

INDEX.

	PAGE
Notice of Appeal	1
Grounds of Appeal	2
Opinion, Supreme Court	3
Rule on Reversal	7
Notice of Appeal, Supreme Court	9
Summons	10
Complaint	10
Answer	13
Case	15
Motion for Non-Suit	38
Motion for Direction of Verdict	60
Renewal of Motion for Non-Suit	60
Charge	61
Defendant's Requests to Charge	68
Grounds of Appeal, Supreme Court	69
Rule for Judgment	74

TESTIMONY.

Plaintiff's Witnesses:

Richard Williams,	
Direct	16
Cross	19
Redirect	25, 27
Recross	26
John Policki,	
Direct	27
Cross	31
Redirect	34
Recross	34

	PAGE
John Dolan,	
Direct	34
Cross	35
Sawer Gelowaski,	
Direct	36
John Burowitz,	
Direct	37
Cross	38

Defendant's Witnesses:

Charles Suavet,	
Direct	40
Cross	43
James McManus,	
Direct	46
Cross	49
Redirect	51, 52
Recross	52
Samuel Reed,	
Direct	53
Cross	54
Redirect	55
Recross	56
John Furrerig,	
Direct	56

Notice of Appeal.

New Jersey Supreme Court

(Filed November 20, 1926.)

SAWER GLOWACKY, Admr. ad pros.
of the Estate of Michael Glow-
acky, deceased,

Plaintiff-Appellee,

vs.

SHEFFIELD FARMS Co., INC.,

Defendant-Appellant.

Action
at Law.

Notice of
Appeal.

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To

MESSRS. AUTENRIETH & GANNON,
Attorneys for Defendant-Appellant.

20

PLEASE TAKE NOTICE, that the plaintiff-
appellee appeals to the New Jersey Court of
Errors and Appeals from the whole of the judg-
ment entered in this cause.

Dated, October 21, 1926.

30

Yours, etc.,

ALEX. SIMPSON,
Attorney for Plaintiff-Appellee.

40

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

(Filed November 23, 1926.)

- | | | |
|----|--|--|
| 10 | <p>SAWER GLOWACKY, Admr. ad pros.
of the Estate of Michael Glow-
acky, deceased,
<i>Plaintiff-Appellant,</i>

vs.

SHEFFIELD FARMS Co., INC.,
<i>Defendant-Appellee.</i></p> | <p>Action
at Law.
Appeal from
New Jersey
Supreme
Court.
Grounds
of Appeal.</p> |
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- 20 The appellant states the following grounds of appeal:

1. The New Jersey Supreme Court erred in reversing the judgment of the Hudson County Court of Common Pleas.

2. The New Jersey Supreme Court erred in refusing to affirm the judgment of the Hudson County Court of Common Pleas.

- 30 Dated, October 21, 1926.

Yours, etc.,

ALEX. SIMPSON,
Attorney for Plaintiff-Appellant.

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

No. 99, OCTOBER TERM, 1926.

SAWER GLOWACKY, Administrator
 prosequendum of Michael
 Glowacky, deceased,
Plaintiff-Respondent,

VS.

SHEFFIELD FARMS COMPANY,
Defendant-Appellant.

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On appeal from the Hudson County Court of
 Common Pleas.

20

Before GUMMERE, Chief Justice and Justices
 KALISCH and CAMPBELL.

For the appellant AUTENRIETH & GANNON;
 For the respondent ALEXANDER SIMPSON.

Per Curiam: This is an appeal from a judgment entered on the verdict of a jury in the Hudson County Court of Common Pleas in favor of the plaintiff below against the defendant below for the sum of six thousand dollars.

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The plaintiff's decedent was a minor, 13 years of age at the time of his injury and death. The defendant is a corporation selling and dealing in milk at wholesale and retail. The milk was received and obtained by it in the Pennsylvania Railroad Company's yards, at Jersey City, from the latter's freight cars. On the 17th day of Oc-

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Opinion of Supreme Court.

tober, 1924, the plaintiff's decedent was run over and killed by one of the trucks of the defendant company. The plaintiff brought his action against the defendant under the Death Act, to recover the pecuniary loss sustained by the de-

10 cedent's father and brother, alleging as the cause of decedent's death defendant's negligence, and which action resulted in a verdict and judgment thereon against it, as above stated. For the conduct of its business the defendant had in operation many motor trucks amongst which was a nine ton Mack Truck, which on the day in question, at about five o'clock in the afternoon, in charge of a chauffeur, accompanied by a helper, was being

20 driven to the Pennsylvania Railroad Company's yards at the foot of Exchange Place, Jersey City, to deliver a load of empty milk bottles and to take a load of filled bottles of milk and milk in cans.

There was uncontroverted proof that the drivers were expressly forbidden to hire any one to help them in the discharge of their duties, and in addition notices to that effect were conspicuously posted at the place where the drivers called for their trucks.

30 There was some evidence in the cause that on several occasions the driver's helper requested lads ranging from 12 to 15 years to help the driver and that the latter would compensate them for their work with a bottle of milk. There was no testimony that these acts of the helper or driver were ever brought to the notice of the defendant company, or that it had knowledge of any such conduct as attributed to them.

Opinion of Supreme Court.

Richard Williams, aged fifteen, who claimed to be one of the boys employed to help in loading and unloading the truck, called by the plaintiff, testified that he helped the helper; that it was the defendant's helper who asked him whether he wanted to help the chauffeur, and upon saying yes, started in to help. Williams further testified that shortly before the happening of the accident he hailed the truck at Grand and Washington Streets, about two and a half blocks from the river front and rode to the ferry entrance; that the driver slowed up to let him on; that he got on the "run board," that is where he rode and while there the defendant's helper got off at the Hudson Terminal, in Jersey City. Whether Williams got on the driver's seat after the helper left the truck is in some confusion. Williams, according to his testimony, rode two blocks and a half on the running board. He says, later on, that he was sitting on the driver's seat next to the driver and that the helper was also sitting in the same seat and it may be that when the helper left he took the vacant seat. At any rate, the witness testified that the truck had entered through the gate and had gone about ten feet when he saw the plaintiff's decedent running through the car house and make an attempt to get hold on the side of the grip when he said "Chauffeur wait, here's a little boy that will help you. And I put out my hand to get him, but he kept right on, and when I turned around again to look, the boy was not there." The witness further testified that he saw the decedent standing on the running board and while he spoke to the driver the de-

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Opinion of Supreme Court.

cedent disappeared; that at the time the decedent attempted to board the truck—it was going fast. There was an utter absence of proof that the driver saw the decedent, or that he saw or knew that the decedent was standing on the running board.

10 Viewing the testimony most strongly in favor of the plaintiff and accepting the plaintiff's theory that it was the habit of the driver to hire boys to help him, we are confronted with the unchallenged situation, that the driver's act in that regard were unauthorized and in defiance of express orders of defendant not to engage in such practice, and furthermore, that the defendant
20 company was unaware of the practice in disobedience of its express orders. For this reason alone the plaintiff's decedent was disentitled to recover. An equal bar to a recovery is the undisputed fact that the plaintiff's decedent was running for the truck and was aware that it was not slackening its speed but was going fast and hence was not going to stop for him and take him on, nevertheless, he made the attempt to board it and succeeded in obtaining a momentary foothold, when
30 he either slipped or fell off through the ordinary movements of the vehicle. There being no proof that he was invited to get on but on the contrary made the attempt to board the truck as above stated, he was there as a trespasser, and, therefore, there was no legal duty owing to him from the defendant except to refrain from inflicting upon him a wilful and wanton injury.

40 For the reasons stated, the judgment is reversed.

Rule of Reversal and Remittitur.

NEW JERSEY SUPREME COURT.

SAWER GLOWACKY, Administrator ad prosequendum of Michael Glowacky, deceased, <i>Plaintiff-Respondent,</i>	} On Appeal. 10
vs. SHEFFIELD FARMS COMPANY, <i>Defendant-Appellant,</i>	

Rule of
Reversal and
Remittitur.

This cause coming duly before this Court on appeal from a judgment entered on the verdict of a jury in the Hudson County Court of Common Pleas in favor of the plaintiff-respondent, in the presence of Autenrieth and Gannon, attorneys of defendant-appellant, and Alexander Simpson, attorney of plaintiff-respondent, and the Court having duly examined the briefs and heard the argument of counsel for the respective parties; and the cause being duly submitted to this Court for determination;

And the Court having adjudged and determined that the judgment below should be reversed, as appears from the opinion of the Court filed herein;

It is on this 3rd day of November, 1926, ordered and adjudged, that the judgment heretofore entered in favor of Sawyer Glowacky, administrator ad prosequendum of Michael Glowacky, deceased, the plaintiff-respondent herein, and against Sheffield Farms Company, the defendant-appellant

Rule of Reversal and Remittitur.

herein, in the Hudson County Court of Common Pleas be and the same is hereby reversed.

And this cause is hereby remitted to said Hudson County Court of Common Pleas to be proceeded with according to law and the practice of said court.

10

Rule actually entered this 3rd day of November, 1926.

On motion of

AUTENRIETH, GANNON & WORTENDYKE,
Successors of Autenrieth & Gannon,
Attorneys of Defendant-Appellant.

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A true copy.

EDWARD J. KELLEHER,
Clerk.

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Notice of Appeal.

(Filed June 9th, 1925.)

HUDSON COUNTY COURT OF COMMON PLEAS.

SAWER GLOWACKI, Administrator
ad Pros. of the Estate of Mich-
ael Glowacki, deceased,

Plaintiff,

vs.

SHEFFIELD FARMS COMPANY, INC.,
a corporation,

Defendant.

Action
at Law.

Notice of
Appeal.

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To:

Sawyer Glowacki, Administrator as aforesaid,
or
Alexander Simpson, his attorney.

PLEASE TAKE NOTICE that the defendant,
Sheffield Farms Company, Inc., a corporation, ap-
peals to the New Jersey Supreme Court, from the
whole of the judgment entered in the above en-
titled cause.

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Dated, June 2nd, 1925.

Yours respectfully,

AUTENRIETH & GANNON,

Attorneys for Defendant.

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Summons.

The defendant was duly summoned.

Complaint.

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(Filed March 9, 1925.)

HUDSON COUNTY COURT OF COMMON
PLEAS.

SAWER GLOWACKY, Administrator
ad prosequendum of the Estate
of Michael Glowacky, deceased,
Plaintiff,

vs.

SHEFFIELD FARMS Co., INC., a
corporation,
Defendant.

Action
at Law.

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Plaintiff, who resides at No. 134 Morris Street,
in the City of Jersey City, in the County of Hud-
son, says that:

1. Plaintiff is administrator ad prosequendum
of the Estate of Michael Glowacky, deceased, and
brings into Court letters of administration ad
prosequendum granted to him upon the said estate
by the Surrogate of the County of Hudson.

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2. Intestate of the plaintiff, on the 17th day of
October, 1924, was killed through the negligence
of the defendant, at Jersey City.

Complaint.

3. The negligence of the defendant consisted in this:

The defendant is a corporation engaged in the business of carrying, transporting, buying and selling milk, and as such had a certain wagon in charge of a servant and agent of the defendant, who was accustomed to hire persons to help in the transporting of the said milk, with the knowledge and authority of the defendant, and the intestate of the plaintiff, who was an infant of tender years, being of the age of 13 years, on and before the date of the accident herein described, had been used and employed by the servant of the defendant who was in control and charge of the said milk wagon to aid him, the servant of the defendant, in loading and carrying and using milk in and about the conduct of the said wagon and while plaintiff's intestate, who was of the age of 13 years, was upon the said wagon, engaged as aforesaid in aiding the servant of the defendant, at his request, in the conduct of the said wagon and use thereof in the business of the defendant, the servant of the defendant failed to use reasonable care to properly guide the said wagon; to operate the same with safety to the persons thereon; to propel the same at a safe rate of speed; to cause the intestate of the plaintiff to be in a safe position, and failed to use reasonable care in the driving, guiding, controlling and use of the said horse and wagon, and as the result thereof the intestate of plaintiff was thrown from said wagon and received injuries from which he died.

4. Intestate of plaintiff was at all times in the exercise of due care for his safety.

Complaint.

5. Intestate of plaintiff left him surviving his father and a brother, who have suffered pecuniary injury by reason of his death.

10 6. The within action is commenced within 24 calendar months from date of death of plaintiff's intestate.

Plaintiff demands \$10,000.

ALEX. SIMPSON,
Attorney for Plaintiff.

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Answer.

(Filed March 7, 1925.)

HUDSON COUNTY COURT OF COMMON
PLEAS.SAWER GLOWACKI, Administrator
ad pros., etc.,*Plaintiff,*

vs.

SHEFFIELD FARMS Co., INC., a
corporation,*Defendant.*Action
at Law.

Answer.

The defendant says:

1. It has no knowledge of the allegations and facts set forth in paragraph 1 of the complaint filed herein.

2. It denies the allegations and facts set forth and contained in paragraphs 2, 3 and 4 of the said complaint.

3. It has no knowledge of the allegations and facts set forth and contained in paragraph 5 of said complaint except that it denies that the next of kin of the plaintiff's intestate suffered any pecuniary injury by reason of his death.

4. It admits the allegations and facts set forth and contained in paragraph 6 of said complaint.

DEFENSES.

1. That the plaintiff's intestate at the time of the happening of the said alleged accident, negli-

Answer.

10 gently, carelessly and unlawfully attempted to board the defendant's wagon while the same was in motion and without notice to the driver or operator thereof and within any knowledge on the part of the defendant, its servants or agents of his intention to board said wagon, and that while attempting to board said wagon, plaintiff's intestate slipped and fell to the ground and was run over by one of the wheels of said wagon.

20 2. That the said plaintiff's intestate had no legal right, expressed or implied, to board the wagon of the defendant and in doing so said plaintiff's intestate was guilty of trespass in entering upon the property of the defendant without its consent or invitation, expressed or implied, and that the defendant's liability was only for wilfull and wanton negligence, and that the said defendant at the time of the happening of said alleged accident was not guilty of negligence in anywise whatsoever.

30 3. That the defendant repeats the allegations and facts set forth and contained in paragraphs 1 and 2 of defenses herein and says that at the time of the happening of the said alleged accident, plaintiff's intestate was guilty of contributory negligence.

AUTENRIETH & GANNON,
Attorneys for Defendant.

Case.

HUDSON COUNTY COURT OF
COMMON PLEAS.

SAWYER GLOWACKI, <i>Administrator,</i> versus SHEFFIELD FARMS COMPANY, INC.	}	Action in Tort. 10
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Jersey City, May 21, 1925.

This action came on for hearing before Honorable Daniel T. O'Regan, Judge, and a jury, in the Court House in the City of Jersey City, on this twenty-first day of May, nineteen hundred and twenty-five. 20

ALEXANDER SIMPSON, Esq., counselor at law, appeared for the plaintiff.

WILLIAM R. GANNON, Esq., counselor at law, appeared for the defendant. 30

Plaintiff's counsel moved the trial of the cause. A jury was drawn, selected, and sworn. Mr. Simpson stated the case for the plaintiff, and Mr. Gannon stated the case for the defendant. Further proceedings follow.

Richard Williams. Called by Plaintiff. Direct.

RICHARD WILLIAMS, called by the plaintiff and sworn, testified as follows:

Direct Examination by Mr. Simpson:

- 10 Q. What is your name? A. Richard Williams.
 Q. Where do you live? A. 199 Warren Street, Jersey City.
 Q. Did you know this boy Michael Glowacki in his life time? A. Yes.
 Q. Did you see him when he was killed on the seventeenth of October last? A. Yes.
 Q. Where were you at the time? A. I was on the truck.
 20 Q. What truck? A. Sheffield Farms Company's truck that run over him.
 Q. Who was the driver of the truck at the time? A. I don't know his name.
 Q. Is he here? A. Yes, sir.
 Q. Point him out. A. There, in the first row.
 Q. How far from the wall? A. The second man from the wall.
 Q. What were you doing on the truck? A. I was helping the helper.
 30 Q. Did you ever help him before? A. Yes.
 Q. When? A. Nights.
 Q. How long before this time? A. About a month before that time.
 Q. Every night during that month? A. Not every night; not some nights.
 Q. How often would you help him? (No answer.)
 Q. Every other night? A. Pretty near.
 40 Q. Where would you meet him? A. Generally down at the ferry.

Richard Williams. Called by Plaintiff. Direct.

Q. How did you help him? A. Taking the cases off the truck and putting them in the milk car.

Q. Were they empties? A. Yes, sir.

Q. Did you do anything else? A. Then I would put on loaded cans of milk.

Q. By loaded cans you mean they were full cans? A. Yes, sir. 10

Q. Did this Kowalski boy help you? A. Yes—three boys.

Q. You mean there were three boys? A. Four; me, Kowalski and two others.

Q. After you got through what did he give you? A. A bottle of milk.

Q. Did you take that home? A. Yes, sir.

Q. How long had Kowalski been working on the wagon? A. I don't know. I was supposed to get the job back that night. I had not been working for him about a week before that. 20

Q. How did he come to hire you on that truck then? A. He said to me, Do you want to help the chauffeur? And I said, Yes. Then me and the other boy went over.

Q. Where were you then? A. In where he gets the milk, up where the railroad is.

Q. Pennsylvania Railroad Yard? A. Yes. 30

Q. On this night where did you get on when the boy was killed? A. Grand and Washington Street.

Q. Did the driver stop for you? A. He slowed up and I got on.

Q. And how did you get on? A. I got up by the grip which is outside.

Q. Then where did you land?

(Objected to as immaterial and incompetent, and that authority on the part of the driver 40

Richard Williams. Called by Plaintiff. Direct.

has not been shown. Question allowed. (Exception.)

