

Court of Errors and Appeals of New Jersey.

June Term, 1916.

Case No.

WILHELMINA NAPOLEON,
Petitioner-Defendant-Respondent,

vs.

WILLIAM McCULLOUGH,
Defendant-Prosecutor-Appellant.

*On Appeal
from
Supreme Court.*

Brief for Appellant.

THE FACTS.

This case arises under the Workmen's Compensation Act. The original petition, filed in the Hudson County Court of Common Pleas, sets forth (state of case, page 8, lines 30 to 41), "That on the twenty-third day of November, A. D. nineteen hundred and fourteen, at *half past eleven or twelve o'clock* in the forenoon, (the said) James Napoleon was engaged in the performance of his duties as such (defendant's) driver, and as the result of the injuries sustained by him in same, and as the result of an accident, while in the performance of his duties on the twenty-third day of November, A. D. nineteen hundred and fourteen, he fell from the truck he was driving, and was severely injured, and subsequently died."

It will be noted that the petition was filed May 18th, 1915, and that it contains no allegation as to

what caused the accident. In the defendant's answer it is denied that the injuries were the result of an accident, and it is set forth (case, page 11, lines 35 to 39), that on the day in question, while in the course of his employment, the decedent was intoxicated, and his intoxication was the natural and proximate cause of the injuries and death of the decedent.

The matter was tried before the Hon. George G. Tennant, Judge of the Court of Hudson County Common Pleas, on August 9th, 1915.

In the determination and findings of the Judge (case, page 14, lines 13 to 20), it is set forth that the decedent "was thrown to the street and seriously injured; that he sustained injuries such as necessitated his immediate removal to the hospital, where he subsequently died; that the accident arose out of and in the course of his employment." It will be noted that the Court does not determine how he was thrown or what was the nature of the accident.

The judgment of the Court of Common Pleas was affirmed by the Supreme Court in a *per curiam* opinion (case, pages 2 to 3).

This is stated in the opinion of the Supreme Court (page 3, lines 19 to 22): "the only eye witness to the happening of the accident testified that the decedent appeared to him to be all right *and that a jounce of the wagon threw the deceased to the street.*" As will later appear, *there was no testimony that a jounce of the wagon threw the deceased to the street.*

The appellant comes before this Court for the reason that the uncontradicted testimony before the Court of Common Pleas shows no cause for the injuries and death of the decedent unless it was his intoxication.

The following is the defendant's evidence:

The testimony of Hermans, produced by the defendant, is (page 17, lines 20 to 40), that he knew the decedent for two or three months and saw him on the morning of November 23d, 1914, when he came to Bayonne, to the shipping department of the American Radiator Company, which employs the defendant to do trucking. When the decedent first came he was given a delivery to be made in Bayonne, and after that he returned for another load of radiators to be taken to New York. The first time the witness saw him (page 18, line 3) he was "pretty fair." At the end of half an hour, when he returned for a second load, he was intoxicated (p. 18, l. 22-25). The witness (page 18, line 31), told him to be careful, and the decedent left Bayonne (page 19, lines 1 to 3) shortly after eleven o'clock. Upon cross-examination, Hermans, who has been shipping clerk for the American Radiator Company for about twelve years, repeats that the decedent was intoxicated (page 19, lines 17 to 18), and says (page 19, lines 37 to 40), although he is not exactly a judge of how far the decedent was gone, he was pretty fair the first time, compared with the second time he showed up. He testifies (page 20, lines 1 to 12), that the decedent the second time was so badly under the influence that he had to be helped on the seat by one of the men employed by the American Radiator Company. He further testifies (page 21, ll. 10-11) that prior to getting on the seat, the decedent was staggering all over. The witness did not report to the American Radiator Company that this driver was drunk, for the reason that the driver was not an employe of the American Radiator Company (page 22, lines 30 to 33). The witness repeats that he saw him staggering when he was off the truck,

“while we (American Radiator Company employees) were placing the material on it.” He says (p. 23, lines 9 to 10): “I asked him where he got it all;” (page 23, line 25); he smelt liquor from him (page 23, lines 39 to 40), like stale rum and a lot of other things combined. He repeats (page 24, lines 3 to 7) that he asked him where he got it all, and (page 24, lines 16 to 17), that he told him to be careful. Then (page 24 and 25) he testifies that he is quite sure that from the smell and actions of the man, that decedent was drunk, and that he had to be assisted to get on the seat of the truck.

The testimony of Ralston Connell, produced by the defendant, shows, that between the hour of eleven and eleven thirty o'clock, between Gates and Carteret avenues, on Garfield avenue, he saw the decedent, (page 27, lines, 38 to 40), sitting on the seat swinging from side to side (page 28, lines 3 to 4); that there was no reason for him to swing from side to side, and that he looked like a drunken man. This witness further testifies (page 29, lines 10 to 20) that the decedent was moving from side to side, and he was half asleep. Throughout his testimony he said he was quite sure that the decedent was drunk. He also says (page 31, line 19), that decedent's eyes were heavy and drowsy.

Howard C. Brown, also produced by the defendant, lives at No. 361 Garfield avenue, near Carteret avenue. He saw the decedent (page 32, lines 1 to 30) rolling a cigarette, while the reins were over the dash board, and his feet over the reins; around his feet was a blanket. The horses were going slow. The witness left his house to go to Ocean avenue for a loaf of bread, and after his return, in about five minutes (page 33, lines 1 to 15), he was sitting down to his dinner when he noticed the people going and looking down the street (lines 20

to 30). He went out to see what was the matter, and he saw the same driver, (who had been rolling a cigarette) lying in the street with a blanket around him.

The following is a statement of the testimony produced to meet the foregoing case of the defendant.

Wilhelmina Napoleon testifies (page 39, lines 1 to 10) that *at six o'clock in the morning when her husband left the house*, his condition was all right.

Patrick O'Hara, who was formerly employed by the defendant, says, (p. 39) that *five minutes after six on the morning* in question, the decedent was sober.

Timothy J. Driscoll, is employed by the Bayonne Supply Company, to which the first delivery on the morning of November 23rd was made. He neither remembers or knows (pp. 40-41) anything about the decedent or his condition on the morning of November 23rd, 1914.

Mary Herlihy, **is also produced by the petitioner.** The accident happened, according to her testimony, (page 41, lines 1 to 40) on Garfield avenue, between Carteret avenue and another street, right in the back of her house. She did not see the decedent fall, but she saw that he was dying, and (page 42) she sent a boy to bring down some liquor from her house.

Upon her re direct examination, (**and this is very important,**) she testifies (page 42, line 35 to page 43, line 10), that before she gave him any liquor she was kneeling alongside of him, *and could smell liquor upon his body*, because he was puking up, and she was *keeping it wiped off with a horse blanket*. She repeats that this was before she gave him any liquor, and is *quite sure*, for in answer to the question of petitioner's counsel; "Could you smell liquor from him," she replied, "I certainly could."

Mary E. Brown, also produced by petitioner, testifies, that she lives at No. 861 Garfield avenue, and that when the decedent passed by with a double truck, (page 43, lines 30 to 35), he was rolling a cigarette, and (page 44, line 1), he was holding his head down.

Upon cross-examination (page 44, lines 10 to 25) she says he was stooping and had nothing else in his hands but the cigarette, and had the blankets around him, the way they have them when they are driving. The horses were going very slow.

Fred Smith, another witness produced for the petitioner, lives at No. 165 Warren street, which is two miles or more from the place of the accident. He testifies to the accident as if it happened on November 24th, 1914. This is his narrative, (page 45, line 28): "I was standing by Jim Price's barn at noon, *about twenty five minutes to one*. I happened to see him coming down the street with a cigarette in his mouth. Well, he made a jounce, and off the truck he went and hits the cobblestone, and right on the sidewalk he went. So there was two fellows coming along, just happened to bring him up and bring him across the street there to the stable. I went over and helped wrap the blanket around him. He testifies (page 45, line 15), "he did not have no reins in his hands when I seen him," and "was smoking a cigarette."

Judge Tennant (state of the case, page 50, ll. 6-7), indicates that *there was no question at all about the fact that the decedent had been drinking*. At page 51 (lines 30 to 40) the Judge says: "There is evidence for and against that statement (that the decedent was intoxicated at the time of the injury), and I might readily be left in doubt as to whether he was so intoxicated that the cause of the injury was intoxication. At any rate, it is obvious he fell from,

or was thrown from his truck. There is only one witness who testifies to the accident itself, and *by his testimony there is nothing to show that the intoxication operated as a proximate cause of the injury.* Judge Tennant then proceeds to give judgment for the petitioner.

