of Case, p. 19, line 34, to p. 20, line 13, inclusive.)

This gave Dixon little time for sleep between the Sunday evening preceding his death and Wednesday morning when he was found dead. His work was mostly night work and his only chance to sleep at home during that time was less than four hours on Monday morning and from about two or three o'clock on Tuesday morning to noon on that day.

It was August, the weather was warm, Dixon's house small and occupied by four small children. His chance to get restful sleep there during the hours of daylight was small.

It is reasonable to assume that the risk of Dixon's falling asleep during his fatiguing journey to and from Philadelphia at night with a walking team thoroughly familiar with the road, and the possible danger of so doing, was a risk contemplated both by him and his employer at the time the employment began.

That he did fall asleep at the end of his journey on Wednesday morning is strongly indicated by the fact that he failed to turn his team to the right after passing the packing house, as he should have done, and that the team, in the absence of his guiding hand, went directly to the stable where it belonged.

This is the only inference warranted by the facts in this case.

If this is a reasonable and proper conclusion from the facts found by the Court in this cause, as it unquestionably is, the employer is liable and the petitioner entitled to recover under the Workmen's Compensation Act, even though the act of Dixon in thus going to sleep may be held to constitute negligence on his part.

Neither is the claimed negligence of Dixon in failing to turn to the right after passing the packing house, and in failing to leave the wagon at the platform where he usually left it before taking his team to the stable, and in lieu thereof continuing direct to the stable, such an act of negligence or disobedience as would deprive the petitioner of her right to recover.

Kolaszynski vs. Klie, 102 Atl. 5;
L. R. A. 1917 D. 121.

"Doing the work in the wrong way" held not to be a bar to recovery in compensation cases.

Balir & Co., Ltd., vs. Chilton (House of Lords), Eng. 5-11-1915, 8 B. W. C. C. 327 (See also 7 B. W. C. C. 607).

Even *wilful negligence* is not a defence to the action under Section II of the act, on which this claim is based.

Taylor vs. Seabrook, 87 N. J. L. p. 407.

By Section II the only defences are that "the injury or death is intentionally self-inflicted, or that intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer." (See Par. 7 of Act.)

The Court found that there was no such evidence in the case. (See Printed State of Case, p. 21, l. 8.)

> "It may be well said that those whose employments require them to travel by land or sea are known by their employers to be subject to the common perils that such traveling incurs. The risk is inherent in the employment itself.
>
> "The manner in which the accident was brought about is not at all of the essence of the matter, the vital question always being, was the accident connected with the employment? If it was, then it arose out of the employment, provided it occurred in the course of the employment."
>
> *Foley vs. Home Rubber Co., supra, pp.* 479-480.

There can be no question that under the facts in this case as determined by the Judge of the Burlington County Court of Common Pleas, the death of

Dixon was caused "by accident arising out of and in the course of his employment," that the said Judge has not "misdirected himself in point of law," and that the writ of certiorari was properly dismissed by the Supreme Court.

The appeal should also be dismissed with costs.

Respectfully submitted,

SAMUEL K. ROBBINS,
Attorney for Petitioner and Respondent.