10 Mr. Gannon: Without interrupting with constant objections, if the Senator will consent I desire to enter a general ~~interruption~~ ^{EXCEPTION} to this whole line of testimony. Exception allowed.

A. I got on the run board.

Q. And that is where you rode? A. Yes, sir.

Q. Where did you go to then while there? A. Down Grand Street to Green, and over Green down to York; and we turned around Montgomery Street, and there the helper got off at the Hudson Terminal near the depot.

20 Q. How did you get in the milk shed? Do you go through the gate at Hudson Street? A. No, you go down Montgomery and then you go through the gate at the ferry and turn to the left.

Q. Was there any other boy on the truck when you got on that time? A. No.

Q. Where did he pick up Kowalski? A. Right at the ferry. He came running through the car house where the cars stop at the ferry.

30 Q. Did he get on the ferry? A. No, he tried to.

Q. Where was your truck when he tried to get on? A. About ten feet out from the entrance of the gate.

40 Q. What did he do to get on the truck? A. Jumped on the truck and tried to get hold on the side of that grip, and I said wait, Chauffeur, wait, here's a little boy that will help you. And I put out my hand to him, but he kept right on, and when I turned around again to look the boy was not there.

Richard Williams. Called by Plaintiff. Cross.

Q. Did you know what happened to him? A. No.

Q. Where did you ride? A. Went on to where he gets the milk.

Q. What were you doing there? A. I took the rope off and then a man came running in and said he had run over a boy, and then the chaffeur went out. 10

Q. At the time you put your hand out and said to the driver and said, Wait, here's a little boy that helps us, did he slacken? A. No; he did not slacken at all.

Q. Where was this boy trying to get on? A. Between the front and rear wheel.

Q. Whereabouts on the truck? A. Right beside the driver, where he gets on. 20

Q. What was he doing? A. Trying to get on the running board.

Q. Where were you? were you near the gate or doorway of the truck? A. Sitting just by the driver on the driver's seat.

Cross Examination by Mr. Gannon:

Q. What is your name? A. Richard William. 30

Q. How long had you known this boy? A. I used to see him on the street.

Q. Was he a pal? A. No.

Q. You did know him well? A. I knew him by living around there.

Q. Did you ever go to school with him? A. Once I did.

Q. Did you play with him? A. No.

Q. Were you a friend of his? A. You might say I was a friend of him. 40

Q. You knew him right well? A. Yes.

Richard Williams. Called by Plaintiff. Cross.

Q. Was there a helper on the truck besides the driver this night? A. Yes.

Q. How old was he? A. I couldn't say.

Q. Is he in court? A. Yes.

10 Q. Did you ever see that helper on this truck before this night? A. Yes.

Q. Did you see him every night you were around there? A. Yes.

Q. He used to ride with the driver down to the ferry house every night? A. Yes.

Q. Do you know Mr. Suavet? (Mr. Suavet stand up?) A. No, sir.

Q. You don't know that man standing up there? A. No.

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

Q. Never had conversations with him? A. No, sir.

Q. Don't know who he is? A. No, sir.

Q. Don't know whether he is connected with the Sheffield Farms Company or not? A. No, sir.

Q. You don't know if he is? A. No, sir.

Q. You say Glowacki was trying to get on the truck? A. Yes.

Q. When you were on the truck? A. Yes.

30 Q. Alongside the driver? A. Yes.

Q. You were on the seat? A. Yes.

Q. Next to the driver? A. Yes.

Q. Was any other boy on the seat with you? A. No, sir.

Q. Was the helper on the truck also? A. Yes.

Q. You were the only boy on the truck that night? A. Yes.

40 Q. Did you see Kowalski run out towards the truck to get on? A. Yes.

Q. Was the truck moving? A. Yes.

Richard Williams. Called by Plaintiff. Cross.

Q. How fast? A. I couldn't say.

Q. Ten miles an hour or fifteen? It was going fast.

Q. Was there any room on the driver's seat for him? A. We could make room, but as you would say there would be no room for him.

10

Q. You would have to push over for him to get on the seat? A. Yes.

Q. Do you know whether he saw you on the driver's seat? A. I don't know.

Q. Did you push over to make room for him? A. No, sir.

Q. So if he did jump on the truck there was no room for him to sit down? he would have to stand up on the run board? A. Yes.

20

Q. The truck was going very fast? A. Yes.

Q. And he tried to get on the running board on the side? A. Yes.

Q. This was a motor truck? A. Yes.

Q. No horses connected with it? A. No, sir.

Q. Do you know the name of the motor truck? A. Yes, Mack.

Q. There is a hood where the driver is? A. Yes.

Q. And then there is a step where the driver gets on the seat? A. Yes.

30

Q. And then there is a running board? A. Yes, like a step.

Q. That is where the boy tried to jump on the running board? A. Yes.

Q. On that short step? A. Yes.

Q. That is just behind the front wheel? A. Yes.

Q. And it is quite a small running board? A. Yes.

Q. Did he step up? A. He jumped up for it.

40

Q. Did you see him lose his footing? A. No, sir, I did not pay any attention to him.

Richard Williams. Called by Plaintiff. Cross.

Q. What happened after he started to jump?

A. He jumped on the step right alongside of me and he was holding to part of the cab.

Q. You saw him leap for the running board and you did not see him after that? A. Not after we went around the ferry house.

10

Q. Did you come out of the railroad yard after the accident? A. I came out with the chauffeur.

Q. You came out and looked at Kowalski? A. Yes.

Q. Did you hear him yell or cry when the truck ran over him? A. No, sir.

Q. Not a sound? A. No, sir.

Q. What part of the truck ran over him? A.

20

The father told me the truck ran over him this way.

Q. But you did not see that? A. No, sir.

Q. You heard no cry at the time of the accident? A. No.

Q. And you were on the front seat? A. Yes.

Q. And the last time you saw him he was trying to jump on the running board in front? A. He was standing on the running board and while I spoke to the driver, disappeared.

30

Q. How far is it from where he was standing to the rear wheel of the automobile truck? A. About as far as from here to the wall.

Q. How is it you couldn't hear him? A. There was a lot of noise from the motor.

Q. Could you hear the driver talk? A. He did not say anything to me.

Q. Never said a word to you while you were in the cab? A. No, sir.

40

Q. Was the motor loud enough so that you could not hear the driver talk to you? A. If he talked to me I would have heard him, but he didn't talk.

Richard Williams. Called by Plaintiff. Cross.

Q. The motor was not too loud for that? A. No, sir.

Q. The boy did not say anything to you? A. No, sir.

Q. Nor did the driver? A. No, sir.

Q. Do you work? A. Yes, sir, 60 Beaver Street, 10 New York.

Q. How long do you work there? A. About eight months.

Q. You were not working there at the time of the accident? A. Yes.

Q. How did you happen to be on this truck? A. I got off early that day.

Q. How early? A. About ten minutes after three.

Q. How much pay do you get a week over there? 20
(Objected to.)

Q. Do you get paid a weekly salary? A. Yes, sir.

Q. How much would the driver of the truck give you for helping him with his loading and unloading? A. A bottle of milk after I got through.

Q. How much would that fetch to sell?

(Objected to.)

Q. Did you sell the bottle of milk or keep it? A. 30
Keep it for myself.

Q. Do you mean you brought it to your home? A. Yes, I would take it home.

Q. Do you know what such a bottle of milk sold for in a store?

(Objected to and excluded.)

Richard Williams. Called by Plaintiff. Cross.

Q. You mean to say that although you worked in New York for a salary you used to go to the Sheffield Farm truck and work every night for a bottle of milk? A. Yes.

10 Q. How long did that work with the Sheffield take you? A. A couple of hours, maybe.

Q. You would do two hours work for a bottle of milk? A. We did not work all the time. Perhaps we would work a half hour altogether in the couple of hours. We would go from one job to another.

Q. Was this easy work or hard? A. Pretty hard.

Q. The loaded cans of milk were heavy? A. Yes.

20 Q. And you could not handle them? A. Yes, I could.

Q. How? A. I would roll them.

Q. And did that two hours for a bottle of milk? A. Yes.

Q. Did you ever work for any other milk company or milk concern in this way or on a truck?

A. I used to work on another platform for the Keystone Company.

Q. Also for the Borden? A. No, sir.

30 Q. Do you know Mr. McManus? (Mr. McManus, stand up.) A. I don't know him to talk to but I have seen him at the ferry.

Q. He is in the employ of the Pennsylvania Railroad Company at the gate? A. Yes, sir.

Q. Did he ever chase you away from the entrance to the ferry house?

(Objected to.)

Q. Did you ever see him chase Glowacki from there? A. No, sir.

Richard Williams. Called by Plaintiff. Redirect.

Q. Ever chase you? A. No, sir. Once I seen him chase a couple of other little boys.

Q. Don't you know he threatened to have you and other boys arrested one day for coming into the ferry house?

(Objected to as not cross examination.)

10

A. No, sir.

Redirect Examination by Mr. Simpson:

Q. You did not carry these milk cans? A. No, sir.

Q. You rolled them along the platform? A. Yes.

Q. From the cars? A. Yes, sir.

20

Q. Were the cars level with the platform—the floors of the cars? A. The car was about this much higher.

Q. You rolled up a little incline to the car? A. Yes.

Q. Who put them on the car? A. The driver put them on the car.

Q. On the night the boy was killed was the helper on the wagon when he was killed? A. No. He got off before that happened.

30

Q. Where did he get off? A. At the Hudson Terminal.

Q. When the wagon went through the ferry gates the driver was on the truck? A. No, sir.

Q. When the boy was killed the boat was entering the ferry? A. Right inside of the ferry.

Q. Was there anything ahead of the truck? A. No, sir.

Q. Did it go through the regular place the trucks go through? A. Yes.

40

Richard Williams Called by Plaintiff. Recross.

Q. You said when the boy jumped he stood by you? A. Yes.

Q. Where was he last standing when you saw him last? A. Standing on the running board, and when I turned around he was gone.

10 Q. When did you tell the driver to slow up, that there was a boy there to help? A. Just before the boy got on.

Recross Examination by Mr. Gannon:

Q. Did the driver say anything to the boy the night he was killed and at the time he was killed? A. No, sir.

20 Q. The boy just jumped on the truck? A. Yes, sir.

Q. Have you talked with anybody about your testimony in this case? A. Yes, sir.

Q. Who? A. Mr. Simpson.

Q. Who else? A. Another man. I don't know his name.

Q. What did they say to you? What did the other man have to say to you?

30 (Objected to.)

Q. What did you say to that other man? A. I gave him my statement.

Q. A written statement? A. No. He asked me a few questions.

Q. What did he ask you?

(Objected to.)

40 Q. Are you under subpoena? A. Yes.

Richard Williams. Called by Plaintiff. Redirect.

John Policki. Called by Plaintiff. Direct.

Q. Have you been promised anything in addition to the subpoena fee to testify? A. Not that I know.

Q. Who is going to pay you your days' wages?

(Objected to as assuming a fact not proven.) 10

Q. Have you been promised the payment of your day's wages for coming here today? A. Not that I know.

Q. Don't you know whether you have such a promise? A. Nobody told me that.

Redirect Examination by Mr. Simpson:

Q. What is your age? A. Fifteen. 20

Q. How long to your knowledge had the boy now dead been doing this for that driver?

(Objected to that there is no proof of agency. Question allowed. Exception.)

A. About a month.

JOHN POLICKI, called by the plaintiff and sworn, testified as follows: 30

Direct Examination by Mr. Simpson:

Q. What is your name? A. John Policki.

Q. What is your age? A. Fifteen years.

Q. Did you know Michael Kowalski? A. Yes.

Q. That was his name? A. Michael Kowaski.

Q. Did you know the driver of the truck on which he was killed? A. Yes, by sight. 40

John Policki. Called by Plaintiff. Direct.

Q. Where did you see him? A. When I was working for him.

Q. How long before the boy was killed did you go to work for that man?

10

(Objected to.)

Q. How long before the death of this boy had you been working for this driver?

Mr. Gannon: I object to question as incompetent and immaterial to prove either authority by the driver to hire the boy or the hiring of the boy in any other manner.

(Question allowed. Exception.)

20

Q. What happened between you and that driver this night on which this boy Kowalski was killed?

A. This night I was selling papers, and Kowalski and Snyder was going to the ferry house to meet the Sheffield Farm truck to help in the work.

Q. This man's truck? A. Yes. He was the driver. It was the company's truck.

Q. You did not help on any other truck? A. No, sir. Only that one.

30

Q. You did not go to the truck this night. You were selling papers? A. Yes.

Q. How long had you been working for that driver? A. About a month.

Mr. Gannon: If the Court please, unless Senator Simpson objects, I want to reserve a general exception to this whole line of testimony as I did with the witness Williams.

40

(All this testimony subject to said exception.)

John Policki. Called by Plaintiff. Direct.

Q. How did you come to get the job? A. I went down to the truck and asked to work.

Q. Whom did you ask? A. I did not ask anybody for the job.

Q. How did you get the job? A. Mr. Williams told me to go down and told me to go with him and help. 10

Q. Where did you go with Williams? A. Down to the truck.

Q. Where was it at the time? A. By the milk car.

Q. In the Pennsylvania Railroad yard? A. Yes.

Q. How long was that before the boy was killed? A. About a month.

Q. Having gone down with Williams and got down there, what happened? A. I went down there afterwards with Williams, and this driver said, All right, after Williams told him that the other boy would not come any more. 20

Q. Then what happened? A. I started to put boxes in the car with empty bottles.

Q. Anything else? A. And sometimes I rolled cans.

Q. And you got what for that? A. A bottle of milk, except one night he would not give me any, and then I quit. 30

Q. How long was that before this boy was killed?

(Objected to.)

Q. Was Kowalski working there while you worked there? A. Yes.

Q. Were you there first? A. I was hired and was there about three weeks when he came on.

Q. Were you there when he was put to work? A. Yes. 40

John Policki. Called by Plaintiff. Direct.

Q. What happened when the driver put him to work

Mr. Gannon: Objected to on the same grounds as previously stated.

(Allowed. Exception.)

10

A. He was standing on the side of the truck and Mr. Williams did not appear that day, he came late, and the boy was standing on the side of the truck and Williams, and Williams did not come.

Q. Then what happened? A. I said to the driver do you want him to help you, and he said, All right, I'll take him.

Q. What did the driver tell Kowalski to do? A. To walk to the car.

20

Q. What was he to do at the car? A. Work there.

Q. You took the boy there because you knew Williams was not coming? A. No. I was going down towards the ferry and Kowacki asked where I was going. I did not know Williams was not coming to work.

Q. What did you tell the driver? A. I told him I did not think the other fellow would be down there, and I asked if he wanted Kowacki to help him, and he said, All right.

30

Q. What did Kowacki do then? A. Rolled boxes; and I did also.

Q. Did you roll any milk cans? A. We rolled milk cans out of the car.

Q. Where did you roll them? A. I rolled them about one quarter off the car, and then he rolled it to the opening of the car, and then the man would take it.

40

John Polieki. Called by Plaintiff. Cross.

Q. How long was Kowacki doing that before he was killed? A. About a week or week and a half.

Q. Where did he meet the truck to go on the job? A. At the ferry.

Q. What was the first you knew he was killed?

A. Somebody came to me at the ferry gate and I went over and saw Kowacki lying down. 10

Q. Was he hurt? A. Yes.

Q. Did they take him away? A. Yes, by the ambulance.

Q. Did you see the driver come out with Williams after the boy was hurt? A. I went after the driver. The gateman was going to go down and tell him, and I went down and got to the driver and told him.

Q. Whom did you see there? A. I found the driver and another man taking a rope off the truck. 20

Q. What did you see when you got to the truck?

A. When I got to the truck I saw this driver and Mr. Williams was taking a rope off the truck, and I told them he had run over a boy; and then he went down and the ambulance took the boy away.

Cross Examination by Mr. Gannon:

Q. Did you talk to anybody about your testimony today? A. Yes. 30

Q. Who? A. The lawyer's helper. He was the man who gave me a subpoena.

Q. What did he say to you?

(Objected to.)

Q. What conversation did you have with the man? A. He asked me questions and I told him.

Q. When did you first see this man? A. The night he came. I was playing baseball and Richard Williams told me some man wanted to see me. 40

John Policki. Called by Plaintiff. Cross.

Q. How long ago was that? A. I don't know.

Q. How long after Michael Kowacki got killed?

A. It was only about a week or two.

Q. About a week after? A. No about two weeks ago.

10 Q. Did you talk to anyone else besides this man?

A. No, sir.

Q. Do you know George McGrath? A. No, sir.

Q. Were you not taken to Judge McCarthy's office to make a statement in this case?

(Objected to as incompetent.)

20 Q. Did you not tell a different story to Judge McCarthy than you are telling here today? A. No, sir.

Q. Did you not tell him that you have never worked for the Sheffield Farms— A. No, sir.

Q. But that the boys used to jump on and off the trucks? A. No, sir.

Q. And that you were with the boys? A. No, sir.

Q. And Kowalski also? A. No, sir.

Q. Never told him that? A. No, sir.

30 Q. And you were chased? A. No, sir.

Q. You have not talked with anybody else in this case except the lawyer's assistant and him? A. No, sir.

Q. And that is only two weeks ago? A. Yes.

Q. Mr. Suavet, stand up. Did you ever see him? A. No.

Q. Did you ever have any conversation with him? A. No, sir.

40 Q. Did he ever tell you to help this chauffeur driver with this milk? A. No, sir.

Q. On the truck or on the cars? A. No, sir.

John Policki. Called by Plaintiff. Cross.