It will be noted that neither in the petition filed, nor in the testimony, nor in the colloquy between Judge Tennant and counsel, does there appear any other cause for the falling of the decedent, except his intoxication. Furthermore, *it is important to keep in mind that there is no proof of any accident arising out of and in the course of the decedent's employment.*

THE LAW.

Our points follow:

- I. There was no accident proved by the petitioner; and
- II. There was no accident arising out of the employment; and
- III. Intoxication was the proximate cause of the injury and death of the decedent.

I.

There was no accident proved by the petitioner.

The Workmen's Compensation Act, P. L. 1911, page 134, provides by Section 7 (page 136), that "compensation for personal injuries to or for the death of such employee by accident *arising out of and in the course of his employment*, shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or *when intoxication is the natural and prox-*

imate cause of injury, and the burden of the proof of such fact shall be upon the employer."

Apart and aside from the question of the burden of proof as to intoxication, it is clear that the burden always rests with the petitioner of proving that the injury was caused by accident arising out of and in the course of the employment. *The petition in this matter* (page 8) it will be remarked, *does not set forth that the death in this case was caused by accident arising out of and in the course of the employment.* What the petition sets forth is as follows: "That on the twenty-third day of November, A. D. 1914, and for about four weeks prior thereto, her said husband was employed as a driver by William McCullough, defendant. *That on the twenty-third day of November, A. D. 1914, at about half-past eleven or twelve o'clock in the forenoon, the said James Napoleon was engaged in the performance of his duties as such driver, and as the result of the injuries sustained by him in same and as the result of an accident while in the performance of his duties on the twenty-third day of November, A. D. 1914, he fell from the truck he was driving, was severely injured and subsequently died.*" The defendant traversed this last allegation *in toto* and set up intoxication as the proximate cause of the injuries and death. The evidence discloses that nothing connected with the course of the employment caused the fatality.

The Courts have defined what an accident is. Thus Lord Macnaghten said in *Fenton v. Thorley* (1903), A. C. (Eng.), 443, 72 L. J. K. B. N. S., 787, 52 Week. Rep., 81, 89 L. T. N. S., 314, 19 Times L. R., 684, "Accident is used in the popular and ordinary sense of the word as denoting an unlooked for mishap, or an untoward event which is not expected or designed." In the same case, Lord Lindley said: "In the act, the word (accident) is used in

a very loose way," and that it means "any unintended and unexpected occurrence which produces hurt or loss."

In *Bryant v. Fissell*, 84 N. J. L., 72, 86 Atl., 458, the Supreme Court apparently adopted Lord Macnaghten's definition, and said that "an accident is an unlooked for and untoward event which is not expected or designed."

It is hardly necessary to point out that injury and death are not *per se* an accident. We think that the error into which the lower courts fell in this matter was that of holding effect and cause to be one and the same thing, as the evidence does not disclose any unlooked for or untoward event not expected or designed.

That it was necessary to the petitioner's case to establish that such an event had occurred is clear under our decisions. Thus Justice Trenchard, in *Bryant v. Fissell*, *ubi supra* said: "To warrant a recovery, it must appear that Bryant's death was caused by (a) an accident, (b) arising out of, and (c) in the course of his employment. Even though the injury arose out of and in the course of the employment, *if it be not an 'accident,' within the purview of the act, there can be no recovery. Even if there be an accident which occurred 'in the course of' the employment, if it did not arise 'out of the employment,' there can be no recovery, and even though there be an accident which arose 'out of the employment,' if it did not arise 'in the course of the employment,' there can be no recovery.*" This case is cited with approval by this Court in *Hulley vs. Moosbrugger*, 95 A., 1007, not yet officially reported.

Thus, again, Justice Swayze, in *Steers v. Dunnewald*, 85 N. J. L., 449, 89 Atl., 1007, said: "There

is no finding that the death of the decedent was by accident nor that it arose out of or in the course of his employment. All these facts are essential to recover."

The adjudications elsewhere are all to the same effect. Thus, in *Durocher v. Kinsella*, (1911), *Rap. Jud. Quebec*, 40 C. S., 459, it is held that a workman is bound clearly to show the nature of the accident which happened to him, and that it occurred in the course of his employment. That there must be something more than guess, conjecture, or surmise, and that an award will be set aside where there is no evidence of an accident, is established by these cases: *Woods v. Wilson* (1913), *W. C. & Ins. Rep. (Eng.)*, 569; 29 *Times L. R.*, 726; 6 *B. W. C. C.*, 750; *Langley v. Reeve*, (1910), 3 *B. W. C. C. (Eng.)*, 175; *Griffiths v. North's Nav. Collieries* (1911), 5 *B. W. C. C. (Eng.)*, 21.

In the present case we have a determination by the Court of Common Pleas that the accident arose out of and in the course of the employment of the decedent. There is no evidence to substantiate this statement. Even Smith, who claims to have been an eye-witness of the accident, says (page 46, ll. 16-20): that "the decedent didn't have no reins in his hands when he saw him," and that "he was smoking a cigarette." It is thus further apparent that the decedent, although on the appellant's truck, was not actually driving at the time he fell from the wagon. It is, moreover, very important to keep in mind that this case is barren of any testimony indicative of a collision, a rut in the street, a sudden spurt or turn of the horses (they were moving very slowly, and the wagon was heavily loaded; (see the testimony as to the packages on it, case, p. 20, ll. 20-30) or any other extraneous situation. Not only did the petitioner fail to prove an accident, but at

the very moment the decedent fell, he was not doing anything in the course of his employment. He certainly was not driving his horses, for the reins, according to the petitioner's witness, were not in his hands.

In this regard we must respectfully criticise the opinion of the Supreme Court. *It cites no authority whatever for the proposition that it will be presumed from the finding of the Trial Judge that the accident arose out of and in the course of the employment of the decedent.* This proposition is certainly not established by the cases in New Jersey.

The statute itself (Section 20), requires that the determination shall contain a statement of facts as determined by the Judge. It surely is no determination of the facts by the Judge for him simply to say that the accident arose out of the course and employment of the decedent; that is simply a conclusion which can be based only upon proper facts. The only fact in this regard stated in the determination of the Judge is (page 14, l. 15) "that the decedent was thrown to the street and seriously injured." Of this there is no evidence at all. That the appellate Courts should demand evidence to support the facts is established by the case of *Ryer v. Turkel*, 75 L., 677, in which this Court said that upon certiorari to the Supreme Court, "The function of the writ is that of the writ of error." In such case the Supreme Court accepts the findings of the inferior court upon the facts, *if there be any legal evidence to warrant such findings*; and when the judgment of the Supreme Court is moved into the Court of Errors and Appeals, this Court in turn accepts the findings subject only *to the like inquiry as to there being some legal evidence.* Judge Greene who wrote the opinion, sets forth (page 683) the decisions in

support of this proper practice. The English practice is similar. As was said in *Perry v. Ocean Coal Company*, (1912) W. C. Rep. (Eng.), 212; 106 L. T. N. S., 713; 5 W. B. C. C., 421; "Although a County Judge may act, and must act, and ought to act, in many cases without any direct evidence, and although he ought and in many cases must act upon indirect evidence which justifies his drawing the inference, there is nothing to justify him in that which is really a case of merely balancing up probabilities."

That Judge Tennant was concerned, in his own mind, with "*a case of merely balancing up probabilities*" is plainly indicated by what he says (page 51, line 30, *et seq.*) "**in this case it is urged that the deceased was intoxicated at the time of the injury. There is evidence both for and against that statement, and I might readily be left in doubt as to whether he was intoxicated and that the cause of the injury was the intoxication. At any rate it is obvious that he either fell from or was thrown from his truck.**"

Thus, similarly, again *the widow of the workman has not discharged the burden of proof that the death of her husband was due to the accident*, which rendered necessary the amputation of the index finger of his hand, where the evidence showed that, as he was recovering from the effects of the anæsthetic given for the first operation, the surgeons administered a second anæsthetic for the purpose of removing a tooth, and that he died shortly after from failure of respiration caused by the anæsthetic. (*Charles v. Walker* (1909), 25 Times L. R. (Eng.), 609, 2 B. W. C. C., 5.)

A fortiori it seems to us where there is no evidence that a man was thrown from a truck, the Judge should not say he was thrown, and similarly,

where there is no proof of any accident, the Judge should not say that an accident arose in the course of the deceased's employment.

II.

There was no accident arising out of the employment.

The petition alleges and the answer admits that the decedent was employed by the defendant as a driver. Smith, the petitioner's witness, who saw the decedent fall from the truck, testified (case p. 46, ll. 17-20) that the decedent had no reins in his hands when he first saw him, and he was only about ten feet away from the witness. Howard C. Brown, a witness produced by the defendant, testified (p. 32, l. 1-20) that the decedent was rolling a cigarette with his hands, the reins were over the dash-board, his feet over the lines, and around his feet was a blanket. Mrs. Mary E. Brown, produced by the petitioner, testifies (page 43, ll. 30-40) he was rolling a cigarette when he passed her house (p. 44, l. 1), holding his head down, and (p. 44, ll. 18-19) he had nothing else in his hands but the cigarette, and the horses were going very slow.

It will be noted, therefore, that there is a substantial agreement by all the witnesses to the effect that the decedent was not driving at or immediately before the time he fell.

The authorities are all to the effect that where a workman is doing an act entirely for his own purpose and in no way either directly or indirectly, in the interest of his employer, then *however harmless such act may be he loses the protection of the act while he is so engaged*. Thus in *Smith v. Lancashire & Y.R. Co.*, (1899), 1 Q. B., 141, 1 W. C. C., 1, 68 L. J. Q. B. N. S., 51, 47 Week. Rep., 146, 79 L. T. N. S., 633, 15 Times L. R., 64, it was held that a

ticket taker, who had collected his tickets and then, after the train had started, boarded it to speak to a woman passenger and was injured, that the accident was not one arising out of and in the course of his employment. To a similar effect are the cases of *Reed v. Great Western R. Co.* (1909), A. C. Eng., 31, 2 B. W. C. C., 109, 99 L. T. N. S., 781, 78 L. J. K. B. N. S., 31, 25 Times L. R., 36, 46 Scot., L. R., 700, 53 Sol. Jo., 31. *Lowe v. Pearson* (1889), 1 Q. B., 261, 68 L. J. Q. B. N. S., 122, 47 Week. Rep., 193, 79 L. T. N. S., 654, 15 Times, L. R., 124.

Hulley v. Moosbrugger, 95 Atl., 1007, (not yet officially reported), is clearly to the effect that before compensation may be awarded there must be proof of an accident that arises *both in the course of the employment and out of the nature of the employment itself*. Thus Chancellor Walker (p. 1010): "We are of opinion that an employer is not liable * * * to make compensation for injury to an employe, which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for, while an accident happening in such circumstances, may arise in the course of it, it cannot be said to arise out of the employment."

In the cited case Chancellor Walker has set forth fully the adjudications in other jurisdictions upon the question of *what are not accidents arising out of the employment*. They may be thus summarized: **It is not such an accident.**

a. *Unless the injury had its origin in a risk connected with the employment and that it flowed from that source as a natural consequence* (*McNichol's case*, 215 Mass., 497, 102 N. E., 697); or

b. Unless there is apparent to the rational mind, upon consideration of all the circumstances,

a casual connection between the condition under which the work is required to be performed and the resulting injury; or

c. If the injury * * * cannot fairly be traced to the employment as a contributing proximate cause, and comes from a hazard to which the workmen would have been equally exposed apart from the employment; (*ibid.*) or

d. Unless the *causative danger* is peculiar to the work; (*ibid.*), or

e. Unless it is incidental to the character of the business; and not independent of the relation of master and servant; (*ibid.*) and

f. Unless after the event the causative danger appears to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence; (*ibid.*) or

g. If the accident was caused to a workman while engaged in his work by a fellow workman's doing a wrongful act entirely outside the scope of his employment; (*Armitage v. L. & Y. Ry. Co., L. R., 1902, 2 King's Bench, 178 (181);* or

h. Unless it arises from *such causes as the negligence of fellow workmen * * ** or *some natural cause incidental to the character of the business;* (*ibid., p. 183*) or

i. Unless the cause of the accident has relation to the employment, for "*out of*" points to the origin or cause (*Fitzgerald v. W. G. Clarke & Son, L. R., 1908, 2 King's Bench, 796.*)

We believe it is hardly necessary to point out to this Court, in view of the foregoing summary, that in the instant case there is not presented a situation in which the petitioner may justly and lawfully contend for the compensation allowed by law where

there has been an accident causing injuries and death.

It will be noted, moreover, that in *Hulley v. Moosbrugger*, *ubi supra*, this Court clearly holds that in this class of litigation the law arising upon ascertained facts is always a question to be determined by the reviewing Court (95 A., 1008).

We respectfully insist, therefore, that since there has not been proved in this case an accident which arose both in the course of the employment and out of the employment itself and which was the cause of the injury and death of petitioner's decedent, the judgments below should be reversed and the common pleas directed to give judgment for the defendant.

III.

Intoxication was the proximate cause of the injury and death.

We have already pointed out that no other supervening cause of the injury and death of the decedent is shown in this case. We have also set forth the proofs, which are plenary, to the effect, that the decedent was staggering, and had to be helped to the wagon as he left Bayonne; he looked like a drunken man; he was lurching from side to side, giving no attention to his duties, and that Mrs. Herlihy, a witness produced by the petitioner, was certain that she could smell liquor from him, because he was puking up and she wiped it off (case, p. 42, l. 40; p. 43, l. 10).

Wigmore, Section 235, deals with the subject of intoxication. Shortly, it may be evidenced by (1) the person's conduct (2), the drinking of intoxicative liquor, and the person's prior or subsequent condition of intoxication within such a time that the condition may be supposed to be continuous.

The case of Tuttle v. Russell, 2 Day, 202, is highly illustrative. There the Court said, "Can a Court say that evidence to show that the man has within an hour before drunk a quart of rum, is not relevant to prove that the man is drunk? It is barely possible that the consequence of the man's drinking a quart of rum may not be drunkenness, but generally it is not only a highly probable but a certain consequence. *Courts and juries in weighing evidence are to calculate on probabilities not possibilities.* This was the argument as affirmed by the Court.

This Court in Bageard v. Consolidated Traction Company, 64 N. J. L., 316 (322), dealt with the subject of alleged intoxication as constituting contributory negligence. Judge Collins said:

"A well and sober man in the position of the plaintiff, when he slid down beneath the car wheels, could, with proper care, have avoided such an accident; in fact, he would have been not at all in danger. No matter how the plaintiff came to be in that position, if his sliding down was wholly or partly due to drunkenness and the rule contended for be law, there could be no recovery. That such is the legal rule is well established. In all that I have said upon this subject, it must be understood that the drunkenness, to constitute a defence, must have been voluntary on the plaintiff's part, and this, I understand, was assumed in the requests to charge. There was proof, sufficient to go to the jury, of such drunkenness, and the requests were pertinent. Drunkenness alone, though voluntary, is not negligence. A drunken man may be careful. The true rule is that voluntary drunkenness does not relieve the drunken man from the degree of care required of a sober man in the same circumstances, and if his drunkenness renders him incapable of exercising such care, then it contributes to any injury

thereby sustained, and bars recovery for another's negligence. The text-writers who treat of contributory negligence all assert this doctrine. A great array of references will be found in the recent case of *Smith v. Railroad*, 114 N. C., 728, where the doctrine is declared and elaborately defended. The adjudged cases are collated in 7 Am. and Eng. Encycl. L. (2d ed.), 491. The best statement of the doctrine I have found is that of Mr. Justice McBride in *Woods v. Board of Commissioners of Tipton County*, 128 Ind., 289, 291, as follows: '*Where one, by reason of his own voluntary intoxication, exposes himself to danger, and received injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence, and cannot recover for such injuries.*' Another apposite judicial utterance is found in *Illinois Central Railroad Co v. Cragin*, 71 Ill., 177, 181, where it is said that *a person who voluntarily uses intoxicating drinks until he has become physically helpless, or his powers so far impaired that he is unable to exert the necessary effort, to avoid danger, is guilty of negligence when he places himself in a position of danger, and so when he thus stupefies and deadens his intellectual powers so that he is unable to foresee and guard against danger. These words seem strikingly appropriate to the plaintiff's plight just previous to his injury if due to drink and not to sickness.*'

Of course, we do not intend to argue that mere drunkenness upon the part of the decedent in this case would bar a recovery, but in the absence of proof that any other cause contributed to the fatality, rational minds, we contend, must conclude that the fatality would not have happened if the decedent had not been drunk. The *rationale* of the case just cited, should, we insist, prevail in the present class

of cases: if a man is so stupefied and his intellectual powers so deadened by drink that he gives over the work he is employed to do, and while in such a condition slips from the seat of a slowly moving vehicle and cannot protect himself in falling, his employer ought not to bear the burden of supporting the decedent's family.