Q. Or anywhere? A. No.

Q. You did not see this accident yourself then? You heard about it after it happened? A. Yes.

Q. You did not see it yourself? A. No, sir.

Q. And you only know what somebody else told you? A. I saw him after he was hurt. 10

Q. You did not see him get hurt? A. I did not see the accident, but I was told my friend was run over.

Q. You did not see him run over? A. No.

Q. You did not see him on the truck at the time the accident happened? A. No, sir.

Q. All you got for your work, you say, was a bottle of milk each night? A. Yes.

Q. And sometimes not even that? A. No, sir; 20 and then I quit.

Q. You did not do any other work except sell papers? A. I don't sell them any more now either.

Q. That is all the work you ever did? A. Yes, except on that truck.

Q. Richard Williams was the one took you to work for the Sheffield Farms? A. Yes.

Q. Were you the person who got Michael to go to work for the Sheffield Farms? A. Yes.

Q. I understand you told the driver that Williams had quit, and you got Michael the job? A. I did not say that. 30

Q. How did he come to get the job? A. I was going there and Michael asked me where I was going, and I told him to help the driver, and he asked if he could go with me, and I said all right, and he came along with me.

Q. And you started him to work with the chauffeur? A. Richard Williams did not appear that day on time, and I was waiting a while for him, and then I asked the driver if he wanted this boy 40

John Policki. Called by Plaintiff. Redirect.

John Policki. Called by Plaintiff. Recross.

John Dolan. Called by Plaintiff. Direct.

to work for him, as Williams was not there, and the driver said all right.

10 Q. But you were the one that brought the boy to the driver?

(Objected to.)

Redirect by Mr. Simpson:

Q. Were you and Kowacki and Williams the only boys worked there? A. No, sir. Harry Yujack also worked there.

20 Q. Are you working? A. No, sir.

Q. Do you go to school? A. Yes, sir.

Recross by Mr. Gannon:

Q. You were a good friend of Michael's? A. Yes, sir.

Q. How long did you know him? A. I don't know how long I did know him.

Q. Did you pal around together? A. Once in a while—most of the time we did.

30

JOHN DOLAN, called by the plaintiff and sworn, testified as follows:

Direct Examination by Mr. Simpson:

Q. You are an officer of the Jersey City police department? A. Yes, sir.

40 Q. Where was your beat on the 17th of October at the time of this accident? A. Reserve duty, First Precinct.

John Dolan. Called by Plaintiff. Cross.

Q. What was your first knowledge of it? A. An ambulance call to go to Exchange Place for an accident, and I went there and I saw the boy lying on the roadway just inside of the ferry entrance.

Q. About how far in? A. Thirty feet. I seen the ambulance coming down Montgomery Street, and a man in the administration office had raised the boy and put him on a stretcher, and they then took him to the hospital. 10

Q. Where was the boy injured? A. The bone was open from the knee up, the skin was all broke on his leg up to the crotch and almost to the waist line, and on the back the same way, and on the side was laid open.

Q. Was he in pain? A. Yes, in great pain. 20

Q. What became of him? A. Taken to the hospital.

Q. Where was the driver when you saw him? A. Standing on the pathway.

Q. You did not see him on the milk wagon? A. No. He was standing near the ferry when I got there.

Q. Did you examine the truck? A. Yes.

Q. What was the condition? A. The brakes were in good condition. 30

Q. There was nothing wrong about the car? A. No, sir.

Q. It was in good condition? A. Yes.

Q. There was nothing broken on it that you saw? A. No, sir.

Cross Examination by Mr. Gannon:

Q. You don't know that it was a Sheffield Farm truck that run over the boy? A. I did not see the accident. 40

Sauer Gelowaski. Called by Plaintiff. Direct.

Q. So that all you know about it is what somebody else told you? A. That's all.

Q. And you don't know that this man was the driver of the truck at the time? A. He told me he was the driver of that truck.

10 Q. Have you been on duty around the Pennsylvania Railroad Station? A. No, sir.

Q. Prior to the accident? A. Never any length of time.

Q. You never had occasion to go there and chase boys away from there? A. No, sir.

Q. When this boy was lying there was he quiet or crying? A. Quiet.

20 Q. Was he conscious or unconscious? A. He was conscious.

SAUER GELOWASKI, called by the plaintiff and sworn, testified as follows:

Direct Examination by Mr. Simpson:

Q. What is your name? A. Sauer Gelowaski.

30 Q. You are the father of Michael Gelowaski? A. Yes.

Q. This boy who was killed in this accident? A. Yes.

Q. What is your age? A. Thirty-nine years.

Q. How long have you been in Jersey City? A. Sixteen years.

Q. Where do you work? A. O'Neill's lumber yard.

40 Q. How old was the boy Michael at the time he was killed by this truck? A. Thirteen years and two months and a half when he was killed.

John Burowitz. Called by Plaintiff. Direct.

Q. Where did he die? A. Yes. He was dead the same night he was taken to the hospital from the accident place to the hospital.

Q. Did he work? A. He was going to Number public school.

Q. Did he bring home a bottle of milk before he was killed? A. Yes. 10

Q. How long before he was killed? A. About two weeks before that.

Q. Bring one every night? A. I couldn't say exactly every night, but many nights.

Q. He brought the bottle of milk to his mother? A. No, to the mother-in-law. His mother is dead about twelve years ago.

Q. Did he work? A. No, only this night. He done that about two weeks. 20

Mr. Simpson: Mr. Gannon, do you admit the driver was in the employ of the defendant at the time the boy was killed by the defendant's truck?

Mr. Gannon: I think I ought not to make that admission, because there is also the question of authority involved on the part of the driver. 30

JOHN BUROWITZ, called by the plaintiff and sworn, testified as follows:

Direct Examination by Mr. Simpson:

Q. On the 17th of October were you employed by the Sheffield Farms Company? A. Yes. 40

Q. You drove a truck for that company? A. Yes.

Q. Did you have a Mack truck to drive the day of the accident? A. Yes.

*John Burowitz. Called by Plaintiff. Cross.
Motion for Non-Suit.*

Q. Did you go through the Pennsylvania Ferry before that time that day? A. Yes.

Q. Did you see this policeman after the accident? A. Yes.

10 Q. Did you tell the policeman that your truck run over the boy? A. I said that they blamed me for it.

Q. Who blamed you for it? A. The gateman of the Pennsylvania Railroad.

Q. McNamara? A. Yes.

Cross Examination by Mr. Gannon:

20 Q. You don't know whether your truck run over the boy or not? A. No.

Plaintiff submits Letters of Administration.
Received and marked P-1.

Plaintiff rests.

30 Mr. Gannon: I move for a non-suit because there is no proof that this was the defendant's truck, or that the driver had authority to employ the boy, or to employ him by authority of the defendant; and that there was no negligence on the part of the driver.

The Court: Where is the negligence, Mr. Simpson?

Mr. Simpson: Williams said to the driver that the boy was getting on, and he got on.

The Court: That is not the evidence? There is no evidence that the driver even heard Williams talk to him when he said, Here comes a boy will help you.

40 Mr. Simpson: The boy got on the truck, and after being warned by Williams that the boy

Motion for Non-Suit.

was there he kept on at the same rate of speed and paid no attention.

Your Honor is apparently trying to decide negligence as a matter of law: But that is a matter of inference from fact. This driver was in the habit of hiring this boy; and the boy actually got on the truck and was standing there, and the driver should have decreased his speed at that time. 10

The stenographer, on request, reads from the testimony of Williams, viz.:

"Q. Where was he last standing when you saw him last? A. Standing on the running board, and when I turned around again he was gone." 20

The Court: I did not have that in my notes. Do you want to say anything more, Mr. Gannon?

Mr. Gannon: I move for a non-suit on the further ground:

1. No ownership shown on the truck;
2. That it appears affirmatively by the plaintiff's case there was contributory negligence by the boy in jumping on the truck moving at a fast rate of speed; 30
3. No evidence in the case of authority of the driver of the truck to hire the boy or of his agency to hire boys, or allow them on the truck, and therefore the boy was a mere trespasser;
4. On the further ground that if the boy was in the employ of the defendant by our assent to hiring by the driver, the cause of action is under the Employers' Liability Law and not under this Death Act; 40

Charles Suavet. Called by Defendant. Direct.

5. That it appears affirmatively that the negligence that caused the death of the boy (if any) was that of a co-servant, and there is no evidence to show that the master was negligent in hiring proper workmen;

10

6. On the further ground that there is no damages shown;

7. On the further ground that the boy was a mere licensee and therefore the only duty owed him was to refrain from wilful or wanton acts in regard to him.

The Court: Motion denied.

Mr. Gannon: Exception.

20

The Court: Gentlemen of the jury, before you proceed to consider this case the Court will advise you that you have nothing to do with this discussion in settling the state of facts. And the Court has nothing to do with the decision of the facts. You are the sole judges of those. And in the consideration of the case you will eliminate this discussion from your recollection.

30

CHARLES SUAVET, called by the defendant and sworn, testified as follows:

Direct Examination by Mr. Gannon:

Q. What is your business? A. Employed by the Sheffield Farms Company as branch superintendent.

40

Q. What branch? A. Jersey City, No. 1 Ocean Avenue.

Charles Suavet. Called by Defendant. Direct.

Q. Is that the stable or headquarters from which the truck driven by John Burowick is operated?

A. Yes.

Q. Was he employed by you? A. Not originally. He was transferred to me by our headquarters.

Q. He was under your supervision and control after that and at the time of this accident? A. Yes. 10

Q. As Superintendent of that branch was it among your duties to hire and employ men to work for the company? A. Yes.

Q. Is it customary that all men employed by the company or working for them must be employed by you? A. Yes.

Q. Did you employ the decedent Michael Glowacki at any time to work on or about Sheffield Farms Wagons? A. No, sir. 20

Q. Did you ever know him? A. No, sir.

Q. Have the automobile men or drivers of the Sheffield Farms wagons instructions regarding the employees' instructions? A. Yes. There are notices and also there is a book.

Q. What are the instructions? A. There are notices exposed in the building prohibiting the drivers allowing the riding of boys on wagons or helping. 30

Q. Where are those notices posted? A. In my office.

Q. Is this a notice of that kind posted in your office or building No. 1 Ocean Avenue (shown)? A. Yes.

Q. Where was it posted? A. Next to the clock.

Q. How long? A. For years.

Q. Do you know whether the contents of the notice was communicated to the men? A. Yes, sir. 40

Q. How do you know? A. By the manager of the men who gives them instructions to that effect

Charles Suavet. Called by Defendant. Direct.

and also a copy of this notice and gives them a book of instructions.

(Notice read in evidence. Marked D-1.)

10 Q. Is this a copy of the drivers' book that you mentioned where this rule is set out? A. Yes. (Shown.)

Q. And this is given to all drivers? A. Yes; to all employees.

(Exhibit D-2, Rule 9, called to the attention of the jury and read to them.)

20 Q. There has been testimony that the Glowacki boy and other boys were employed by this driver Glowacki in loading and unloading milk. Was that brought to your attention on or prior to this accident? A. No, sir.

Q. Were you ever informed of such a custom by your drivers? A. No, sir.

Q. And you had no information as to Michael Glowacki in particular in regard to such a practice at any time before this accident? A. No, sir.

30 Q. Is there a helper allowed to each truck together with the driver? A. Yes, there is.

Q. Do you know whether there was a helper with John Furrevig on this day of the accident? A. Yes, sir.

Q. Who assisted him? A. Samuel Reed.

Q. Do you know he went out with the truck that day? A. I do know that he went out with it.

40 Q. Where are the drivers and helpers attached to the Ocean Avenue Branch paid? A. At the office there.

Q. Are there any employees of that Jersey City branch paid at any other place? A. No, sir.

Charles Suavet. Called by Defendant. Cross.

Q. Who pays them? A. The cashier.

Q. Under your supervision? A. Yes.

Q. Are you familiar with all the employees paid by the defendant at that branch? A. I am.

Q. Was Michael Glowacki ever paid there for services performed for the company at that branch or any other branch? A. No, sir. 10

Q. As the drivers come back from the yards do you check up the milk? A. Yes.

Q. At the Jersey City branch at the yard the truck is loaded with empty milk bottles? A. Yes.

Q. What does it return with? A. Full bottles of milk.

Q. Are they checked up? A. Yes.

Q. If any are missing who are they charged to? A. To the driver as a rule. 20

Q. Have you checked up whether there was a shortage on this driver's deliveries?

(Objected to.)

A. None were known to me.

Q. Would you know whether there was any such shortage? A. Yes, sir.

Cross Examination by Mr. Simpson: 30

Q. What kind of truck did Burowick have? A. Mack truck, seven and a half ton.

Q. Who was in charge of it? A. The chaffeur.

Q. Was there any person in charge of the milk trucks at the time of the accident at the cars? A. No, sir; not of the Sheffield Farms.

Q. Who would be in charge? A. The milk agent at the railroad, I presume. 40

Charles Suavet. Called by Defendant. Cross.

Q. You had nobody there to see how the loading was done? A. No, sir.

Q. You left that entirely in the charge of the driver? A. Yes.

10 Q. He was the only person representing the Sheffield Farms Company at the yard? A. Yes.

Q. After this accident did you investigate to ascertain whether the boys had been helping? A. No.

Q. Did the Sheffield Farms Company make such an investigation? A. Yes, sir.

Q. How do you know? A. Because there was a claim made from my department.

Q. Burowick has not been dismissed? A. No, sir.

20 Q. And your claim department made an investigation? A. Yes.

Q. Is the man who made the investigation here? A. Yes.

Q. Who checked up on the drivers' loads? A. Assistant Superintendent Mack.

Q. And if a driver is short how much does he have to pay? A. He does not always pay, but he is given a warning, and if it happens seriously he would be discharged in my department.

30 Q. What would you call seriously? A. If it happened several nights a week.

Q. Who checked up? A. Mr. Abels.

Q. How does he check? A. It shows the number of cases.

Q. He brings full cases from the railroad? A. Yes.

40 Q. And the only check you have is what he brings? A. We count the quantity he has on the truck and we have the railroad freight bills as a check.

Charles Suavet. Called by Defendant. Cross.

Q. The freight bills would check on his loads?
A. Yes.

Q. Have you produced those bills here? A. No, sir.

Q. For the four months previous to the accident? A. No, sir.

10

Q. None at all? A. No, sir; I could have had them here if I knew they were to be called for.

Q. How many bottle would one of these trucks carry? A. Three thousand.

Q. Are there any breakages? A. Sometimes.

Q. Is that charged to the driver? A. It is checked up with the freight bill, and if the breakage is marked on the freight bill he does not have to make up that; the railroad stands for that.

20

Q. About how much freight breaking is there on a truck a night? A. It depends. Say half a dozen bottles a night.

Q. Mr. Gannon asked you to stand up and he asked these boys if they ever saw you. Do you remember that? A. Yes.

Q. Had you seen those boys? A. No, sir.

Q. You never had anything to do with these boys? A. No, sir.

Q. You never questioned them? A. No, sir.

30

Mr. Gannon: I only asked that to show that he did not hire them.

Mr. Simpson: If that was the only object I am through with this witness.

40

James McManus. Called by Defendant. Direct.

JAMES McMANUS, called by the defendant and sworn, testified as follows:

Direct Examination by Mr. Gannon:

- 10 Q. What is your name? A. James McManus.
 Q. Where do you live? A. Eight Bright Street, Jersey City.
 Q. By whom are you employed? A. By the Pennsylvania Railroad Company.
 Q. You are under subpoena by Senator Simpson for the plaintiff? A. Yes, sir.
 Q. On October 17th, 1924, were you employed by the Pennsylvania Railroad Company? A. Yes.
 20 Q. You were working in their employ at that time, on that day? A. Yes, sir.
 Q. In what capacity? A. My duty was to stand outside and direct the passengers, standing outside of the ferry house.
 Q. About where did you stand there? A. Where the entrance gates are.
 Q. Do you remember the date of this accident? A. Yes, remember the accident very well.
 Q. Were there many wagons around at the time? A. There were quite a few there about that time.
 30 Q. Did you see the accident? A. Yes, sir.
 Q. And you say that you remember it well? A. Yes, sir.
 Q. Tell how it happened? A. It was about ten minutes after five at night, see, and it was quite busy there at that time, see, and there was quite a crowd standing at the ferry house and it was my duty to get all the trucks around from the gutter, there, see—
 40 Q. Did you see this boy before the accident? A. I see the truck before I see the boy there—see?

Jams McManus. Called by Defendant. Direct.

Q. Where was the truck then? A. It was about —just about coming in the ferry entrance.

Q. And the truck was coming along? A. Yes, coming towards the entrance to the ferry to come in; it was going to come in.

Q. Where was the boy then? A. I was standing about forty feet from the ferry and I noticed the boy coming out of the car house and run after the truck, and the truck was outside of the ferry house still, and I seen the boy grab hold of the back of the truck and just got hold, and then he grabbed hold of the side, and he couldn't get up very well, and as he hung on the side he let go of the back of the truck, and got his hand on along the side, and got both feet on the running board, and traveled about three feet, and he had just got on when he fell. 10 20

Q. How far was this truck, by the front wheels, from the gate of the ferry house? A. About from me to that hat rack.

Q. The trucks average about fifteen feet? A. Yes, sir; about that I guess.

Q. How far from the back of the truck was the boy hanging on from the side when he was hanging there and fell off from the truck? A. I don't know. 30

Q. Nearer which end? A. He was nearer to the front of the truck.

Q. Did that running board run along the side of the truck? A. Yes.

Q. To the rear of the truck? A. No. He was on that little running board that you step on to get on the truck to the driver's seat.