The authorities in other jurisdictions also sustain the proposition that where the accident is caused by the intoxication of the workman at a time when he was not actually engaged in his duty, his injury does not arise out of the employment. The cases to this effect are collected under note 47, at page 62 of *Lawyers' Reports Annotated*, 1916A, from which the following excerpts are taken: In *McCrae v. Renfrew*, (1914), 2 Scot. L. T., 354, 51 Scot. L. R., 467, 7 B. W. C. C., 898, the Lord Justice Clerk said: "The only statement of fact regarding his being there is that he got himself into such a state of intoxication that when he went to a second public house, his condition was such that he was refused when he asked for a drink, because he was intoxicated. He was therefore unfit for business and was not in the course of his employment. He had chosen to take to a course of conduct which was inconsistent with his actions being in the course of his employment. I can not for my part accept the idea that having gone out of the course of his employment, he entered it again that night because he set off in his staggering drunken state to endeavor to get home. To me it appears just to say that a man, the course of whose ordinary employment would cover his return home after a journey, may break off from the course of his employment, and that it is entirely a question of circumstances whether he can be held to have taken up the course of his employment again merely because he later proceeds to make his way home."

Again in *Murphy v. Cooney* (1914), 2 I. R., 76, (1914), W. C. & Ins. Rep., 45, 48 Ir. Law. Times, 13, 7 B. W. C. C., 962, the opinion of the Court was: The drunkenness of a mate and not a risk incident to his employment must be held to have been the cause of his death where he appeared on the bridge in such a condition of intoxication that the master ordered him below and he did not immediately obey such orders, *but was last seen about eight or ten minutes after receiving the order standing at the head of the ladder by which the bridge was reached, and shortly thereafter a thud was heard* and he was found in an unconscious condition at the foot of the ladder, nobody having seen him fall, and it not being proved whether he fell while attempting to obey the orders and descend the ladder.

In *Horsfall v. The Jura* (1913), W. C. & Ins. Rep. (Eng.), 183, 6 B. W. C. C., 213, the opinion of the Court was that the second mate of a vessel who was ordered by the captain to go to his room because of his intoxicated condition and who instead of obeying the captain went aft to speak to the chief engineer and on his way fell down the hatch and was injured, *does not suffer injury by accident arising out of his employment.*

In *Frith v. The Louisianian* (1912) 2 K. B. (Eng.), 155, 81 L. J. K. B. N. S., 701 (1912), W. C. Rep., 285, 5 B. C. C., 410, 106 L. T. N. S., 667 (1912), W. N., 98, 28 Times, L. R., 331, the opinion of the Court was that the fact that a sailor has reached the vessel is not sufficient, if he reaches it in such a state of intoxication that he cannot perform his duty, and such intoxication is the cause of his death. Buckley, L. J., said: "The whole question here is whether the accident to this man arose out of his employment. I have not the smallest hesitation in

answering that in the negative. *It arose out of the fact that he was so hopelessly drunk that he could not stand, and I doubt whether he could see.* He had gone on shore without leave, which by itself is misconduct, and had got drunk there; he came back so drunk that he was thrown on the deck like a sack of sand; he staggered to his feet after a minute or two and fell over the side of the ship. He was not engaged on his employment: he was not fit for the performance of his employment. If he had been in his employment he would not have been in that part of the ship, but elsewhere. *He was within the ambit of the employment in the sense that he was on board the ship; but the accident did not arise out of his employment, but out of the fact that he was so drunk that he would neither stand nor see."*

In *O'Brien v. Star Line* (1908), 45 Scot., L. R., 1 B. W. C. C. 177, the opinion of the Court was that where a seaman who had returned to his ship late at night the worse for liquor, was found the next morning lying in the bottom of a hole, and there was no evidence as to how he came there and the door through which he fell had been locked and bolted as usual the night before but was found broken open in the morning, and there was no evidence as to how or when it was so broken, *it was held that the applicant had not met the burden resting upon him of proving that the accident arose "out of" as well as in the course of the employment.*

To similar effect is *Nash v. The Rangatira* (1914), 3 K. B. (Eng.), 978; 83 L. J. K. B., 1496; (1914), W. N., 291; 111 L. T. N. S., 704; 58 Sol. Jo. 705; 7 B. W. C. C., 590.

There a sailor returned to a ship in a drunken condition, and in going up a gangway from the quay to the ship, let go his hold of the hand rope and fell on

the quay receiving injuries from which he died. It was held that the injury was due entirely to his intoxicated condition, and that his widow was not entitled to compensation.

We respectfully submit that no rational mind can, in this case, conclude otherwise than that no cause is shown for the injury and death of the decedent except his intoxication, and in view of this fact the judgment of the lower Courts should be reversed.

Respectfully submitted,

JOHN FRANCIS GOUGH,
Of Counsel with the Defendant-
Prosecutor-Appellant.

JAMES A. SULLIVAN,
Attorney.

Court of Errors and Appeals of New Jersey.

June Term, 1916.

Case No.

WILHELMINA NAPOLEON,
Petitioner-Defendant-Respondent,

vs.

WILLIAM McCULLOUGH,
Defendant-Prosecutor-Appellant.

On Appeal

from

Supreme Court.

Brief for Respondent.

THE FACTS.

This is a case that arises under the Workman's Compensation Act. The petition was filed in the Court of Common Pleas of Hudson County on May 18th, 1915. The answer which was filed on June 14, 1915, admits all of the allegations set forth in the petition as filed, except it denies that James Napoleon, the deceased, "died as a result of injuries sustained by him in the performance of his duties as a driver and as the result of injuries sustained by him in same and as the result of an accident while in the performance of his duties and in this regard this defendant says that James Napoleon on the 23d day of November, A. D. 1914, while in the course of his employment by this defendant was intoxicated, and his intoxication was the natural and proximate cause of the injuries and death of the said James Napoleon." Paragraph seven of the defendant's answer formally denies the allegation of the petitioner as to compensation. It will be noted

therefore that the answer admits every allegation of the petition except the cause of the death. This being so the Hudson County Court of Common Pleas ordered the defendant to proceed with his proof as to the cause of the death of the decedent. This was proper since the defendant set up the affirmative defense of intoxication. The Trial Court found that "on November 23rd, 1914, while the said James Napoleon, deceased, was employed by the defendant in the capacity aforesaid (driver), he was thrown to the street and seriously injured; that he sustained injuries such as necessitated his immediate removal to the hospital where he subsequently died; that the accident arose out of and in the course of his employment, and that the defendant herein had notice and knowledge of said accident; that said deceased left him surviving his wife, Wilhelmina Napoleon and five minor children" (see page 14, state of the case, lines 13 to 25). This determination of the Trial Court was reviewed on certiorari to the Supreme Court and that tribunal affirmed the findings of the Hudson County Court of Common Pleas (see state of the case, page 2);

The appellant maintains that there was no testimony as to what caused the death of the deceased. This statement of fact (see appellant's brief, page 2) is contradicted by the testimony in this case of Frederick Smith (see state of the case, page 45, lines 28 to 38): "Well, he made a jounce and off the truck he went and hits the cobble-stones and right on the sidewalk he went." Surely this is descriptive enough as to what caused the injuries which resulted in the death of the deceased. This evidence was enough to enable the Trial Court to determine that this was the manner in which the deceased met his death and that this "jounce" was the cause of the same, and the Supreme Court affirmed, comment-

ing upon the very part of the testimony as being the cause of the death of the deceased herein. The testimony of this same witness (see state of the case, page 46) is the only testimony in the whole case which deals with the actual happenings that resulted in the death of this decedent. This witness says (see page 46, lines 11 and 12) "he appeared to me all right." It will be noted here that this witness is the only eye-witness to the accident itself, that he was the only person in the whole case who saw what happened before, at and after the accident which resulted in the death of this decedent. The Trial Court (see page 50, state of the case, line 23, etc.) in open Court stated, what had been agreed to by counsel as being the facts in this case, to which no objection was made. That statement is as follows: "It is agreed in the case that the petitioner's husband was employed by the respondent and that his wages were sixteen dollars a week; that he was a driver; that on the 23rd day of November, 1914, he was engaged in the course of his employment; that while so engaged he met with an accident, falling or being thrown or jostled in some way from the truck which he was driving and fell to the ground and was so injured that he died in the City Hospital shortly after."

"The answer of the respondent substantially admits all these facts, but sets out as a defense that the petitioner's husband was intoxicated at the time of the injury, and the respondent claims, therefore, that he is not responsible for the happening." It is now too late for counsel to attack this statement of fact in the case. At the hearing before the Trial Court, no objection was made at any time to these facts, as set forth by the Court.

THE LAW.**A decision of a question of fact by the Supreme Court upon certiorari is binding upon the Court of Errors and Appeals.**

It is true that the Supreme Court on certiorari may review the law and the fact in the case. Its discretion, however, has been limited to such examination of the findings of facts as to determine whether or not the determination in question was reasonable in view of the testimony and if the Trial Court's determination can be supported by any competent testimony the Supreme Court will not disturb its finding. See the case of Moran et al., v. the Mayor and Aldermen of Jersey City, 58 N. J. L., page 144; Bellis v. Philips, 28 N. J. L., page 125; Jeffrey v. Owen, 41 N. J. L., page 260, and a line of cases that support this contention. This being true, a fortiori the Court of Errors and Appeals will not go into the question of the merits of the case and the findings of fact of a Trial Judge after the Supreme Court, we must assume has exercised its prerogative and affirmed such findings. In this connection see Vreeland v. Bayonne, 60 N. J. L., page 168; Morris & Cummings Dredging Co. v. Mayor and Aldermen of Jersey City, 64 N. J. L., page 587; Atlantic City Water Works v. Read, 50 N. J. L., page 665; State v. Jersey City, 58 N. J. L., page 144, and a line of cases with which the Court is familiar.

“Where a writ of certiorari is used as a writ of error to review the action of the lower Court, the Supreme Court and the Court of Errors and Appeals will not review findings of fact if there is any evidence to support them.”

Coles v. Blythe, 69 N. J. L., 666.

“A decision of a question of fact decided by the Supreme Court upon certiorari is binding upon the Court of Errors and Appeals.”

State, Suburban Land et al. v Vailsburg, 68 N. J. L., 311. “The findings of fact based on competent evidence will not be reviewed,” 6 Cyc., 841. In the recent case of Public Service Company v. Public Utility Board, reported 95 Atl., page 1079, the decision of the Supreme Court in the same case, reported in 84 Law, page 463, is affirmed. This case, at page 65, stands for the principal that the Supreme Court refuses to disturb the final determination of the Court of first instance on the merits of a question which has already been decided (see also Benedict v. Howell, 10 Vroom, 221, Mooney v. Edwards, 22 Id., page 479). In L. R. A. (N. S.), 1916, A, at page 211, entitled “Appeal and Review, we find “findings of fact by the commission or Trial Court are conclusive and will not be disturbed by the Appellate Court if there is any evidence to support them, although the Court in trying the facts might have reached a different conclusion.” See Jackson v. Erie R. Co., 86 N. J. L., 551. “An order of the Court of Common Pleas, made under the Employer’s Liability Act based upon disputed questions of fact, will not be set aside.” This too was taken up in the Supreme Court on certiorari and is the latest case to our knowledge on the question in dispute. See also in this connection Diaz’s case (1914), 217 Mass., 36; Donovan’s case (1914), 217 Mass., 76; Bentley’s case (1914), 217 Mass., 79; Herrick’s case (1914), 217 Mass., 111; Janes’ case (1914), 217 Mass., 192; Jackson’s case (1914), 217 Mass., 388. Plass v. Central New England R. Co. in Appellate Div., 155 N. Y. Supp., 854. In further substantiation of the fact that this Court cannot review findings of fact see Closter Dairy

Farm v. N. Y. Central and H. R. R. Co., 97 Atl.,
305.

It is respectfully submitted that the finding of
the Supreme Court in this case should be affirmed.

BROGAN & SULLIVAN,

Attorneys for and of Counsel with Respondent.

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ASSIGNMENT OF GROUNDS OF APPEAL.

Filed March 12, 1916.

NEW JERSEY
Court of Errors and Appeals

WILHELMINA NAPOLEON,
Petitioner-Defendant-Respondent,

vs.

WILLIAM MCCULLOUGH,
Defendant-Prosecutor-Appellant.

10
*On Appeal
from New
Jersey Su-
preme Court.*

*Assignment of
Grounds of
Appeal.*

*To Messrs. Brogan & Sullivan, Attorneys for Re-
spondent;*

20

SIRS:

Take notice, that the following are the grounds of appeal from the whole of the judgment entered in this cause, which the appellant hereby assigns, and upon which he will rely.

1. Because the New Jersey Supreme Court erroneously affirmed the judgment of the Hudson County Court of Common Pleas.

2. Because the New Jersey Supreme Court erroneously refused to reverse the judgment of the Hudson County Court of Common Pleas.

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3. Because the New Jersey Supreme Court erroneously held that James Napoleon was not wilfully negligent at the time of his death, and that his intoxication was not the natural and proximate cause of his death.

4. Because the New Jersey Supreme Court erroneously held that the intoxication of James Napoleon was not the natural and proximate cause of

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OPINION OF SUPREME COURT

the injury and death of the said James Napoleon.
Dated March 10th, 1916.

JAMES A. SULLIVAN,
Attorney for Appellant.

JOHN FRANCIS GOUGH,
Of Counsel.

10

Service of the foregoing assignment of grounds
of appeal is acknowledged this 11th day of March,
1916.

BROGAN & SULLIVAN,
Attorneys of Wilhelmina Napoleon,
Respondent.

 OPINION OF SUPREME COURT.

Filed February 17, 1916.

20

NEW JERSEY SUPREME COURT.
November Term, 1915.

WILHELMINA NAPOLEON,
Petitioner-Respondent.

vs.

WILLIAM McCULLOUGH,
Defendant-Prosecutor.

30

Submitted December 2, 1915.

Decided February , 1916.

Certiorari to Hudson County Common Pleas.

Before Justices Parker, Minturn and Kalisch.

For the prosecutor, James A. Sullivan.

For the respondent, Brogan and Sullivan.

Per Curiam.

40 This is a case under the Workmen's Compensa-
tion Act. The prosecutor seeks to reverse the judg-
ment because the Trial Judge failed to make a find-

OPINION OF SUPREME COURT

ing that the death of the petitioner's decedent was the result of injuries received by him while in a state of intoxication and that such intoxication was the natural and proximate cause of such injuries. Whether or not that was so presented a question of fact for the Court to determine.

There was testimony of witnesses to the effect that they saw the petitioner's decedent shortly before the occurrence of the accident in an intoxicated condition sitting on the seat of the wagon driving the horses.

There was also testimony to the effect that the deceased, just before the accident happened, appeared to be all right.

The only eye witness to the happening of the accident testified that the deceased appeared to him to be all right and that a jounce of the wagon threw the deceased to the street.

This being the state of the evidence the Trial Judge was warranted in making the finding that he did. He was under no legal duty to make an express finding negating the assertion of the prosecutor that the deceased was intoxicated at the time he received his injuries, and that such intoxication proximately caused his injuries and death. Such a negative finding was necessarily included in and will be presumed, from the finding of the Trial Judge, that the accident arose out of and in the course of the employment of the deceased.

Judgment will be affirmed, with costs.

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JUDGMENT OF SUPREME COURT.

Entered February 23, 1916.

NEW JERSEY SUPREME COURT.

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WILHELMINA NAPOLEON,
Petitioner-Respondent,

vs.

WILLIAM McCULLOUGH,
Defendant-Prosecutor.

On Certiorari.

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The Court having inspected the transcript and proceedings of the Court of Common Pleas of the County of Hudson returned with the certiorari in this cause, the reason for reversing the judgment below, and having read the briefs submitted by counsel for the respective parties, and having duly considered the same,

Do order that the judgment of the Court of Common Pleas of the County of Hudson be in all things affirmed, with the costs of suit to be taxed, and said record remitted to the Court below to be proceeded with according to law and practice of said Court.

30

Entered Feb. 23, 1916.

On motion of

LEO S. SULLIVAN,
Attorney of Petitioner.

40

REASONS FOR REVERSAL.

Filed October 20th, 1915.

NEW JERSEY SUPREME COURT.

WILHELMINA NAPOLEON,
Plaintiff-Respondent,

vs.

WILLIAM McCULLOUGH,
Defendant-Prosecutor.