Q. He had run from the back of the truck where he got on, and run forward along the side of the 40

James McManus. Called by Defendant. Direct.

truck to the little run board? A. Yes. He kept his hand sliding along until he fell off, see?

Q. Which side of the truck was he on when he fell off? A. The right hand side.

10 Q. You mean when you say the right hand side the side away from the driver? A. Yes, sir.

Q. Did you ever see the boy who was killed before that day? A. Yes.

Q. When and where? A. I seen him around there at night time.

Q. What was he doing? A. I couldn't say whether it was him or not, but there was some boy sold papers.

20 Q. Did you ever have occasion to chase this boy and other boys from the ferry house that were jumping on trucks? A. Yes, sir.

Q. How many times did you see him do that?

(Objected to.)

Q. Did you ever have to call a police officer to keep this boy from jumping on the trucks?

(Objected to.)

30 Q. Did you ever see this boy on this truck before this time? A. No, sir.

Q. Did you ever see him on any Sheffield Farm truck? A. No, sir, except that once.

Q. Did you ever see any boys driven on Sheffield Farm trucks? A. Yes.

Q. When? A. That very night I seen a boy on a Sheffield truck.

40 Q. Who was on a truck of the company that night? A. The first boy that testified here today.

James McManus. Called by Defendant. Cross

Q. Did you ever see the boy that was killed on any of those trucks at any time except on this one the night of the accident? A. No, sir, never saw him on any other truck.

Q. When this boy was run over did he cry or scream? A. I was quite a ways from him and when I reached there he told me, three times, "Sheffield." 10

Q. Did you hear him cry or scream when he was run over? A. No, sir.

Q. Or when he fell? A. No, sir.

Q. Or just before that? A. No, sir.

Q. What were your duties as gateman outside at this gate entrance of the Pennsylvania Railroad?

A. There was a gate at the front and also on the side and they had somebody there to tell people which way to go. 20

Q. Was it your duty to keep boys from being around the entrance in the way of the trucks? A. I was told I might do that, but it was not really my duty.

Cross Examination by Mr. Simpson:

Q. You were under subpoena by me? A. Yes. 30

Q. Were you under subpoena of the defendant? A. Yes.

Q. I spoke to you this morning in the hall and asked you about the facts in this case, and you were reluctant to say anything until an officer told you to go ahead and then you said I've told this story so often that I will be twisted up." Is that right? A. Yes.

Q. You did say that to me? A. Yes, sir. Mr. Gannon and a lot of people asked me before about it. 40

James McManus. Called by Defendant. Cross.

Q. Have you been in Gannon's office before? A. No.

Q. You mean a lot of people have asked about it and you got sick of it? A. Yes.

10 Q. You saw the little boy on the rear of the truck: is that right? A. Yes.

Q. And he couldn't maintain his position there and he got off? A. Yes.

Q. And then he ran alongside to the step just behind the front wheel? A. Yes.

Q. And he got on that step? A. Yes.

Q. And the truck went on three feet and he dropped off? A. Yes.

20 Q. Was the truck going fast? A. Well, I don't know.

Q. Did you not tell me outside it was going slow? A. He was going about as fast as the little boy could run.

Q. Did he decrease his speed when the boy fell off? A. No.

Q. Did he before the boy fell? A. No, he did not. When he went inside he had to duck in and turn out again, and then turn in again, and it was then in making that turn the boy came off.

30 Q. In other words, when the direction of the truck changed the boy came off? A. Yes.

Q. Was that turn made to bring him in the yard? A. There is about thirty to fifty feet of a straight drive, and then he had to turn to get inside.

Q. When he got to a certain point, in order to get into the yard he had to turn to the left? A. Yes.

40 Q. And then when he made that turn the boy came off? A. Yes.

James McManus. Called by Defendant. Re-direct.

Q. How long would you say the boy had been on their with safety? A. Riding about ten feet.

Q. How long were you employed there? A. From May to October.

Q. Did you see Sheffield Farms trucks there? A. Yes, very often. (10

Q. Did you ever see boys riding with the drivers? A. Yes.

Q. Where were the boys riding? A. On the seat with the drivers.

Q. (By Juror) When you seen this boy hanging on the truck what was the name of the truck? A. Sheffield Farms Company.

Q. (By Mr. Simpson) When the boy got on he was not hanging on the truck? A. No, sir. 20

Q. (By same) He was standing on it? A. Yes, sir.

Redirect Examination by Mr. Gannon:

Q. Did he have hold of anything when he was on the truck? A. Yes. There was something to hold on.

Q. Was he holding on to anything? A. Yes, sir, and his hands were up in the air in the way as if he had hold of something. (30

Q. Was there any handle that he could hold on to secure himself securely?

(Excluded.)

Q. Was there any handle on the car to hold on? A. There was a place to grab, but I don't think he had hold of that. His hands were up when he got hold of the truck when I was outside, and then I went in. (40

James McManus. Called by Defendant. Recross.

James McManus. Called by Defendant. Redirect.

Recross Examination by Mr. Simpson:

Q. Did you lose sight of him? A. No, sir.

10 Q. You mean you think he had hold of something? A. Yes. He had to have hold of something.

Q. When you say his hands were up in the air you mean he had hold of something? A. Yes.

Q. Were you there when the driver came out after the boy was hurt? A. I went out and got him.

Q. Was this Williams boy with him? A. Yes; they were together.

20 Q. Where did you get the driver then? A. He was right near his truck when I went out. The two were standing there still at the truck.

Q. Do you know what they were doing? A. No, sir. I don't know that I noticed that.

Q. Was there a helper on the truck? A. No, sir; only the boy and the driver.

Q. What were they doing there? A. Standing there.

30 Redirect Examination by Mr. Gannon:

Q. Do the Sheffield Farms trucks go in there during all night? A. Well, quite a number go in and out.

40

Samuel Reed. Called by Defendant. Direct.

SAMUEL REED, called by the defendant and sworn, testified as follows:

Direct Examination by Mr. Gannon:

Q. By whom are you employed? A. Sheffield Farms. 10

Q. How long have you been employed by them? A. Eleven months.

Q. Were you employed by them October 17th, 1924? A. Yes, sir.

Q. Do you remember the date of this accident? A. Yes.

Q. In what capacity were you employed? A. I was helper at that time.

Q. Were you on this truck at the time of the accident? A. No. 20

Q. Did you leave the truck? A. Yes.

Q. Where did you get off the truck? A. Seventy yards from where the accident occurred.

Q. Where is that? The entrance to the freight office? A. Yes, sir.

Q. What did you get off for? A. To get the numbers of the cars the milk was on that was to be got. 30

Q. At the time you got off the truck was there a boy riding on the front seat? A. No.

Q. At any time that night was there any boy riding with the driver or on the truck? A. No, sir.

Q. Was it your custom to go in the freight house and get the numbers? A. Sure; every evening.

Q. After you got those numbers where did you go? A. To the Pennsylvania building.

Q. You got out of the freight office? A. Yes. 40

Q. And then you met your driver again? A. Yes.

Samuel Reed. Called by Defendant. Cross.

Q. Then what would he do? A. He would put out the empty bottles.

Q. And then he would load with the full bottles? A. Yes.

10 Q. Was this milk in bottles or cans? A. The first load that would be on top would be case goods.

Q. you made two trips each night? A. Yes.

Q. On any of these nights when you were inside of the freight car with the driver were any boys helping you? A. No, sir.

Q. Did you or the driver of this truck to your knowledge either on this night of the accident or any other night, hire boys to transfer the cans or cases from the cars to the truck? A. No, sir.

20 Q. Did you, or the driver to your knowledge, ever give any bottles of milk as compensation for the boys helping to load or unload the truck? A. Never gave any bottles of milk to anyone.

Q. Can you tell whether bottles of milk were stolen from the Sheffield Farms truck from time to time?

(Objected to. Objection sustained. Exception.)

30

Cross Examination by Mr. Simpson:

Q. You never saw the Williams boy before you saw him in court? A. No, sir.

Q. Don't know what he was doing down there when the policeman found him at the truck? A. No, sir.

Q. And there was nobody on the truck when he got off? A. No, sir.

40

Q. You know you could be discharged by the Sheffield Farms Company if anybody was on the

Samuel Reed. Called by Defendant. Redirect.

truck with your permission, you would be discharged, isn't that so? A. I guess so.

Q. You know that is so, don't you? A. Yes, sir.

Q. You would be discharged if you confessed?

A. Yes.

Q. You say you never saw this boy before to-day? A. No, sir; I never did. 10

Q. And you don't know what he was doing on the milk car near the driver of that truck? A. I went down with the policeman—

Q. You don't know what this boy was doing with the driver of the truck at the milk car? A. No, sir.

Redirect Examination by Mr. Gannon:

Q. You know he was not an employee— 20

(Objected to.)

Q. This driver's seat, how wide is that, on the truck? A. Two and a half feet, I guess.

Q. How many can sit on that seat? A. Two can sit comfortably.

Q. Is there room for three or four to sit on that seat? A. No, there is not. 30

Q. How wide is this running board to get on the front seat? A. About 18 inches long front to rear.

Q. And about how wide is it? A. Perhaps five inches.

Q. So that it is just large enough as a step to get on to the driver's seat? A. Yes.

Q. It don't run along the side of the car to the rear of the truck outside? A. No, sir.

Q. It is not a long run board? A. No, sir; just a short step. 40

Q. Is it a fact that you did employ or hire boys on this wagon? A. No, sir.

Samuel Reed. Called by Defendant. Recross.

John Furrevig. Recalled. Direct.

Q. If it was a fact would that prevent you from violating your oath to tell the truth today?

(Objected to. Question allowed.)

10

A. No, sir.

Recross Examination by Mr. Simpson:

Q. You can't conceive any circumstances under which you would answer that question yes, can you? A. No, sir.

Recess.

20

AFTERNOON SESSION, 2 P. M.

JOHN FURREVIG, recalled.

Direct Examination by Mr. Gannon:

Q. Do I understand that you were familiar with the rules and regulations of the company— A. Yes.

30

Q. Just wait until I have finished. —and that you knew that this notice, Exhibit D-1, was posted in the depot of the company at Jersey City, prohibiting you from allowing anybody to ride on a truck, or hiring anybody to help you? A. Yes.

Q. You were familiar with those rules and regulations? A. Yes.

40

Q. Both on the day the accident occurred and prior to that day; you knew about that the day of the accident? A. Yes.

John Furrevig. Recalled. Direct.

Q. You also knew about that for some time prior to the accident? A. Yes.

By Mr. Simpson:

Q. How long had you been working for the Sheffield Farms Company? A. Pretty near four years. 10

Q. How long had you been going down to this milk yard? A. For a month and a half.

Q. Had you driven the same kind of truck before the accident? A. Been driving for three years.

Q. You knew how to manage the truck all right? A. Yes.

Q. Could you stop it with the brakes—the brakes were all right, weren't they? A. Yes. 20

Q. This Williams boy, was he riding on the truck the day of the accident? A. Nobody was riding with me.

Q. And the officer did not find him down there with you when he went down and told you that the boy had been run over, did he? A. No, sir.

Mr. Gannon: I do not understand the officer testified to that.

Mr. Simpson: He testified he went down and found the Williams boy and this man at the truck, but he was so excited he would not know what he was doing. 30

Q. Is it a fact the officer found you and this Williams boy down there?

The Court: I think the officer did testify he found them there together. I will allow the question. 40

Mr. Simpson: Stand up, Officer McNamara.

John Furrevig. Recalled. Direct.

Q. This man came down and told you the boy had been run over, didn't he? A. Yes.

Q. And he found you down at the milk train? A. Yes.

10 Q. And he did not find the Williams boy with you? A. No, sir.

Q. The Williams boy was not there? A. No, sir.

Q. You never saw the Williams boy until you saw him in court today, did you? A. No, sir.

Q. You understand you are under oath, don't you? A. Yes.

Q. And you say the policeman did not come down and find this Williams boy with you? A. No, sir.

20 Q. And you never saw this Williams boy until you saw him in court today, did you? A. No, sir.

Q. Never saw him on a truck? A. No.

Q. Never had him helping you? A. No.

Q. Never gave him a bottle of milk? A. No.

Q. Never saw the boy that was run over before you found him lying in the roadway? A. No.

Q. Never saw the other little boy who says he helped you and you gave him bottles of milk? A. No.

30 Q. Never saw McNamara, this policeman, did you, who brought you out and told you the boy had been run over? A. I did not see him before he came down to the ferry.

Q. You did not see the policeman, you mean? A. Before he come down to the ferry?

Q. Before who came down to the ferry? A. The policeman.

40 Q. I am not talking about Dolan; I am talking about the Pennsylvania Railroad man who says he went in and brought you out to where the boy had been run over. Did anybody bring you out? A. The gateman from the Pennsylvania ferry.

John Furrevig. Recalled. Direct.

The Court: This man that stood up?

Q. This man that stood up.

The Court: McManus, I think the name is.

Q. You know McManus, you had seen him going
in and out of that gate? A. Yes. 10

Q. You swear this Williams boy was never on
your truck and never near you, and you never saw
him until you saw him in court today? A. Yes.

Q. Is that so? A. Yes.

By Mr. Gannon:

Q. Did you see any boy jump on your truck the
day of the accident as you were driving into the
ferry slip? A. No. 20

Q. Did you hear anybody call to you and say
that there was a boy hanging on your truck? A.
No.

Q. As a matter of fact, did you know that you
had run over anybody until McManus came into
the freight yard and told you? A. No.

By Mr. Simpson:

Q. And I understand you to say that none of
these boys ever were with you and never helped
you down at this place, either this night or any
other night? A. No. 30

Q. Never saw them? A. I may have seen them.

Q. But not know them? A. No.

By Mr. Gannon:

Q. Did your helper, Mr. Reid, have any author-
ity or did he ever hire any boys to help you in the
freight yards? A. No. 40

Motion for Direction of Verdict.
Renewal of Motion for Non-Suit.

Q. You were in control of that truck? A. Yes.

Q. And Reid was under you? A. Yes.

Testimony closed.

10

Mr. Gannon: I move for a direction of a verdict in favor of the defendant on the ground that there is no evidence in the case that, assuming for the sake of argument, the driver had had boys or employed boys, or whatever you wish to call it, to help him in loading and unloading—there is no evidence in the case to show that he had authority, that all the evidence in the case, undisputed, is that he had no authority to hire or employ anybody to aid or assist him in his duties, and that if he did so, it was in direct violation of his orders, from his master, and therefore the defendant is not liable.

20

The Court: Motion denied.

Mr. Gannon: Exception.

Now, I renew my motion for a nonsuit on the same grounds as at the time of the conclusion of the plaintiff's case, and I move for a nonsuit on the further ground that there is no pecuniary damage, which is the only damage under the statute which can be awarded in this case—there is no evidence of any pecuniary damage in the case.

30

The Court: Motion denied.

Mr. Gannon: Exception.

The Court thereupon charged the jury as follows:

40

Charge.

The Court: Gentlemen of the Jury: This is a suit brought by Glowaski, administrator ad prosequendum of the estate of Michael Glowaski, deceased, against the Sheffield Farms Company, Incorporated, a corporation, in which the plaintiffs allege that Michael Glowaski was killed through the negligence of the servant of the defendant corporation. The main facts are denied by the defendants. They say as a separate defense that the plaintiff's intestate at the time of the alleged accident negligently, carelessly and unlawfully attempted to board this wagon while the same was in motion, and without notice to the driver or operator thereof, and without any knowledge on the part of the defendant's servants or agents of his intention to board said wagon; that while attempting to board said wagon plaintiff's intestate fell to the ground and was run over by one of the wheels of said wagon; that said plaintiff's intestate had no legal right, express or implied, to board the wagon of the defendant, and that in doing so plaintiff's intestate was guilty of trespass in entering upon the property of the defendant without its consent or invitation, express or implied, and that the defendant's liability was only for wilful and wanton negligence, and that the said defendant at the time of the happening of said alleged accident was not guilty of negligence. 10 20 30

They allege also that the deceased, Michael Glowaski, was guilty of contributory negligence.

Gentlemen of the jury, before charging you the law applicable to this case I want to reiterate to you what I said at the close of the plaintiff's case, that you are to pay no attention to the colloquy between counsel and the court in reference to the denial of the motion for non-suit. You are not to 40

Charge.

take anything the court might have said during the colloquy as being indicative of what the court thinks as to the facts in this case. Entirely disregard it. What the court thinks about the facts has nothing at all to do with your determination of the facts. No one else has anything to do with them. What counsel for the plaintiffs, what counsel for the defense say in their summations can have nothing to do with the facts. If they in summing up have recited some things to have been testified to which your recollection says is in conflict with what you remember the testimony to be, your recollection of the testimony is what is to govern and guide you in the determination of this case.

20 You are to determine the case purely by the evidence introduced. Let no feelings of sympathy or animus or anything else enter into your consideration. Decide the case as you swore you would decide it, according to the evidence produced, so help you God, and render a true and just verdict according to your conscience.

Also in passing I tell you to disregard what counsel for the plaintiff said about having secured a verdict for five thousand dollars in the case of a child who was killed. Eliminate that from your consideration.

30

This case is brought under what is known as the Death Act. Prior to the passage of this act, there could be no recovery on account of a death. The legislature, to correct that, passed an act in 1848, permitting a suit to be brought under the Death Act, and the act provides as follows:

40 "In every such action the jury may give such damages as shall be deemed fair and just with reference to the pecuniary injury resulting from

Charge.

such death to the wife and next of kin of such deceased person." The Court of Errors and Appeals, amplifying that rule, said that what the plaintiff is entitled to recover is a capital fund, so to speak, which shall represent the present value of all the pecuniary loss which will fall upon the widow and next of kin from the premature taking off of the intestate. The fund is to be ascertained by taking into account all of the probabilities. The intestate might have died in the court of nature shortly after the accident. 10

He might, had he lived, have suffered adversity. The wife, had he lived, might have died long before he did. Of course that would have no bearing on this case, with reference to the husband and wife, but it will give you a fair idea in estimating what is the fair and just compensation, if you come to that point, in determining what the life of a child of this age is in your estimation worth. Nothing is to be allowed for loss of society or wounded feelings or anything else which cannot be measured by money and satisfied by a pecuniary recompense. The damages are to be determined exclusively by reference to the pecuniary injury resulting to the widow and next of kin by his death. And the injury to be thus recovered for has been defined by this court to be the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation is therefore the sole measure of damages in such a case. If you come to the question of damages and you feel, after consideration of all of the evidence in the case, that the plaintiff is entitled to damage, then in estimating the damages you will follow the rule laid down by the Court of Errors 20 30 40

Charge.

and Appeals in the case just quoted from. Before you come to that, gentlemen, first you have to have the rules of law which are applicable. Merely because an accident happens it does not necessarily follow that damages must be given as a result of that accident. The accident must be due to the negligence of the defendant, and the plaintiff who is suing must be free from contributory negligence. The plaintiffs must establish by a preponderance of the evidence, that is by a greater weight of the evidence, that the death of this child was due to the negligence of the servant of the defendant Sheffield Farms Company, and that the plaintiff's intestate was free from contributory negligence, that is, that the child himself did nothing to contribute to that accident. If the child had contributed to the accident then he would be barred from any recovery.

Now, in defining the attitude and actions of that child, counsel for the defendant said in talking to you, what would a reasonably prudent person do under that set of circumstances? That is not the rule you are to use in determining the actions of the child in this case. This was a minor of thirteen years of age, and he was not required to use the same degree or kind of care which a mature person would use. The rule I think has been stated very succinctly in the case of Solomon against the Public Service Railway in which the Court says that the degree of care required of a child who has reached the age of discretion and is considered sui juris, will, as a matter of law, be no higher than such as is usually exercised by persons of similar age, judgment and experience. Whether that degree of caution has been exercised by a child in a given case is usually, if not always, a question for the jury. Therefore you will say to yourselves, did

Charge.

this boy in doing what he did do on this particular occasion use the same degree of care as a boy of his age would ordinarily use under the circumstances? You are to consider the facts carefully. First has the plaintiff established his case by the greater weight of the evidence? If he has, then he is entitled to a recovery, provided of course you find that there is no contributory negligence upon the part of the plaintiff. If the plaintiff has not established his case by the greater weight of the evidence, then of course he would be entitled to no recovery, and you would bring in a verdict of no cause of action. If the plaintiff has shown that the child was guilty of contributory negligence and that they were not in any way negligent or at fault, then, of course, you would bring in a verdict for the defendant. So there are three verdicts you may render: You may find no cause of action at all, a verdict for the plaintiff, or a verdict for the defendant.

If you come to the question of a verdict for the plaintiff, then in estimating the damages the rule I set down to you in reading the Death Act and in reading the opinion of the Court of Errors and Appeals would apply.

There has been a lot of controversy throughout this entire case as to the liability of the company—if you think this boy was actually hired by the driver—since the company instructed their drivers not to hire anybody and threatened them with loss of employment if they did so hire somebody else. The rule has been laid down in the same case I quoted before, they say there: “Where defendant’s servant”—this is on a trolley car, and the same rule will hold to be applicable here—“where defendant’s servant, a motorman, invited plaintiff,

Charge.

10 a child, to ride free on his car, it is not a valid defense that such conduct was not within the motorman's scope of employment or contrary to his instructions. While it may be reasonable to say, as a rule of law, that a grown person has no right to enter a car except as a passenger, and if he does so as a friend of the conductor, that such a situation creates no relationship between such person and the car company, it would be unreasonable to apply the same rule to a child under similar circumstances. It is the legal duty of every one dealing with a child to protect it against its own indiscretion."

20 Further: "Where there was testimony that the defendant's servant, a motorman, invited plaintiff to board his car and while he was doing so and before he reached a place of safety, the motorman accelerated the speed of the car or started it up in such a manner as to jerk plaintiff from the car—Held to be sufficient evidence for the jury to find that defendant was negligent."

30 You may consider the attitude of the witnesses who testified in this case. How did they impress you on the stand? Did they impress you as though they were telling the truth, or did they have any interest in the case which might tend to have them color the testimony they have given in this case? How did they impress you?

Counsel for the defendant has submitted to me a number of requests to charge. I have charged them substantially, and refuse to charge further on them.

40 Mr. Gannon: I would like to call attention to probably a slip, where in speaking of contributory negligence your Honor said, "If the *plaintiff* was not guilty of contributory negligence." I suppose you meant the plaintiff's intestate.

Charge.

The Court: The plaintiff's intestate, of course. Of course the jury understands that; that it is the dead child and not the man who is suing now. The action is brought by the father of this boy, who is deceased.

The jury retired.

10

Mr. Gannon: I except to your Honor's refusal to charge as requested, other than the manner in which you did charge.

The Court: All right.

Mr. Gannon: I want to except to that part of your Honor's charge which states that the rule laid down as to authority to hire in *Solomon v. The Public Service* is the rule applicable to this case. I want to except to that part of your Honor's charge which applies the rule set down in *Solomon v. The Public Service Railway Company*, as to the duty owed an invitee, because there is a great distinction between the principle involved in that case and in this.

20

And I want to expressly except to your Honor's refusal to charge as requested by me, and if they find the servant of the defendant disobeyed express orders, there could be no recovery against the defendant.

30

The Court: I did not say that.

Mr. Gannon: I except to your Honor's refusal to charge my request that if the jury finds that the negligence was that of a fellow servant, that they could not bring a verdict in for the plaintiff, unless they also find that the defendant *Sheffield Farms* was negligent.

40

Defendant's Requests to Charge.

1. Plaintiff cannot recover unless negligence on part of defendant is established by the greater weight of the evidence and the burden of proving such negligence is upon the plaintiff.

10 2. Negligence of defendant's servant must be attributable to defendant before plaintiff can recover, and if defendant's servant acted outside the scope of his duty defendant is not liable.

3. If plaintiff's intestate was guilty of contributory negligence the plaintiff cannot recover even if defendant's servant was guilty of negligence.

20 4. If the jury finds plaintiff's intestate was employed by defendant, then they must find defendant itself guilty of negligence before they can find against defendant.

5. If the jury finds that the negligence that caused the accident was that of a fellow servant then they cannot hold the defendant unless they also find negligence on the part of defendant itself.

30 6. Before the jury can find that the boy killed was in the employ of defendant they must find that defendant's servant had authority to hire him.

7. If the jury finds that the boy was not in the employ of defendant, then the only duty owed him was to refrain from wilful and wanton acts towards the boy.

40 8. If the jury finds that the employee of the defendant violated express orders, then the defendant is not liable to plaintiff.

9. The only damages that can be awarded are compensatory damages to father for money loss.

Grounds of Appeal.

(Filed July 2, 1925.)

NEW JERSEY SUPREME COURT.

SAWER GLOWACKI, Administrator
ad pros. of the Estate of
Michael Glowacki, deceased,

Plaintiff,

vs.

SHEFFIELD FARMS COMPANY, INC.,
a corporation,

Defendant.

On Appeal
Grounds of
Appeal.

10

To: SAWER GLOWACKI, Administrator ad pros.,
Plaintiff, and ALEXANDER SIMPSON, his
Attorney.

20

The Appellant states the following grounds of
appeal:

1. The Court erred in refusing to grant defend-
ant's motion for non-suit.

2. The Court erred in refusing to grant defend-
ant's motion for direction of a verdict in favor of
the defendant.

30

3. The Court erred in admitting in evidence
over objection of defendant's counsel, the ques-
tions and answers of the witness Richard Williams
for the purpose of proving that the decedent
Michael Glowacki was lawfully employed by, or an
invitee of, Sheffield Farms Company at the time
he was killed.

40

Grounds of Appeal.

4. The Court erred in admitting in evidence over objection of defendant's counsel, the questions and answers of the witness John Polici for the purpose of proving that the decedent Michael Glowacki was lawfully employed by, or an invitee of, Sheffield Farms Company at the time he was killed.

10

5. The Court erred in admitting answers to the following questions to the witness John Policki:

(a) Q. How long before the death of this boy had you been working for this driver?

(b) Q. How long had you been working for that driver?

20

(c) Q. That happened when the driver put him to work?

6. The Court erred in overruling the following question to the witness Samuel Reed:

Q. Can you tell whether bottles of milk were stolen from the Sheffield Farm's truck from time to time?

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7. The Court erred in charging the jury as follows:

(a) "Now, in defining the attitude and actions of that child, counsel for the defendant said, in talking to you, what would a reasonably prudent person do under that set of circumstances? That is not the rule you are to use in determining the actions of the child in this case. This was a minor over thirteen years of age and he was not required to take the same degree or kind of care which a mature person would use."

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Grounds of Appeal.

(b) "The rule, I think, has been stated very succinctly in the case of *Solomon vs. The Public Service Railway Co.* in which the Court said that the degree of care required of a child who has reached the age of discretion and is considered *sui juris* will, as a matter of law, be no higher than such as is usually exercised by persons of similar age, judgment and experience." 10

(c) "Therefore, you will say to yourselves, did this boy in doing what he did do on this particular occasion, use the same degree of care as a boy of his age would ordinarily use under the circumstances?" 20

(d) "First, has the plaintiff established his case by the greater weight of the evidence? If he has, then he is entitled to a recovery, provided, of course, you find that there is no contributory negligence on the part of the plaintiff."

(e) "If the plaintiff (defendant) has shown that the child was guilty of contributory negligence and that they were not in any way negligent or at fault, then, of course, you would bring in a verdict for the defendant." 30

(f) "There has been a lot of controversy throughout this entire case as to the liability of the company—if you think this boy was actually hired by the driver—since the company instructed their drivers not to hire any boy and threatened them with loss of employment if they did so hire somebody else. The rule has been laid down in the same case I quoted before, they say there: 'where defend- 40

Grounds of Appeal.

10 ant's servant'—this is on a trolley car and the same rule will hold to be applicable here—
 20 'where defendant's servant, a motorman, invited plaintiff, a child, to ride free on his car, it is not a valid defense that such conduct was not within the motorman's scope of employment, or contrary to his instructions. While it may be reasonable to say as a rule of law that a grown person has no right to enter a car except as a passenger, and if he does so as a friend of the conductor, that such a situation creates no relationship between such person and the car company, it would be unreasonable to apply the same rule to a child under similar circumstances. It is the legal duty of everyone dealing with the child to protect it against its own indiscretion.' ”

30 (g) “Further, ‘where there was testimony that the defendant's servant, a motorman, invited plaintiff to board his car and while he was doing so and before he reached a place of safety, the motorman accelerated the speed of the car, or started it up in such manner as to jerk plaintiff from the car—held to be sufficient evidence for a jury to find that the defendant was negligent.’ ”

8. The Court erred in refusing to charge the jury as requested by the defendant as follows:

40 (a) “2. Negligence of defendant's servant must be attributable to defendant before plaintiff can recover, and if defendant's servant acted outside the scope of his duty, the defendant is not liable.”

Grounds of Appeal.

(b) "4. If the jury finds plaintiff's intestate was employed by defendant, then they must find defendant itself guilty of negligence before they can find against the defendant."

(c) "5. That if the jury find that the negligence that caused the accident was that of a fellow servant, then they cannot hold the defendant unless they also find negligence on the part of the defendant itself." 10

(d) "6. Before the jury can find that the boy killed was in the employ of the defendant, they must find that defendant's servant had authority to hire him." 20

(e) "7. If the jury finds that the boy was not in the employ of the defendant, then the only duty owed him was to refrain from wilful and wanton acts towards the boy."

(f) "8. If the jury find that the employee of the defendant violated express orders, then the defendant is not liable to plaintiff."

AUTENRIETH & GANNON, 30
Attorneys for Defendant.

Endorsed: Service of a copy of within acknowledged June 29th, 1925.

ALEX. SIMPSON,
Attorney of Plaintiff.

Rule for Judgment.

(Entered May 25, 1925.)

HUDSON COUNTY COURT OF COMMON
PLEAS.

10	SAWER GLOWACKI, Administrator ad pros. of the Estate of Michael Glowacki, deceased, <i>Plaintiff,</i>	} Action at Law Rules for Final Judgment.
	vs.	
	SHEFFIELD FARMS COMPANY, INC., a corporation, <i>Defendant.</i>	
20		

The above entitled case having duly come on for trial before Hon. Daniel O'Regan, Judge and a jury on the 21st day of May, 1925, and the jury having considered the evidence adduced by both sides returned its verdict in favor of the plaintiff and against the defendant and assessed damages in the sum of Six thousand Dollars (\$6,000).

30 It is on this 25th day of May, 1925, Ordered and adjudged that the plaintiff have and recover against the defendant the sum of six thousand dollars (\$6,000) with costs to be taxed.

DANIEL O'REGAN,
Judge.

On Motion of
ALEX. SIMPSON,
Attorney for Plaintiff.

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Rule actually entered May 25th, 1925.

EXHIBIT D-1.

SHEFFIELD FARMS COMPANY, INC.,
New York.

Rules for Drivers.

Drivers must not under any circumstances, 10
allow any person not in the employ of this com-
pany, to assist them in any way or to ride on
their wagons, trucks, or autos.

Any violation of this rule will be considered suf-
ficient cause for dismissal.

SHEFFIELD FARMS COMPANY, INC.,

H. S. TUTHILL,
Vice-President. 20

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EXHIBIT D-2.

Rule 9 of General Company Rules.

9. Without the consent of the company, employees will not permit others to perform any portion of their work and are not to allow unauthorized persons on their wagons or autos. Boys under 14 years are liable to subject the company to a heavy fine by the Department of Labor.

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New Jersey Court of Errors and Appeals

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ON APPEAL FROM THE NEW JERSEY
SUPREME COURT.

SAWER GLOWACKY, Admr. *ad pros.*
of the Estate of Michael Glow-
acky, deceased,

Plaintiff-Appellant,

vs.

SHEFFIELD FARMS Co., INC.,
Defendant-Appellee.

20

Action at Law.

BRIEF FOR PLAINTIFF-APPELLANT.

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Facts.

The defendant was a corporation selling and dealing in milk, retail and wholesale. Milk came into the Pennsylvania Railroad yards at Jersey City, in cars. The defendant had many trucks, among them a 9-ton Mack truck, which on the 17th of October, 1924, was going to the Pennsylvania yards at the foot of Exchange Place, Jersey City,

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to deliver a load of empty bottles and to take a load of filled bottles and milk in cans. It had been the custom of the driver of the truck, who was in sole control of the truck and of the means of loading and unloading same (S. C., page 36), to hire boys of from 12 to 15 years to help him (S. C., page 9). He had been doing this for months (S. C., page 8). The intestate of the plaintiff, 13 years 2 months old, on the 17th of October, 1924, had been for a period of about 2 weeks, employed by the driver to help, with other boys, in unloading the truck of the empty cans and in loading full milk cans from the freight car. One boy would roll them one-fourth of the distance, another boy another one-fourth of the distance, which brought them to the door at the center of the freight car, when driver or helper would take full milk cans and put them on truck. The intestate of the plaintiff had been meeting truck for a period of two weeks at the ferry entrance, Exchange Place (S. C., page 31).

On the night of the accident, the Williams boy, one of the boy helpers, was on the truck. He had gotten on the truck at Grand & Washington Streets, Jersey City, which is about two and one-half blocks from the river front and two blocks over from Montgomery Street, out of which Exchange Place debouches. He rode to the Ferry entrance; then he, the Williams boy, saw the Glowacky boy approaching the truck and he said to the driver "Here comes the little fellow that meets us and helps us." The driver did not answer; the truck was going slow enough so the Glowacky boy was able to get on the truck into a position of safety. He rode from 3 to 5 feet when the driver of the truck turned the truck

without reducing speed, in such a manner that the swing threw the 13-year old boy off the truck and under the wheels and he was injured so that he died (S. C., page 19).

the deceased had been working for the driver for a month as testified to by Williams (S. C., page 19):

“Q. How long to your knowledge had the boy now dead been doing this for the driver?
A. About a month.” 10

It is not as contended by the appellee that the intestate of the plaintiff fell in some unaccountable way under the wheels of the truck, for the boy had safely got on the truck and rode about ten (10) feet, when the driver of the truck turned the truck without reducing the speed in such a manner that the swing threw the boy off the truck and under the wheels (S. C., pages 50-51). 20

Argument.