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The prosecutor herewith files the following reasons upon which it will reply for a reversal of the determination and order directing payment in this case:

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1. Judgment should have been entered denying compensation claimed by petitioner and dismissing the petition.

2. The determination and finding of fact by the Judge of the Hudson County Court of Common Pleas was not in accordance with the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for the injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplements and amendments thereto.

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3. The determination of fact of the Judge of the Hudson County Court of Common Pleas was not based upon the evidence, as it appears that the petitioner was wilfully negligent at the time of re-

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WRIT OF CERTIORARI

ceiving his injuries, and intoxication was the natural and proximate cause of the injury.

JAMES A. SULLIVAN,
Attorney for Defendant-Prosecutor.

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WRIT OF CERTIORARI.

Filed October 22d, 1915.

NEW JERSEY, SS.

The State of New Jersey, to George G. Tennant, Judge of the Court of Common Pleas of the County of Hudson, and John J. McGovern, Clerk of said Court.

20 GREETING:

We being willing for certain reasons to be certified of and concerning a certain order, proceedings and determination made and rendered by George G. Tennant, Esquire, Judge of the Court of Common Pleas in and for the County of Hudson, which determination was filed with the Clerk of the said Court on September 17th, 1915, in certain proceedings brought on behalf of Wilhelmina Napoleon, petitioner, against William McCullough, defendant, to recover compensation under an act of the Legislature of the State of New Jersey, entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, do command you that the said order, proceeding, determination and judgment, together with all things touching and concerning the same, as fully

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ALLOCATUR and RETURN

as before you they remain or are in your custody or control you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the 22nd day of October, 1915, that therein may be done what of right and according to law ought to be done.

10

WITNESS, William S. Gummere, Chief Justice of our Supreme Court, at Trenton aforesaid, this 8th day of October, A. D. 1915.

WM. C. GEBHARDT,
Clerk.

JAMES A. SULLIVAN,
Attorney.

ALLOCATUR.

20

I allow this writ. Let it be sealed.

F. J. SWAYZE.

RETURN.

The answer of George G. Tennant, Esquire, Judge of the Court of Common Pleas, holden in and for the said County of Hudson, and John J. McGovern, Clerk of said County and within named, the record and proceeding of the plaintiff whereof mention is within made, with all things touching the same, we certify to the Justices of our Supreme Court of Judicature at Trenton, N. J., at the day and year within contained in a certain schedule to this writ annexed, as within we are commanded.

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GEORGE G. TENNANT,
Judge.

ATTEST:

JOHN J. MCGOVERN,
Clerk.

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PETITION.

Filed May 18, 1915.

COURT OF COMMON PLEAS OF THE COUNTY
OF HUDSON.

10

WILHELMINA NAPOLEON,
Plaintiff,

vs.

WILLIAM McCULLOUGH,
Defendant.

20

*To the Honorable George G. Tennant, Judge of the
Court of Common Pleas of the County of
Hudson:*

The petition of Wilhelmina Napoleon, of the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows:

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1. That she is the widow of James Napoleon, late of the City of Jersey City aforesaid.

2. That on the twenty-third day of November, A. D. 1914, and for about four weeks prior thereto, her said husband was employed as a driver by William McCullough, defendant. That on the twenty-third day of November, A. D. 1914, at about half-past eleven or twelve o'clock in the forenoon, the said James Napoleon was engaged in the performance of his duties as such driver, and as the result of the injuries sustained by him in same and as the result of an accident while in the performance of his duties on the twenty-third day of November, A. D. 1914, he fell from the truck he was driving, was severely injured and subsequently

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died.

PETITION

3. That on the sixteenth day of December, 1914, and several days afterwards, the said William McCullough was notified and made aware of the injury and death of the said James Napoleon, of his employment, the place of the accident and its result.

4. That at the time of the said accident and death of the said James Napoleon, he was earning a salary of sixteen dollars per week.

5. That there are five children living as the result of marriage between your petitioner and the said James Napoleon; that the five children were absolutely dependent on and supported by the said James Napoleon.

7. That the wages of the said James Napoleon up to the time of his death were paid to your petitioner by William McCullough; that the said William McCullough has refused to pay any compensation under the said Workmen's Compensation or Employer's Liability Act.

7. Petitioner alleges that under and by virtue of the provisions of an Act of the Legislature entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplements thereto, the said Wilhelmina Napoleon, as the widow of the said James Napoleon, by reason of such death to her said husband, is entitled to compensation by virtue of the said act and also compensation should be awarded for the five children as aforesaid.

Your petitioner, therefore, prays that your Honor

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PETITION

10 will make an order fixing and determining the compensation to which your petitioner is entitled as the widow of the said James Napoleon and for the five children, and that she, your petitioner, may have such other and further relief as may be just and proper and that she may be awarded the costs of this proceeding.

And your petitioner as in duty bound will ever pray, etc.

WILHELMINA NAPOLEON,
Petitioner.

BROGAN & SULLIVAN,
Attorneys.

20 STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

WILHELMINA NAPOLEON, of full age, being duly sworn according to law on her oath, deposes and says that she is the petitioner named in foregoing petition and who signed the same petition; that the matters and things therein set forth are true to the best of her knowledge, information and belief.

WILHELMINA NAPOLEON.

30 Sworn and subscribed to }
before me at Jersey City }
this 30 day of April, 1915. }

LEO S. SULLIVAN,
Attorney at Law of New Jersey.

ANSWER

COURT OF COMMON PLEAS OF THE COUNTY
OF HUDSON.

ANSWER.

Filed June 14, 1915.

WILHELMINA NAPOLEON,
Plaintiff,

v.

WILLIAM McCULLOUGH,
Defendant.

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*On Petition for
Compensation.*

The answer of the defendant William McCullough
to the petition in the above stated matter:

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1. The defendant admits the allegations of para-
graph one of the petition.

2. The defendant admits the allegations of para-
graph two of said petition, except so far as they set
forth that James Napoleon was severely injured and
subsequently died as a result of injuries sustained
by him in the performance of his duties as a driver
and as the result of injuries sustained by him in
same and as the result of an accident while in the
performance of his duties, and in this regard this
defendant says that the said James Napoleon on the
twenty-third day of November, A. D. 1914, while
in the course of his employment by this defendant
was intoxicated, and his intoxication was the nat-
ural and proximate cause of the injuries and death
of the said James Napoleon.

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3. Defendant admits the allegations contained in
the third paragraph of the petition.

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ANSWER

4. Defendant admits the allegations contained in the fourth paragraph of said petition.

5. Defendant admits the allegations of the fifth paragraph of said petition.

10 6. Defendant admits the allegations of the sixth paragraph of said petition.

7. Defendant denies the allegations contained in the seventh paragraph of the petition.

The defendant therefor prays that the petition of the petitioner be dismissed.

JAMES A. SULLIVAN,
Attorney of Defendant.

20 STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.

WILLIAM McCULLOUGH, of full age, being duly sworn, according to law, upon his oath says, that he is the defendant named in the foregoing answer, and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

W. McCULLOUGH.

30 Subscribed and sworn to before }
me at Jersey City, this 2nd }
day of June, 1915. }

JAMES A. SULLIVAN,
Attorney at Law of New Jersey.

DETERMINATION AND FINDINGS.

Filed September 17, 1915.

COURT OF COMMON PLEAS COUNTY OF
HUDSON.

WILHELMINA NAPOLEON, <i>Petitioner,</i> <i>vs.</i> WILLIAM McCULLOUGH, <i>Defendant.</i>	}	<i>On Petition.</i> <i>Determination</i> <i>and Findings.</i>	10
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*To the Honorable George G. Tennant, Judge of the
 Court of Common Pleas of the County of
 Hudson;*

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This is an action on a petition for a compensation under an act entitled "An Act prescribing a liability of an employer to make compensation for an injury received by an employe in course of employment, establishing an elective schedule of compensation and regulating procedure for the determining by liability and compensation thereunder," approved April 4th, 1911, and the act supplementary thereto and amendatory thereof.

It appears to the Court that a copy of the petition in this matter was served upon the respondent on the eighteenth day of May, A. D. nineteen hundred and fourteen, together with a copy of the order of the Court fixing the twenty-fifth day of June, A. D. nineteen hundred and fourteen, at the hour of ten o'clock in the forenoon, at the Court House in the City of Jersey City, N. J., as the time and place for the hearing of said petition; and the said hearing having been continued by an order of this Court to Monday, July 26th, 1914, at the

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DETERMINATION AND FINDINGS

10 same place and the parties to said petition having appeared by their respective attorneys, and witnesses having been examined from whose testimony it appears that said James Napoleon, deceased, was immediately prior to his death employed by the defendant herein as a driver; that the said average weekly wage of the said James Napoleon was sixteen dollars per week at the time of his death.