The Supreme Court made this the controlling fact in the case:

“There was uncontroverted proof that the drivers were expressly forbidden to hire anyone to help them in the discharge of their duties, and in addition notices to that effect were conspicuously posted at the place where the drivers called for their trucks.” 30

But this is not controlling, as the cases heretofore quoted in this brief show. That if the act is within the scope of the servant's employment, expressly forbidding him to do certain things, 40

does not relieve the master, for it is the policy of the law to make the master responsible for any act done within the scope of the servant's employment. Here it was within the scope of his employment to load and unload trucks, and he had openly and notoriously hired these small boys, which the jury might have found, to the knowledge of the master. The statute expressly forbidding the hiring of minors, shows the legislative policy to make such an act actionable.

Section 3 "Employment of Children and Other Operatives in Factories, etc.," found in 1911-1924, Cumulative Supplements to the Compiled Statutes of New Jersey on page 1671 under heading "Employment of Children," says:

20 "No child under the age of fourteen years shall be employed, allowed or permitted to work in any newspaper plant, printery factory, workshop, mill, commercial laundry or place where printing or the manufacture of goods of any kind is carried on, or in any mine or quarry."

See the following cases:

30 *Hetzel Junior vs. Wasson Piston Ring Co.*, 89 L., 201.
Schwartz vs. Argo Mills Co., 92 L., 433.
Heller & Bros. vs. Dillon, 125 Atl., 101.
Boyle vs. Van Splinter, 127 Atl., 257.

Supreme Court opinion also says the company was unaware of the hiring. This was not controverted. The thing was done so openly and notoriously at the milk market that it was for
 40 the jury to find that the company did have notice

of the hiring of the boys, and its decision by the Supreme Court on the question of facts.

If the driver of the truck was acting within the scope of his employment, and that was the whole crux of the case, then clearly all of the testimony was admissible, as it made up the scope of what was done by the driver pursuant to his authority to get aid in doing the work for his master. It was admissible to aid the jury to ascertain whether or not the contention of the plaintiff was right, that the driver was acting within the scope of his authority when he hired the intestate of the plaintiff. 10

The law applicable to this case is not that set forth in *Karas vs. Burns Brothers*, 94 L., 59, and or that of *Solomon vs. Public Service*, 87 L., 284. The rule of law applicable to this case was neither that of the Solomon case nor the Karas case. This case stands by itself. It was whether or not the driver was acting within the scope of his employment, when he invited boys, not for purposes of his own or for the boys' purposes, but for the purposes of his master, to get on the wagon or truck. 20

I assume that it will be attempted to bring this case within the principle of *Karas vs. Burns Bros.*, 94 N. J. L., 59; *Zampella vs. Fitzhenry*, 97 N. J. L., 517; *Miller vs. Schmidt*, 126 Atl., 310, but these three cases are cases involving different facts. In two cases the driver of the truck, not for the purposes of the master, invited a boy to ride with him and the boy was injured or killed. In those cases it was held the driver went beyond the scope of his employment, not being employed to invite boys as passengers to ride on the truck. In the last case it was held that the boy was a trespasser, because he 30 40

was playing on pile of lumber on public sidewalk and that the defendant had a right to eject trespassers, and therefore there was no liability for the act of the servant of the defendant, even though he used excessive force in the ejectment. Under the case at bar there is a different situation presented. Here the servant in complete control

10 of the truck, who was allowed by the master to devise the ways and means of loading and unloading the milk, hired little boys to help him, giving them each a bottle of milk for their work, which they would probably take home at night. The argument was made in the trial court that there was proof that the master had, by written rule forbidden the driver or helper to allow any strange persons on the truck, left the plaintiff without

20 remedy; but there were two answers to this. First: The written or printed rule had been violated openly and notoriously by the employees of the defendant at the public milk market where the superior could not help but know of the violation. Second: That even if it be held as a matter of law that the jury had no right to find they had waived the written or printed rule, yet the issuance of the rule would not save the situation for the defendant because the Court of Errors and Appeals said in

30 *Solomon vs. Public Service*, 87 N. J. L., 284, "It is immaterial that the driver was acting contrary to his instructions," citing a number of cases, where the Court of Errors and Appeals points out that *Danbeck vs. N. J. Traction Co.*, 57 N. J. L., 463, is where child was riding on a public conveyance at invitation of the person in charge thereof, thus distinguishing it from cases of private conveyances used in business, like coal cart, etc. Yet

40 there the discussion was as to the status of the

child as an invitee; the child was performing no services for the defendant. In this case the child was performing services for the defendant, at the invitation of the person in charge of the immediate services to be rendered, and if he was the servant of the defendant, then the mere fact that the defendant had a printed rule, promulgated at its stable that no person should be allowed on the truck, did not deprive the intestate of the plaintiff of believing that the driver was allowed to hire outside help, without notice to him, the intestate of the plaintiff, that the driver was without such right. He dealt with the driver of the defendant at the public milk yard, where the defendant was in the habit of receiving milk, and there was no notice posted there of any kind which would have informed the intestate of the plaintiff that the driver was without authority to employ him to help with the work. 10 20

In the *Solomon* case, *supra*, it was said in Point 5 of the syllabus:

“Where defendant’s servant, a motorman, invited plaintiff, a child, to ride free on his car, it is not a valid defence that such conduct was not within the motorman’s scope of employment or contrary to his instructions. While it may be reasonable to say, as a rule of law, that a grown person has no right to enter a car except as a passenger, and if he does so as a friend of the conductor, that such a situation created no relationship between such person and the car company; it would be unreasonable to apply the same rule to a child under similar circumstances. It is the legal duty of every one dealing with 30 40

a child to protect it against its own discretion.”

10 If it is reasonable to say that a child would have a right to accept the invitation of a motorman, even though against his orders, to ride on a street car, was it unreasonable for a child to accept the invitation of the person in charge to help in load-
ing and unloading, although a grown person might?

In *Klitch vs. Betts*, 89 N. J. L., 351, the Court said:

20 “The general rule is a very clear one, that the master is liable for any act of his servant done within the scope of his employment, and if a servant is acting in the execution of his master’s orders, and by his negligence causes injury to a third party, the master will be responsible, although the servant’s act was not necessary for the proper performance of his duty to his master or was even contrary to his master’s orders.”

McCann vs. Consolidated Traction Co.,
59 N. J. L., 481.

30 “The application of the rule *respondeat superior* does not depend upon the obedience of the servant to his master’s orders, nor upon the legality of the servant’s conduct; where a servant is acting within the scope of his employment, and in so acting does something negligent or wrongful, the employer is liable, even though the acts done may be the very reverse of that which the
40 servant was actually directed to do.”

Driscoll vs. Carlin, 50 N. J. L., 28.

Donaldson vs. Ludlow and Squire, 94 L., 306.

In *Holler vs. Ross*, 68 N. J. L., 324, it was held that the servant of the master cannot bind the master to respond in damages to the plaintiff unless it be shown that the act which the servant did, which caused the injury, was an act which was, expressly or by necessary implication, within the line of his duty under his employment, and it cites with approval *Stone vs. Hill*, 45 Conn., 44. 10

“For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master’s business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions, the servant alone is responsible. 20

“To rebut the presumption of liability of a master for damage consequent upon the negligent act of a servant done within the apparent scope of the latter’s employment, it must be shown either that the act was purely wanton or that it was not performed in furtherance of any duty within the actual scope of the servant’s authority.” 30

Rhinesmith vs. Erie R. R. Co., 76 N. J. L., 783.

In cases where the scope of authority of a servant or agent depends upon disputed matters of fact, the extent of such authority is ordinarily a question for the jury.

Dierkes vs. Hauxhurst Land Co., 80 N. J. L., 369.

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Here the facts are clearly within this law, for the duties of the servant were to load and unload the wagon and he was given complete charge of the truck, and although expressly forbidden, according to the testimony, by rule, to have any other persons on the truck, yet he was doing the work for his master which he was empowered to do in a way that he thought best. This brings the case clearly within the law as before laid down.

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The case cited, *McCann vs. Consolidated Traction Co.*, 59 N. J. L., 481, is given as authority for the following proposition:

“The master is liable for any act of his servants done within the scope of his employment.”

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(The act done here was to do with the loading and unloading of the wagon with milk which was the scope of the employment of the servant.)

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“And if the servant is acting in the execution of his master’s orders, and his negligence causes injury to a certain party, the master will be responsible, although the servant’s act was not necessary for the proper performance of his duty to his master or was even contrary to his master’s orders.”

If, therefore, the master is liable for an act done by the servant in the scope of his employment, and, in the instant case, the employment of the servant was loading and unloading of a wagon, and in the loading and unloading the servant obtained the assistance of a small boy to whom he gave milk, even though the employing of boys was contrary to the express direction of his master, under the foregoing cases, the master was liable. 10

See also the case of *Hough vs. Heller*, 92 N. J. L., 552. Here the master was held liable for the acts of his servants, unnecessarily done in lifting the tail-board of a wagon, which afterwards fell on the pedestrian.

The act in this case, that of having the boys aid in loading the wagon, not for the benefit of the servant or an independent act of his own not connected with his employment, but was intimately connected with his employment which was the carrying of empty cases from the wagon and carrying full cases to the wagon and getting the milk cans on the wagon. This would bring it within Point 1 of the syllabus *McCann vs. Consolidated Traction Co.*, 59 N. J. L., 481, which directly holds that even if the act of the servant be contrary to the orders of the master, yet if it is incidental to his employment while he was working for the master, the master is liable. 20 30

In the case of *Bennett vs. Busch*, 75 N. J. L., 244, it is said that whether the servant was acting within the scope of his employment was a jury question. Here the automobile driver instead of obeying instructions "to go downstairs in the hotel and get it" drove an automobile out to a different garage for oil, instead of obeying instructions. It was sought to escape liability by showing that he 40

had disobeyed his master's orders and was on an independent errand, but the Court held that it was a jury question as to what was the scope of his employment.

The United States Supreme Court in the case of *Baltimore & Ohio R. R. vs. Burtsch*, 263 U. S., 539, said:

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“The evidence tends to show that the conductor, in making the request, followed a long-standing practice to call upon bystanders to assist in unloading heavy freight. These facts, either undisputed or established by the verdict of the jury under appropriate instructions, are ample to sustain the conclusion reached below that there was an exigency which authorized the conductor to employ outside assistance, and that Burtsch, for the time being, occupied the relation of employee to the company. See, for example, *Marks vs. Rochester R. R.*, 146 N. Y., 181; *Fox vs. Chicago R. R.*, 86 Iowa, 368; *Haluptzok vs. Great Northern R. R. Co.*, 55 Minnesota, 446; *Maxson vs. J. I. Case Threshing Mach. Co.*, 81 Neb., 546; *Aga vs. Harbach*, 127 Iowa, 144.”

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In the instant case it was a question of fact for the jury whether the practice of the defendant's servant was so continued and so openly notorious and within the line of his duty, and if the jury answered these questions in the affirmative, then the deceased was not a volunteer or a trespasser, invited by the servant of the defendant, acting within the scope of his employment on the work.

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See also the case of *Cleveland Terminal & Valley R. R. vs. Marsh*, 63 Ohio St., 236, 13 L. A. R. (N. S.) footnote page 563, where the Ohio court held that a boy who was employed by a station agent to carry lamps and clean them was not an employee of the railroad; was not a trespasser and was not a volunteer, but said:

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"The law assigns to him, without name, the position of one who, being upon the premises of another by the sufferance of such other, performing labor or services for his own purpose and benefit in his own behalf, is entitled of right to be protected against the negligence of the owner of the premises or his servants."

In the case of *Michael vs. Southern Lumber Co.*, 20
3 Advance Reports, Justice Trenchard speaking for the Supreme Court, on page 464, said:

"For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the service required, the instructions given and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible," citing *Bennett vs. Busch*, 75 N. J. L., 240. 30

In the case of *Paiewonsky vs. Joffe*, 3 Advance Reports, the Court of Errors and Appeals speak- 40

ing through Justice Trenchard, on page 1063, said:

10 “Of course, a master is ordinarily liable to answer in a civil suit for the tortious act of his servant, if the act be done in the course of his employment in his master’s service. Whether so done or not must depend upon the facts of each particular case,” citing *Doran vs. Thomsen*, 74 N. J. L., 45; *Michael vs. Southern Lumber Co.*, 127 Atl. Rep., 580.

And on page 1065, said:

20 “But if the master’s servant, employed by him to drive his automobile, invites the plaintiff to ride in the car, and if, in inviting the plaintiff to ride, the defendant’s driver acted, either expressly or by implication, within the line of his duty under his employment, then the master will be liable to the plaintiff for any injury resulting proximately from the servant’s negligence,” citing *Depue vs. Salmon Co.*, 92 N. J. L., 550.

ASSUMPTION OF RISK.

30 The deceased, in the instant case, did not assume the risk of the negligent driving.

Matthison vs. Payne, 98 N. J. L., 87.

CONTRIBUTORY NEGLIGENCE.

The question of contributory negligence was properly submitted to the jury.

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David vs. West Jersey, 87 Atl., 440.
Solomon vs. Public Service, 87 N. J. L.,
 284.

CONCLUSION.

It is respectfully submitted that the judgment
 below should be reversed and that the judgment 10
 of the trial Court should be affirmed.

ALEX. SIMPSON,
 Attorney for Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals

SAWER GLOWACKY, Admr. *ad. pros.*
of the Estate of Michael Glow-
acky, deceased,

Plaintiff-Appellant,

vs.

SHEFFIELD FARMS CO., INC.,
Defendant-Respondent.

On Appeal
from the
New Jersey
Supreme
Court.

BRIEF FOR DEFENDANT-RESPONDENT.

The decision of the Supreme Court reversing the judgment of the trial court as set forth in the former's opinion, is based upon three distinct propositions, to wit: (1) That the uncontroverted testimony shows not only that the driver of the truck in question was under the specific prohibition of his employer to hire any boy, boys or other persons to help him, but also, that said driver's employer had no knowledge or notice of its driver's practice in so doing, and that there were no circumstances appearing from all the evidence in the case, from which the jury could possibly spell out knowledge of said driver's practice on the part of his employer, which knowledge on the part of said employer is a *sine qua non* to the drawing of an inference that said employer ratified such practice. (S. C., pp. 4 and 6.) (2) That the decedent seeing the truck in motion did run after the same and seek to climb upon or did climb upon it while it was traveling at a high rate of speed, and that there was no evidence

from which the jury could infer that the driver saw the decedent in the act or heard the other boy tell him, the said driver, if such other boy actually did so. (S. C., pp. 5 and 6). (3) That the evidence having uncontrovertibly shown that decedent saw that the truck was traveling rapidly and that it was going to slacken its speed for him, and that he nevertheless ran after it and attempted to board it while in rapid motion, plaintiff's intestate in so doing was contributorily negligent as a matter of law.

Attention is respectfully called to a misquotation of testimony in the brief of plaintiff-appellant, on page 2 thereof, wherein it is stated that when the witness, Richard Williams, saw plaintiff's intestate approaching he said to the driver, "Here comes the little fellow that meets us and helps us." The testimony of this witness with respect to the matter set forth on page 18 of the State of Case, wherein the witness testified to having said, "Wait, Chauffeur, wait, here's a little boy that will help you." It is respectfully submitted that there is a very material difference between the legal effect of the use of words as set forth in the brief of plaintiff-appellant and of the words actually used as contained in the State of Case.

Further, in the brief of plaintiff-appellant, in the last paragraph of his Statement of Fact (Appellant's Brief, p. 3), he takes issue upon the alleged contention of the defendant-appellee that the intestate of plaintiff fell, as appellant describes it, "in some unaccountable way under the wheels of the truck," plaintiff-appellant claiming that there was evidence before the jury that the decedent was thrown off the truck as a result of the manner in which it was being handled. It is respectfully submitted that an examination of the testimony in the

State of Case fails to reveal any evidence indicating or from which the jury might infer the existence of any causal connection between the manner in which the truck was being handled and decedent's falling off from the truck.

Argument.

Although the points upon which plaintiff-appellant relies are not specifically numbered in his brief, he has divided his argument into three main propositions only, to wit: (1) Was the act of the driver in making use of the services of the deceased, within the scope of such driver's authority, either express or necessarily to be implied, so as to charge the defendant, the master of said driver, with the latter's negligence, if any? (2) Did the deceased, as a matter of law, assume the risk of negligent acts or omissions on said driver's part in the premises? (3) Was there such uncontroverted evidence of contributory negligence on the part of the deceased as to render a verdict for the plaintiff attributable either to mistake, passion, prejudice or sympathy?

We shall discuss these propositions in the order named.

I. In employing the services of the plaintiff's intestate, defendant's driver exceeded the scope of his authority and of his employment, and said driver's negligence, if any, cannot be imputed to the defendant.