20 That on November 23rd, 1914, while the said James Napoleon, deceased, was employed by the defendant in the capacity aforesaid, he was thrown to the street and seriously injured; that he sustained injuries such as necessitated his immediate removal to the hospital where he subsequently died; that the accident arose out of and in the course of his employment, and that the defendant herein had notice and knowledge of said accident; that said deceased left him surviving his wife, Wilhelmina Napoleon, and five minor children:

Margaret Napoleon who will be eleven years of age on October 1st, 1915.

Theresa Napoleon who will be ten years of age on May 19, 1916.

30 James Napoleon who will be eight years of age on February 19th, 1916.

Walter Napoleon who will be seven years of age on August 15th, 1916.

Matthew Napoleon who will be five years of age on April 30th, 1916.

40 I therefore find in view of the above facts, that the petitioner, Wilhelmina Napoleon, is entitled to receive compensation by reason of the death of the said James Napoleon; that the action and injuries sustained arose out of and in the course of the em-

DETERMINATION AND FINDINGS

ployment of the said James Napoleon, deceased, by the defendant herein; that said defendant had notice and knowledge of said accident and death; that the deceased earned an average salary of sixteen dollars per week; that said Wilhelmina Napoleon is entitled to receive compensation under the aforesaid act as and for the rate allowed for six dependents, to wit: sixty per centum of the weekly wage of said James Napoleon, deceased, for a period of three hundred weeks; that said petitioner, Wilhelmina Napoleon, is also entitled to receive the sum of one hundred dollars (\$100.00) as funeral expenses. 10

I will allow the attorney for the petitioner the sum of two hundred dollars (\$200) to be paid by the petitioner. 20

Judgment may be entered accordingly.

I hereby consent as to form only.

GEORGE G. TENNANT.

JAMES A. SULLIVAN.

It is hereby ordered that judgment final be and the same hereby is entered in accordance with the above determination and findings for the weekly compensation due to date from the above named defendant to the plaintiff herein, amounting to the sum of four hundred and sixty-four dollars and eighty cents (\$464.80), being compensation at the rate of sixty per cent. of the weekly wage of the deceased from December 7th, 1914, to August 30th, 1915, being a period of thirty-eight weeks in all together with the funeral expenses, which amount to one hundred dollars (\$100.00). 30

MICHAEL B. HERMANS—Direct
 HUDSON COUNTY COURT OF COMMON
 PLEAS.

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WILHELMINA NAPOLEON,
Petitioner,

vs.

WILLIAM McCULLOUGH,
Defendant.

*On Petition for
 Compensation.*

APPEARANCES:

For the petitioner, LEO S. SULLIVAN.

20 For the respondent, JAS. A. SULLIVAN.

The above entitled case was tried August 9, 1915,
 before Hon. George G. Tennant, Judge.

MICHAEL B. HERMANS, sworn.

Direct examination by Mr. James A. Sullivan.

Q. Mr. Hermans, where do you reside? A. 136
 West 52d street, Bayonne.

Q. Are you employed in Bayonne? A. Yes, sir.

30 Q. By whom? A. American Radiator Company.

Q. The American Radiator Company. How
 long have you been employed there? A. About
 twelve years.

Q. About twelve years. A. (Witness nods head.)

Q. What was the nature of your employment?
 A. Shipping Clerk.

Q. What were the duties of a shipping clerk?
 A. To hand out and see to the loading of all trucks
 and other vehicles.

40 Q. You would come in contact with the drivers
 of those wagons, would you not? A. Yes, sir.

MICHAEL B. HERMANS—Direct

Q. Do you know William McCullough? A. Yes, sir.

Q. In what way? A. As the employer of trucks, I mean; has the trucks for the hauling.

Q. He has a contract with your firm for hauling? A. Yes, sir.

Q. Did you know the petitioner in this case Mr. Napoleon,—James Napoleon. A. I did.

Q. How long had you known him?

THE COURT—That is the petitioner's husband.

Q. Petitioner's husband? A. About two or three months.

Q. You knew James Napoleon how long? A. Two or three months.

Q. Two or three months. Whom did he work for? A. William McCullough.

Q. William McCullough. On the morning of November 23, 1914, did you see Mr. Napoleon? A. That was the last day he worked; yes, sir.

Q. You saw him? A. Yes, sir.

Q. Did he go to your place of business with— A. (Interrupting) A team of horses.

Q. Team of horses. What were they, truck horses? A. Well, the average run, capable of hauling about four tons.

Q. He went there for what? A. Well, when he came there there was no definite work at that time to do; they simply came there for whatever we saw fit to give them.

Q. You saw him that morning? A. I saw him.

Q. Did he take a consignment of merchandise in your place? A. When he first came we gave him an open delivery to be delivered in Bayonne, and after he made that delivery he came back for another load that was to be taken to New York.

MICHAEL B. HERMANS—Direct

Q. The first time you saw him was he apparently all right? Did he seem to be intoxicated?

A. Well, he was pretty fair; he wasn't what I would call—

10 Q. (Interrupting). How long did it take him to deliver that first load? A. Well, it was a half hour or so.

Q. You say he returned for a second load? A. He returned for a second load.

THE COURT—Where did he take these loads to?

A. Well, the first load he took to Broadway, Bayonne.

THE COURT—Where? From where?

20 Q. From 46th street; that was a distance of about twenty blocks.

Q. When he returned the second time did you notice Mr. Napoleon? Did you see him? A. Yes, sir.

Q. Was he intoxicated? A. Yes, sir.

Q. He was? A. Yes, sir.

Q. You generally see drivers of trucks when they go down there? A. Every day that I am working; yes, sir.

30 Q. Did you say anything to Napoleon when you saw him intoxicated? A. Well, I told him to be a little careful.

Q. Where did he take that second load? Where was he supposed to take it? A. He had some pier delivery to New York City.

THE COURT—What?

40 A. Pier delivery; to deliver to a railroad company.

Q. About what time was it when he left Bay-

MICHAEL B. HERMANS—Cross

onne for New York City? A. It must have been in the neighborhood of eleven or perhaps shortly after.

Cross-examination by Mr. Sullivan.

Q. Do you work for the American Radiator Company? A. Yes, sir. 10

Q. Shipping clerk? A. Yes, sir.

Q. I show you some bills of lading. Are those the bills of lading that Mr. Napoleon took from your place of business that morning? A. Yes, sir. (Paper handed to witness.) That is the load.

Q. Second load; eh? A. Yes, sir.

Q. You say Mr. Napoleon was intoxicated on the second trip? A. Yes, sir.

Q. Are you in the habit of delivering your goods to intoxicated drivers? A. Why, of course, we are not employing them directly, we have nothing at all to say or do over the condition of the men. 20

Q. How often have you seen Mr. Napoleon previous to this? A. Well, ordinarily those drivers continue to come every morning; I may have seen him every morning straight for several months.

Q. How is it you recollect seeing Mr. Napoleon on this particular day, November 23rd? A. Because I knew that was the day he met with an accident. I heard of the accident after he left. 30

Q. When did you hear of the accident? A. Why, it was a day or two later.

Q. When? A. A day or two later.

Q. And you recollect Mr. Napoleon? A. Well, I guess I ought to.

Q. And the first time he came there he was all right? A. In the morning he—well, I am not exactly a judge on how far he was gone, but he was pretty fair compared with the way he showed up on the second time. 40

MICHAEL B. HERMANS—Cross

THE COURT—What did he do? What was it that you saw about him?

10 A. Why, the second time when he got his load he was so badly under the influence that he had to be helped on the seat.

THE COURT—Who helped him on?

A. Why, I think it was one of our men.

THE COURT—Did you see that?

A. I was on the verge of going out then.

Q. Did Mr. Napoleon load this wagon himself?

20 A. No; they do nothing at all; they simply remain on their truck. Our men do their own loading.

Q. Was he on the truck all the time? A. Yes, sir.

Q. Did you see him on the truck? A. Yes, sir.

Q. He was able to back the truck in himself? A. Well, he managed to get in.

Q. He got in all right, didn't he, and this load was put on, this 362 pounds—that was one of the bundles put on? A. Yes, sir.