Plaintiff-appellant has rightly pointed out what appears to be the controlling consideration in bringing the Supreme Court to a reversal of the judgment of the lower court, consisting in the find-

ing of uncontroverted proof that the driver had been expressly forbidden to hire anyone to help him in the discharge of his duties. It is futile to review the testimony in detail, indicating that the local headquarters of the defendant in the municipality in which the accident resulting in the death of plaintiff's intestate took place, specifically instructed all of defendant's drivers that they were, under no consideration, to employ anyone to assist them in the performance of their duties or in any respect to delegate said duties (S. C., pp. 41 and 42; Exhibit D-2, S. C., p. 76), and this general prohibition, expressly and explicitly brought home to each of said employees, was further expressed to them by the posting of a set of rules and regulations at said headquarters, the place from which said employees were sent out, containing similar prohibitions with respect to delegation of duties (S. C., pp. 41 and 42; Exhibit D-1, S. C., p. 75), and plaintiff-appellant does not deny that such was the fact, nor does he deny that evidence thereof was uncontroverted on the trial, but plaintiff-appellant further says that this uncontroverted proof is not controlling and that even admitting that defendant had explicitly forbidden its employees to delegate their duties, nevertheless, the law will charge the employer with responsibility for any acts of the employee as a result of which a party suffers, no matter what circumstances, provided only that such employee was at the time of the negligent act or omission, in the performance of the duties of his employment (Appellant's Brief, pp. 4 and 5). The very statement of the proposition is self-contradictory. If the employer has expressly forbidden the employee to do a certain act, then, by that express prohibition, the doing of that act is expressly taken out of the scope of said employee's employment. Of course, it was within

the scope of the truck driver's employment to load and unload trucks, but can it be said that the inference is justifiable that such authorization will necessarily imply said employee's right to hire others to do the work? Personal qualifications and the personal equation enter into every employment situation. John Smith is employed because he is John Smith, and as such has certain qualifications, capabilities and talents, and Tom Jones, who may have applied for a position at the same time and of the same kind as John Smith, is not employed because he is Tom Jones and because his qualifications or the lack of them are as they are.

It is to be reasonably presumed that defendant's driver in this case was employed to load and unload trucks and to drive the trucks because of his physical strength and technical capacity to perform these duties. Defendant very probably anticipated the possibility that its said truck driver might be unable to handle the cases of milk bottles and milk cans with their contents alone, and therefore provided a helper, who was an employee of defendant, to go along with the driver, and render such assistance as came within the purview of the duties of said helper. The defendant in this case had provided a helper (S. C., pp. 20, 42 and 53), and that very fact only corroborates the position assumed by the defendant in this matter, which was that it was to have the sole authority to hire, employ and control any helpers which might be necessary for its said driver in the premises.

Plaintiff-appellant seems to confound the respective meanings of "Scope of employment" and "Scope of authority." A simple illustration will, we respectfully submit, serve to indicate the differentiation between the two phrases. If A employs B to operate a taxicab owned by A for hire, it is

within the scope of B's employment to invite passengers to ride in his said taxicab in consideration of the payment of fare, to keep the interior of the cab reasonably clean and free from injurious agents and to drive and operate the taxicab from place to place and from time to time and at various speeds in carrying his passengers hither and yon. B's use and operation of said taxicab, therefore, is within the scope of his employment. Now, it may possibly be the fact that A has instructed B to use his said taxicab only for the carrying of passengers within the limits of a certain village, town or city, or within the limits of a certain subdivision thereof. Should B, therefore, in the use and operation of said taxicab, take a passenger for a trip of several hundred miles into another state, he is, in so doing, exceeding the scope of his authority, and if, while driving such a passenger, beyond such limits, the latter sustains injury as a result of the negligent operation of the cab by the driver, the principal employer cannot be held responsible. Scope of employment is one thing, scope of authority is another.

The distinction above illustrated is well recognized by the courts of this state and other jurisdictions. The situation referred to seems to be exactly parallel to that involved in the case of *Karas vs. Burns Brothers*, 94 N. J. L., page 59. In the cited case, defendant was engaged in selling and delivering coal. Its driver, while driving a wagon owned by defendant and loaded with its coal, helped up onto his wagon plaintiff, an infant, who, while standing upon the top of the coal was thrown from the wagon to the street, whereby he sustained injuries. The evidence in the case indicated that the infant plaintiff went upon the wagon of the defendant at the invitation of the driver thereof. The plaintiff having recovered in the trial court, sought to sus-

tain the judgment in the Supreme Court by the contention that the driver of the coal wagon, being at the time in the course of making a delivery in and about his employment by the defendant, must, in having invited the infant plaintiff to ride upon the wagon, be deemed to have done so also within the scope of his authority, and that under the doctrine of *respondet superior*, the defendant coal company, the driver's employer, is liable for the resultant injuries, the plaintiff contending that the driver's invitation is to be imputed to his employer. The Appellate Court, however, reversed the judgment of the lower court, holding that the act of the driver in inviting the infant plaintiff to ride upon the wagon constituted upon his part, an exceeding of his authority, even though the invitation was given while he was within the scope of his employment, the court thereby again approving the distinction between the meanings of the two phrases above mentioned. In short, the Appellate Court said the scope of this driver's employment was the delivery of coal and his authority in carrying out that employment was limited to such duties. In inviting the infant plaintiff to ride upon his wagon, he was exceeding the scope of his authority, and therefore, his employer could not be held responsible. How the case just cited can be distinguished from the one at issue, is difficult to understand.

Plaintiff-appellant very surprisingly draws into his argument (Appellant's Brief, p. 4), an act of the Legislature of this State, regulating the age, employment, etc., of children, set forth in Cumulative Supplement to Compiled Statutes, page 1671, from which plaintiff-appellant quotes as follows:

"No child under the age of 14 years shall be employed * * *"

The applicability of this Statute to the case at issue is difficult to conceive. The Statute in question is a penal statute enacted solely for the protection of infants in employemnt and provided, on the violation thereof, certain penalties. It is well established that penal statutes are to be strictly construed.

Lair vs. Killner, 25 N. J. L., 522, and many other cases.

Being a penal statute, and subject to the rule of strict construction aforesaid, it is limited to the purposes for which it was adopted, namely, for the protection of children, and can only be taken advantage of under circumstances coming within the purview thereof, and by means of the penalty therein provided. The case at issue sounds in tort, and is based upon allegations of negligence. It is well settled that the violation of a statute, unless therein specifically provided, will not constitute negligence under the law. Moreover, the statute in question, particularly that portion thereof quoted in the brief of plaintiff-appellant, applies to the *hiring* of a minor. Plaintiff-appellant, in endeavoring to apply this statute to his argument, is assuming that plaintiff's intestate was hired by the defendant. That is a fact in issue in this case, and cannot be assumed, and the very issue immediately in hand is as to whether or not plaintiff's intestate was actually hired by the defendant or whether the relationship of employee and employer can be spelled out from the evidence in the case as existent between plaintiff's intestate and this defendant. In this connection, plaintiff-appellant cites the cases of *Hetzel Junior vs. Wasson Piston Ring Co.*, 89 L. 201, and three other cases, all of which said cases have no application whatsoever to the issues before

the court in this cause, turning as they do only upon the applicability of the Workmen's Compensation Act of this State to the hiring of an infant by an employer in the face of the prohibitive provisions of the Statute aforesaid.

Plaintiff-appellant proceeds further in his brief (Appellant's Brief, p. 4) by contending that the Supreme Court should have found that there was evidence in the case from which the jury might justifiably have found that the defendant milk company had notice of the practice of its driver or drivers, in employing the assistance of boys, including plaintiff's intestate, in the loading and unloading of milk containers and contents at the railroad yards. There are limits to the extent in which a jury may speculate. There is no duty on the part of an employer to assume that his employee is violating his instructions in the absence of knowledge of circumstances justifying such an inference. The evidence in this case is uncontroverted that defendant's driver was habitually sent out by his employer from the local headquarters of the latter at No. 1 Ocean Avenue, Jersey City (S. C., pp. 40 and 41), which is located at or near the most southerly boundary of that municipality; that said driver was sent out with loads of empty milk containers with instructions to transport the same to the Pennsylvania Railroad yards, at Exchange Place, Jersey City, which location is at or near the most northeasterly boundary of said municipality; and that these containers were to be there unloaded from the truck and that the truck was then to be loaded up with full containers taken from freight or express cars at the loading platform, and brought back to the Ocean Avenue headquarters (S. C., p. 43). We have before herein, referred to the uncontroverted evidence as to the fact that the defendant, at all times, specifically instructed its

drivers, of which the driver in question in this case was one, not to employ the assistance of anyone else, and had posted and maintained so posted at the Ocean Avenue headquarters, rules and regulations embodying such prohibition (S. C., pp. 40-42, inclusive). There was further uncontroverted evidence in the case to the effect that Mr. Suavet, who was the defendant's manager at the Ocean Avenue headquarters, was necessarily confined to that place in the performance of his duties, and had at no time ever been informed that it was the custom of any of his employer's drivers to employ the assistance of boys at the railroad yards (S. C., p. 42). Of course, it is perfectly conceivable that some rumor of the practice might eventually trickle back to the ears of the manager at the Ocean Avenue headquarters, but it is respectfully submitted that on the face of the situation, the acquisition of such information would be purely accidental and a jury is not entitled to speculate to the extent of assuming such a possibility and predicating thereon the finding that as a matter of fact, the defendant herein actually knew of the practice.

Plaintiff-appellant apparently misconceives the nature of the facilities located at the railroad yards in question, and refers to it in his brief, page 4 thereof, as a milk market. The evidence is uncontroverted that the milk involved was in the course of shipment and the amount delivered was checked up by the freight bills given by the railroad to the defendant herein (S. C., pp. 44 and 45). The only representative of the defendant at the point of loading in the freight yards was the driver of the defendant (S. C., p. 43).

Plaintiff-appellant contends that the case of *Karas vs. Burns Bros.* cited *supra*, is not controlling in the case at issue, and by way of anticipation, also contends that the further case of *Solomon*

vs. *Public Service*, 87 N. J. L., 284, is likewise inapplicable to the matter in hand. We readily agree with plaintiff-appellant in his contention that the latter case is not applicable here, the distinction being that in the case cited, the defendant sought to relieve itself from liability on the ground that its servant, a trolley car motorman, had invited plaintiff, a child, to ride on his trolley car free of charge, claiming that his having so done, particularly his failure to charge fare therefor, constituted a breach of his authority, and violation of his instructions. The decision in that case turns apparently upon the theory that the very scope of a motorman's employment necessarily involves as incidental thereto, the taking on of passengers, be they adult or minors, and a trolley company being a public utility and obligated to stop its cars and take on passengers when the latter apply for transportation, said motorman was in any event required to permit a child to board his car, and if it subsequently appeared that the child refused to pay his or her fare, the situation then constituted a breach of a separate contract, and the trolley company and its servant had the recourse of ejecting the passenger from the car. This case, however, is entirely different as far as its facts are concerned, from that at issue herein, in that the taking on and carrying of passengers is a necessary incident to the conduct of a trolley car company's transportation business, while the taking of a boy on a milk truck and his use by the driver thereof to assist the latter in handling milk, cannot, by the wildest stretch of the imagination, be deemed to be necessarily incident to or commonly practiced in the conduct of the milk company's business, or the performance of the driver's duties.

Plaintiff-appellant contends that the case at issue stands by itself, and that it presents the question as

to whether the driver must be presumed to have acted within the scope of his employment, because of the fact that he invited boys, not for purposes of his own, or for the boys' purpose, but for the purposes of his master, to get on the truck. The position taken in the foregoing contention is again to be sustained only upon a voluntary unwillingness on the part of plaintiff-appellant to confine himself to the evidence in the case. The purposes of the defendant milk company, consisted in the handling of the milk by its driver and by its own paid helper in the carrying out of the transportation thereof, and the containers as herein referred to. The assistance of the boys served only the purposes of the driver, in that to the extent of the assistance rendered by said boys, said driver's labors were thereby in equal proportion lightened. The point, therefore, raised by plaintiff-appellant, that the assistance of these boys including the plaintiff's intestate, redounded to the benefit or profit of the defendant milk company, is not to be sustained upon the evidence of the case alone.

Yet again, plaintiff-appellant, by way of anticipation, refers to *Karas vs. Burns Bros.*, cited *supra*, together with *Zampella vs. Fitzhenry*, 97 N. J. L. 517, and *Miller vs. Schmidt*, 126 Atl. 310, and seeks to forestall the use of these cases as authorities for the arguments of defendant-appellee by attempting to differentiate them from the case at issue. We have heretofore referred in detail to the *Karas* case. *Miller vs. Schmidt* is, we agree, not applicable to the case at issue, but the case of *Zampella vs. Fitzhenry* is not only completely on all four's with the case now before this Court, but relies upon, in its decision, and favorably cites the *Karas* case aforesaid. In the *Zampella* case, plaintiff, a boy of 15 years, was invited by the driver of defendant's automobile truck to board the the truck

for a ride. While standing on the running board of the truck, the latter struck a rut in the street, causing the boy to fall and sustain injuries, and the court held that the invitation of the driver of the truck to the boy to ride with him, was unauthorized by the owner and was not within the scope of the driver's employment or authority, as a servant of the master, and no liability was therefore, to be imposed on the owner of the truck, and the court in sustaining its decision, draws very learnedly from the springs of English and American law, among others from Y. B. 21 Hen. VIII, page 23, wherein Rede C. J. says:

"Where I command my servant to take lawful distress and he rides (the beasts) down, in this case he shall be punished and I am excused, because when I command a lawful act and the servant acts contrary to instructions, he is guilty of a tort. As I did not consent to this, it is reasonable that he should be punished instead of me."

Asuming that the servant in this old English case had invited a boy to ride upon one of the beasts and had so negligently handled the cattel that the boy was thrown and injured, would the situation therein before the court be legally different, or would the court decide otherwise with respect to the liability to said child of the master of said servant?

From all of the cases cited in his brief by plaintiff-appellant, he seeks to draw a conclusion based upon untrue premises, to wit, the assumption that "in this case, the child was performing services for the defendant" (Appellant's Brief, p. 7). The suggestion is further raised in said brief, that if the defendant sought to rely upon the efficacy of printed rules and regulations for the government of its employees, why did it not post such rules

and regulations at the railroad yard? There is one answer to this question and that is the fact which is uncontroverted in the testimony, that this railroad yard was nothing other than a railroad terminal owned by and in the exclusive control, custody and operation of the railroad authorities, and defendant having no control over or ownership of said railroad yard or any part thereof, would be a technical trespasser in posting therein or thereon such rules and regulations (S. C., pp. 49 and 52).

II. Plaintiff's intestate was a trespasser with respect to defendant's truck, and the driver thereof owed no duty to said intestate of exercising care for his safety.

The only testimony in this case which may be deemed at all reliable, because of being that of an alleged eye-witness to the accident, is the testimony of Richard Williams, the first witness called by the plaintiff, commencing on page 16 of the State of Case. There is no evidence from which the jury might reasonably have inferred that the driver of the truck had either invited plaintiff's intestate to ride thereon on the day of his death or had hired him at that time in any capacity. The witness, Richard Williams, was one of several boys living in the neighborhood of the Pennsylvania Railroad milk depot, who, from time to time and intermittently took part in the unloading of milk containers from cars or trucks at the depot. It should be borne in mind that this employment, if any, was intermittent; that when the boys happened to be hanging around they would take part in the loading and unloading and would sometimes receive as compensation a bottle of milk apiece and on some

occasions nothing at all (S. C., pp. 23 and 24). The said witness himself had, at the time of the death of plaintiff's intestate, not been working in or about the milk loading for about a week prior thereto (S. C., p. 17). He had on various occasions taken part in such work prior to the week in question (S. C., p. 16). On the 17th of October, 1924, the witness Richard Williams, according to his own testimony, which we assume to be true for the purposes of this argument only, was asked by the truck driver whether he wanted to help him, and upon answering in the affirmative, the said witness and another boy, not the plaintiff's intestate, proceeded to take part in the work (S. C., p. 17). Even this witness was not invited to ride on the truck by the driver.

"Q. Did the driver stop for you? A. He slowed up and I got on."

As the driver of the truck in question with the witness, Richard Williams aboard, was entering the ferry gates, with his truck, the plaintiff's intestate came "running through the car house, where the cars stop at the ferry" (S. C., p. 18). There is absolutely no evidence that the driver of this truck saw the plaintiff's intestate running after the truck, or was aware that he was attempting to board the same, and the truck continued without any change in its rate of speed, while plaintiff's intestate continued to run after or alongside of it in the endeavor to climb aboard.

Plaintiff-appellant seeks to predicate notice to the driver of plaintiff's intestate's proximity to the truck or position on the same on the following testimony appearing at the foot of page 18 of the State of Case:

"Q. What did he do to get on the truck? A. Jumped on the truck and tried to get hold on

the side of that grip, and I said wait, Chauffeur, wait, here's a little boy that will help you. And I put out my hand to him, but he kept right on, and when I turned around again to look, the boy was not there."

Plaintiff-appellant had the burden, in order to sustain his theory that the driver of the truck had notice of the position of the intestate, of introducing evidence from which such a fact might be bound. It is respectfully submitted that the testimony last quoted conclusively shows not only that the driver of this truck was unaware that plaintiff's intestate was anywhere in the neighborhood thereof, but also that said driver had neither by word nor action, extended any invitation to plaintiff's intestate either to board the truck or to assist him, the said driver, in loading or unloading the milk, and the insistence of plaintiff-appellant upon the fact that the truck driver made no attempt or effort to slacken the speed of the truck only serves to further justify the necessary inference that he was unaware that plaintiff's intestate was anywhere in the neighborhood of his said truck. At best, the words claimed to have been used by the witness, Richard Williams, to wit: "Wait, Chauffeur, wait, here's a little boy that will help you," can serve only as evidence that this Richard Williams was seeking to obtain employment for his friend, the plaintiff's intestate, and his words in so addressing the driver of the truck, cannot be twisted by any stretch of the imagination, into an invitation on the part of the driver to the plaintiff's intestate.

Throughout the testimony of this witness, Richard Williams, it becomes continually more apparent that when the plaintiff's intestate tried to board defendant's truck, not only was there no express invitation extended to him for the purpose, but all the circumstances should have indicated to him

that his presence on the truck was neither desired nor anticipated.

"Q. Did you see Kowalski run out towards the truck to get on? A. Yes.

Q. Was the truck moving? A. Yes.

Q. How fast? A. I couldn't say.

Q. Ten miles an hour or fifteen? A. It was going fast.

Q. Was there any room on the driver's seat for him? A. We could make room, but as you would say, there would be no room for him." (S. C., pp. 20 and 21.)

And further on page 21:

"Q. Do you know the name of the motor truck? A. Yes, Mack.

Q. There is a hood where the driver is? A. Yes.

Q. And then there is a step where the driver gets on the seat? A. Yes.

Q. And then there is a running board? A. Yes, like a step.

Q. That is where the boy tried to jump on the running board? A. Yes.

Q. On that short step? A. Yes.

Q. That is just behind the front wheel? A. Yes.

Q. And it is quite a small running board? A. Yes.

Q. Did he step up? A. He jumped up for it.

Q. Did you see him lose his footing? A. No, sir, I did not pay any attention to him."

The evidence is further undisputed that even if the witness, Richard Williams, did say to the driver of the truck, "Here's a little boy that will help you," while plaintiff's intestate was still running after the truck, the driver did not hear the witness (S. C., p. 22). It therefore appears uncontroverted from the evidence that on the evening of the accident, the driver made no request of plaintiff's intestate to work for him. Moreover, it does not appear that

on prior occasions there was any contract of hiring by the driver of any duration, or that there was any obligation on the part of the plaintiff's intestate to report for work. It appears that if plaintiff's intestate or any of the other boys who frequented the railroad terminal, desired to earn a bottle of milk, he or they would appear on the loading platform, and when requested by a milk truck driver, would help load and unload milk containers (S. C., p. 24).

It is impossible, from the evidence, to predicate any relationship of agency between the witness, Richard Williams, and the driver of the truck, in seeking the services of the plaintiff's intestate, and as before stated, the only act in that regard on the part of the witness, Richard Williams, was his alleged remark to the driver, while the intestate was chasing the truck, that there was a little boy that would help him. There being, therefore, no evidence of any invitation from the driver to the plaintiff's intestate and the evidence being uncontradicted that the acts of the driver and speed of the truck, together with the other circumstances at the moment gave every indication that said intestate's presence on the truck was neither anticipated nor desired, said intestate was at the time in question a trespasser with respect to the truck. Regarding the duty of a party to a trespasser, the law in this State is well settled and this Court in the recent case of *Faggioni, et al. vs. Weiss*, 99 N. J. L., 157, has fixed the rule to be that a party incurs no liability to licensees and trespassers be they adults or infants, except for willful injury. The case at issue, of course, presents no evidence whatsoever of any willful injury and in fact all the evidence tends to show that the driver was entirely ignorant of the presence on his truck of the plaintiff's intestate, and therefore, could not be willful

in any act or omission on his part with respect to said intestate, and further, even if it be assumed that said intestate was not a trespasser, he was then at best, only a licensee of the driver of the truck, and is still within the rule of *Faggioni vs. Weiss*.

III. Plaintiff's intestate was contributorily negligent as a matter of law.

It is too well settled to require citations of authorities that where the negligence in a case is such from which a jury could not reasonably find that a party was free from contributory negligence, the Court is bound to find as a matter of law that contributory negligence existed. Plaintiff's intestate had seen the milk truck approaching the ferry gate, going at a speed of fifteen miles an hour and had commenced to run after it, and upon catching up with it, endeavored to climb on behind, but finding that he was unable to maintain his position thereon, dropped off and ran alongside and endeavored to climb on the short and narrow step located alongside the driver's seat, in lieu of a running board (S. C., p. 47). While the intestate was thus endeavoring to climb on the truck, the truck did not slacken its speed in any respect (S. C., p. 21). There is absolutely no contradiction to this testimony, which was elicited not only from plaintiff's witness, but also from the witness McManus, called by the defendant.

It appeared further to be the case that this boy was over 13 years of age, that he lived in the neighborhood of the railroad terminal and that he had on prior occasions taken part in loading and unloading operations at the terminal, and was well acquainted with the trucks and vehicles of various milk companies.

This boy was therefore *sui juris*. It is well settled in this State that where a person *sui juris* knows of a dangerous condition, and nevertheless places himself therein with such knowledge, he is deemed to assume the risk of any injury which he may sustain, which is only another way of saying that he is contributorily negligent as a matter of law, and thereby precluded from recovery, for any such injuries.

IV. There was no evidence sufficient to take the case to the jury on the question of the negligence of the driver of the truck.

As heretofore stated, the only witness for the plaintiff who actually saw any of the phases of the chain of operations leading up to the death of plaintiff's intestate, was the witness, Richard Williams. This witness was unable to state how plaintiff's intestate was killed.

“Q. Did he step up? A. He jumped for it.

Q. Did you see him lose his footing? A. No, sir, I did not pay any attention to him.

Q. What happened after he started to jump?

A. He jumped on the step right alongside of me and he was holding to part of the cab.

Q. You saw him leap for the running board, and you did not see him after that? A. Not after we went around the ferry house” (S. C., pp. 21 and 22).

The burden of this witness' testimony was to the effect that he saw plaintiff's intestate jump on to the running board of the truck, whereupon the witness called to the chauffeur and when he turned around again to look, the boy (plaintiff's intestate) was not there (S. C., p. 18).

It is well settled that the burden rested upon the plaintiff, in order to entitle him to any recovery whatsoever, of showing, first, that the defendant either actually or imputedly committed a breach in the duty, if any, which it owed to plaintiff's intestate, of exercising due care for his safety, and it is well settled that in the absence of proof of the existence of such duty in the premises at issue in this case, no recovery can be had.

Prosser vs. West Jersey, etc., Railroad Co., 72 N. J. L. 342.

The trial court should have non-suited the plaintiff, therefore, on the ground that he had failed to adduce any evidence showing negligence on the part of the defendant or of circumstances from which the jury might have inferred such negligence, and the trial court likewise should have directed a verdict for the defendant at the close of the case, because of the absence therefrom of any evidence of negligence on the part of the defendant or of its truck driver.

V. Plaintiff's intestate was at best a fellow-servant of the defendant.

If the theory upon which plaintiff sued in this case, and which he seeks to sustain in this court, be adopted, the evidence before the trial court showed uncontrovertably that plaintiff's intestate and the driver of defendant's truck were fellow-servants engaged in a common enterprise, and if it be assumed that said truck driver was negligent, and that as a result of said negligence, plaintiff's intestate was killed, then defendant is not liable to plaintiff, under the authority of *Ewan vs. Lippen-cott*, 47 N. J. L. 192.

VI. On the case made out by plaintiff, only nominal damages could be awarded.

It is too evident to require citation of authorities that in an action in which plaintiff predicates his right to recovery upon negligence on the part of defendant, plaintiff has the burden of proving that as a result of said negligence he has sustained damages. This theory and principal is necessarily involved in and made a part of the Death Act, under which the suit at issue was brought. Lippen-cott, J., speaking for the Supreme Court, in the case of *May, Admr., vs. West Jersey, etc., Railroad Co.*, 62 N. J. L. 67, lays down the rule governing damages in an action under the Death Act, as follows:

“The rule of law laid down in *Telfour vs. Northern Railroad Co.*, 30 N. J. L. 189, was that in actions of this class, the plaintiff was entitled to recover nothing but the pecuniary loss sustained by the person for whose benefit as next of kin, the action was brought. This is the measure of damages prescribed by the Statute.”

We find this principal further approved by the Supreme Court in the case of *Ferguson vs. Delaware, etc., Telephone Co.*, 71 N. J. L. 59. There is no evidence whatsoever, not even the slightest scintilla thereof, either as to the probable expectancy of life attributable to plaintiff's intestate or of any habit or custom in the past on the part of said intestate of rendering services to his father or of the capacity or ability of the said intestate to render services of value to his next of kin, or the nature of services, if any, which said intestate might reasonably be expected to render. The Statute specifically fixes damages in “pecuniary” loss to the next of kin by reason of the death, and some proof

at least of such pecuniary loss must be offered by the plaintiff as part of his case to entitle him to recover.

17 C. J. 1297;

and the principal, not only in this State, but in all other jurisdictions providing for a right of action for wrongful death, is to the effect that the plaintiff has the burden in the first instance to prove a wrongful act or omission on the part of defendant, and that the death of plaintiff was proximately caused by such act or omission, and where the action is under a survival statute, that the death was not accidental, and "otherwise to establish his case by proper evidence as in other civil actions." 17 C. J. 1303.

Although the law presumes damage from the infringement of a legal right, the amount of damages so presumed to be is only nominal. Hence, where a legal wrong is established but there is no evidence as to actual damages, nominal damages are properly awarded.

17 C. J. 721, citing *Hasselbusch vs. Mohmking*, 76 N. J. L. 691.

The case last cited is not one under the Death Act, but sustains and supports the general rule enunciated in 17 C. J. 1303, that in addition to the other requirements in establishing *prima facie* cases under the Death Act, plaintiff must "otherwise establish his case by proper evidence as in other actions."

The trial court, therefore, erred in failing to nonsuit the plaintiff for his failure to introduce some evidence of damages, and further in failing to charge the jury that in the absence of such proof, nominal damages only could be awarded.

VII. The court erred in admitting in evidence testimony of the custom of the driver in hiring boys without the knowledge of the defendant company.

Objections were duly taken by the defendant to the admission of such evidence of the custom of defendant's driver in hiring boys to help him without the knowledge of the defendant (S. C., pp. 18, 27, 28 and 30). Without repeating specifically the objections so taken, it appears that a general objection was taken to all questions relating to the testimony of witnesses as to such habit and custom on the part of the defendant's driver, and a general exception to all of said testimony was allowed by the court. It appears that the trial court permitted testimony from several witnesses with respect to the habit of the driver in question, upon arriving at the Pennsylvania terminal, at Exchange Place in Jersey City, of procuring the assistance of boys who happened to be in the neighborhood in unloading the truck and reloading the same in the freight yard. All of the objections to evidence presented in the reasons of appeal embrace this general character of testimony and the exceptions taken thereto as herein stated. This testimony was tantamount to the admission in evidence of alleged conversations of the driver regarding employment by the latter of boys to assist him and conversations between the driver and another boy regarding the latter's procuring still another boy or boys to help in the work. The testimony objected to further involved all of the circumstances under which the driver arranged to use the boys for the purpose aforesaid, and the compensation to be given to them for their services in the shape of a bottle of milk apiece. It is too well settled to render citation of authority necessary that all of said conversations

between the boys and the driver were inadmissible. The driver was clearly without authority to hire assistance in view of the specific prohibition with respect thereto, and it was not either necessarily or naturally in the course of the performance of his duties to the defendant to hire such boys. Hence, his conversations with these boys being made by him as an agent of the corporation, not in the course of the performance of his duties thereto, are inadmissible to bind his employer.

Saffner vs. Gollin, 96 N. J. L. 431;

Huebner Admr. vs. Erie Railroad Co., 69 N. J. L., 327.

The testimony relating to the custom or habit of employing boys for the purposes aforesaid was clearly inadmissible unless it was also proven that the driver had authority to do so, or that it was within the scope of his employment, or that the proper agent of the Company, who was charged with the duty of hiring employees, had knowledge of the driver's actions and on behalf of the Company acquiesced therein. The driver's custom or habit in this regard on its face was a clear violation of the posted notice and written instructions (Exhibit D-1, p. 75; Exhibit D-2, p. 76). Therefore his conduct was entirely without the scope of his employment, and the defendant could not be bound in respect thereto. The case is utterly barren of any testimony or facts from which any legal inference could be drawn to the effect that the superintendent of the defendant, whose duty it was to hire employees, had any notice or knowledge directly or indirectly of the driver's practice in hiring boys to assist him. The only inference that could be drawn from the testimony is this, that if the superintendent had any knowledge or notice of the driver's un-

lawful practice, that the driver would be discharged for violating his written instructions regarding the character of his employment and the custody and operation of his motor truck.

In Labatt on Master and Servant, Volume 6, Section 2221, it is stated that a master may be responsible for the wrongful act of his servant without the scope of the servant's employment or authority upon the ground of ratification but there can be no ratification unless the original act was done on behalf of the Master and for his benefit, and there must exist both the knowledge by the Master of the act and an intention to ratify. Either under the theory of estoppel or ratification the essential element to charge the Master in his knowledge of the act and acquiescence therein which would inferentially authorize a repetition of the act, or a ratification with intent by the Master to make it his own act.

13 Cyc. 1247, etc.

In the case at bar, as heretofore indicated, testimony of the custom and practice of the driver was admitted but there is no connecting link by direct evidence or the barest inference by which any knowledge of his habits or custom can be imputed to the Master, and secondly no action on the Master's part in any wise indicating acquiescence or ratification.

All of the testimony, therefore, relating to the practice of the driver in hiring boys became immaterial and it was not binding upon the Company, and therefore should have been stricken from the record or only admitted by the Court subject to being connected in such manner as to make it binding upon the defendant.

It is logical to say that all of the actions and conduct of the driver, and his conversations are

utterly immaterial unless they are within the scope of his employment or authority, or acquiesced in or ratified by such agent of the company charged with the performance of the duties that the driver attempted unlawfully to perform.

The admissions or conduct of an agent can only be binding on the principal when done within the scope of the agency or when authorized by the principal.

Yoshimi vs. U. S. Express Co., 78 N. J. L. 281.

Unauthorized acts may be relevant and material if it appears that the master or principal has sanctioned them or adopted them.

McGuire vs. Grant, 25 N. J. L. 357.

Where the employment was purely mechanical, the servant's declarations or conversation was immaterial.

King vs. Atl. Gas Co., 70 N. J. L. 679.

In the case at bar the defendant's servant being charged only with the duty of driving a truck, loading and unloading its contents, how can it then be material and relevant if without his master's knowledge he hires assistance for his own convenience. All his statements as to the hiring and his conduct in relation thereto were inadmissible.

In this respect it is submitted that the Trial Court was in error to the prejudice of the defendant's rights on the trial of the cause.

VIII. The court erroneously charged the jury.

The Court charged the jury on various phases of the case. In general the errors in the Court's charge may be divided into two classes, one that part which relates to the rule of law governing the agency of the driver, and the other that part which relates to the law regarding negligence.

The Court charged that the rule of law upon which the jury was to determine the case was the rule of law laid down in the case of *Solomon vs. Public Service Railway Company* (87 N. J. L., 284; S. C., p. 64). This clearly is error. As heretofore argued the rule of law applicable to this case is that laid down in the case of *Karas vs. Burns Bros.*, 94 N. J. L., 59, and subsequently approved in the case of *Zampella vs. Fitzhenry*, 97 N. J. L., 517, and *Faggioni vs. Weiss*, 99 N. J. L., 157, by the Court of Errors and Appeals. The case of *Solomon vs. Public Service Railway* is based upon the assumption that it is within the implied scope of the trolley car conductor's employment to invite the public to ride upon the trolley car. The law in the case of *Karas vs. Burns Bros.*, definitely settles the fact that the driver of a truck to deliver merchandise has no implied authority to invite anybody not an employee of the company upon his truck, but is hired solely and only to drive the truck and deliver the merchandise and the incidental duties that relate thereto. The Court therefore has clearly defined the distinction in the law and declared that the legal principle of *Solomon vs. Public Service Railway Company* relates only to a specific character of employment, viz: the operation of a transportation vehicle upon which the public is invited to ride and in respect to which it is the duty of the operator to invite the public of all ages to ride

for a stipulated sum. There is nothing about the duties of the driver of a coal truck, or a milk truck, that in anywise suggests the right of the public to board the truck or to ride upon it in any manner whatsoever, and therefore the charge of the Court to the jury as to the law of the case is clearly error.

The rule is of general application in various jurisdictions and applies even though the invitee is rendering service.

Driscoll vs. Scanlon, 165 Mass. 348 (43 N. E. 100) ;

Wilkinson vs. Moore, 79 N. H. 335 (109 Atl. 45) ;

Hughes vs. Murdock Storage Co., 269 Pa. 222 (112 Atl. 11).

The Court made several references in its charge to the rules relating to negligence. One portion of the Court's charge that stands out as a glaring error of the rules of negligence, is as follows :

"If the plaintiff (defendant) has shown that the child was guilty of contributory negligence, and that they were not in any way negligent or at fault, then, of course, you would bring in a verdict for the defendant."

It is elementary that where the plaintiff is guilty of contributory negligence that a verdict must result for the defendant. The defendant is not obliged to exculpate himself from negligence on his part. The very defense of contributory negligence assumes the existence of primary negligence to which the other kind is contributory.

The words of the Court when used in conjunction with the other language of the charge regarding negligence are not qualified in any manner but rather the other statements of the Court regarding negligence are qualified by the charge above quoted.

A reading of the Court's charge makes the impression clear that not only must the defendant prove the plaintiff guilty of contributory negligence but the defendant must also disprove by the greater weight of the evidence that it was not guilty of negligence. It is unnecessary to cite cases in support of these legal principles.

The Court refused to charge the jury in several respects as set forth in the grounds of appeal. The legal questions raised in the request to charge are largely those herein argued as the law of the case and it will not, therefore, be necessary to restate the legal principle in the relation of master and servant as they are applicable to the defendant's request to charge the jury. We believe it is a sufficient presentation to this Court to call attention to them as set forth in the grounds of appeal (pp. 70, 71 and 72), and the reasons for charging error in the Court's refusal are fully set forth in the argument as to the scope of the servant's employment as heretofore set forth.

CONCLUSIONS.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed and that the judgment of the trial court should stand reversed.

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