30 Q. Another package of 3,722 pounds? A. No; that is twenty packages.

Q. Twenty packages of 3,722 pounds? A. Yes.

Q. And eighteen packages of 18,459 pounds? A. Yes, sir.

Q. He remained on the wagon while that was being loaded? A. He remained on the wagon. The condition of the man had nothing to do with our loading, because there are many times when the man is not even in the neighborhood and we load the trucks.

40 Q. You put that stuff on the wagon? A. Yes, sir.

MICHAEL B. HERMANS—Cross

Q. And you had noticed that this man was intoxicated at the time. A. Yes; the man had nothing to do with the placing of the material on the truck at all; they are simply on there to tie up after they are loaded and drive away.

Q. Just how bad was Mr. Napoleon? A. Well, prior to getting on to the seat he was staggering all over. 10

Q. Were you speaking to him? A. I spoke a few words to him.

Q. Did you make any report to the company that this driver was drunk? A. To what company?

Q. To your own company? A. No.

Q. Isn't it customary? A. No. Understand he is not an employe of ours; had he been an employe of ours why, we would, of course, have dealt with him differently. 20

Q. The approach to your place for wagons, what kind of place is it? A. We have a court yard in the neighborhood of 75 or 100 feet wide, platform the full length.

Q. Full length of the yard? A. Yes, sir.

Q. How do you get into this court yard? A. Why, it is a straight road down. We have a sort of semi private road. It is paved for trucking.

Q. He drove through that road down to the court yard? A. I guess he did. 30

Q. He backed his wagon to the platform? A. Yes, sir.

Q. Where were you when he backed the wagon in? A. Out in the office.

Q. In the office? A. Yes, sir.

Q. You didn't see him, did you? A. I seen him driving down.

Q. Where is the office situated? A. Right on the same line as the platform, but raised, so that by 40

MICHAEL B. HERMANS—Cross

being up in the office I had a full view of the entire approach.

Q. What were you doing at this time when he was backing the wagon? A. Why, I could not tell.

Q. Were you watching him? A. I watched him coming down, yes.

10 Q. When he backed in were you watching him then? A. No, sir.

Q. How do you know he backed in? A. Well, I don't know; his truck was backed in.

Q. You don't know whether he backed in? A. Well, I don't know.

Q. You don't know whether he drove the truck down, do you? A. Unless they came down themselves, he did.

20 Q. Did you see him? A. I seen him on the seat, yes.

Q. You saw him on the seat; didn't see him driving the wagon? A. Naturally he was driving when he was on the seat.

Q. Well, did you see him? A. Coming down, but I didn't see him back in because—

Q. (Interrupting) How long did he remain on the seat? A. That I could not say.

30 Q. Weren't you watching him? A. Watching him driving down; yes, sir.

Q. When did you see him stagger? A. When he was off the truck; while we were placing the material on the truck.

Q. Did you place the material on the truck? A. No, sir; I—

Q. (Interrupting) Who did? A. Laborers.

Q. Who? A. Laborers; we have laborers.

Q. Are they here? A. Yes, sir.

40 Q. You were sitting in the office? A. At the time he drove down.

Q. When he drove down? A. Yes, sir.

MICHAEL B. HERMANS—Cross

Q. You didn't see him back in? A. No; sir; because at the time he reached our court yard I went down to give him his load. So by the time I was going down the stairs he backed in.

Q. Did you speak to him? A. Yes; I asked him where he got it all.

Q. How near were you to him when you spoke to him? A. What? 10

Q. How near were you to him when you spoke to him? A. A little closer that I am to you.

Q. Did he tell you what he was after? A. No; I knew what he was after.

Q. Oh, you knew what he was after? Didn't he have any bills from Mr. McCullough or any orders from Mr. McCullough to your company? A. When he had his first load taken away I sent the second load for him; so when he came back I already knew what he was going to take. 20

Q. Just about how far were you away from him when you spoke to him? A. Perhaps a foot or two.

Q. A foot or two, eh? Did you smell liquor from him? A. Yes, sir.

Q. What was it you smelled? A. Well, (laughing) did you ever stand in front of an intoxicated man?

Q. I asked you what it was. A. Well, pardon me; I am not a judge of liquor. 30

Q. You are not a judge of a man when he is intoxicated? How do you know it was liquor? A. I could tell it was liquor.

Q. How did you know it was liquor? A. I could not define what it was.

Q. How do you know it was liquor? A. I could tell from the smell of it.

Q. What did it smell like? A. Stale rum and a lot of other things combined. 40

Q. Stale rum; stale rum, eh? You had no con-

MICHAEL B. HERMANS—Cross

versation with him? A. Yes; I spoke a few words to him.

Q. What did you say to him? A. I asked him where he got it all.

10 Q. All what? A. Well, apparently, the stuff that he had in him that caused him to become so badly intoxicated.

Q. And what did he say? A. I don't recall what his answer was.

Q. Don't recall? Did he answer you? A. I can't really say.

Q. Did you say anything else to him? A. Told him to be careful.

Q. Anything else? A. No, sir.

20 Q. Did he say anything to you when you told him to be careful? A. No, sir.

Q. Nothing at all? A. Not that I can recall.

Q. How long have you been an expert on smelling stale rum on a man's breath? A. I don't claim to be an expert.

Q. How do you know it was stale rum that you smelled? A. I would not say it was stale.

Q. You said it was stale rum? A. Well, I thought so.

30 Q. Could it have been cider? A. Oh, no; I don't think so.

Q. What?

A. I don't think so.

Q. Could the man have been sick? A. Well—

Q. (Interrupting.) You are not sure, are you?
A. Well, if he was sick it was because of what intoxicating liquors he had in him.

Q. How do you know? A. Well, from the smell that emanated from him.

40 Q. Did you see him drink anything? A. No, sir.

Q. Well, how do you know he was intoxicated?

MICHAEL B. HERMANS—Cross

A. Well, his actions would lead anyone to believe that.

Q. Could he have been sick? A. Not from his actions; I don't think so. I have seen sick men and they never acted like that. I have seen drunken men and pretty near know how they act.

Q. When the truck was loaded how did Mr. Napoleon act? A. He had to be assisted to the seat. 10

Q. He had to be assisted to the seat. Did you see him driving away? A. No; I left him there.

Q. Who assisted him there? A. I really could not say; one of our men, I think.

Q. You don't really know that he was assisted on? A. Oh, yes; I do.

Q. Who assisted him on? A. One of our men.

Q. Wasn't he able to get on the truck himself? A. Apparently not. 20

Q. Did he know when his truck was loaded? A. We tell a man when his truck is finished.

Q. He got on the seat and drove away? A. He was assisted on the seat.

Q. He got on the seat, was assisted on, and drove away? A. Yes, sir.

Q. Did you talk to anybody about this case lately? A. Lately?

Q. Yes, sir. Since it happened did you talk to anybody? A. No; I was only told that the case was coming up for trial. 30

Q. Who told you? A. I was served with a subpoena—

Q. (Interrupting). That is the first you knew about it? A. Yes, sir; in fact, I had forgotten. I thought the case was all settled; I didn't hear anything about it and didn't know.

Q. You knew the—you never discussed the case with Mr. McCullough or any of his men before this time? A. No, sir. 40

RALSTON CONNELL—Direct

Q. Never? A. Never.

Q. Do you know why you were examined here as a witness? A. Sir?

Q. Do you know why you were examined here as a witness? A. Yes, sir; to tell the truth.

10 Q. You didn't speak about this case to anybody at all before you received the subpoena, did you?

A. Why, yes; Mr. Sullivan asked me what I knew.

Q. And did you discuss the case with somebody before you came here? A. I didn't discuss the case; I told him what I knew.

Q. Well, that was discussing the case? A. No, sir.

Q. That is all.

(Witness excused.)

20

RALSTON CONNELL, sworn.

Direct examination by Mr. James A. Sullivan.

Q. Mr. Connell, where do you reside? A. 303 Chapel avenue, Jersey City.

Q. Were you in Jersey City on November 23, 1914? A. Yes, sir.

30 Q. Where were you about between eleven and twelve thirty on that morning? A. Well, between eleven and twelve thirty—between eleven and half-past eleven we were going to Bayonne.

Q. You were going to Bayonne? A. Yes, sir.

Q. Anybody with you? A. Yes, sir.

Q. Who was it? A. Mr. McCullough, the driver.

Q. Who? A. Edward McCullough, the driver.

Q. Edward McCullough. What were you on, a motor truck? A. Yes, sir.

Q. A motor truck? A. Yes, sir.

40 Q. What were you going to Bayonne for? A. A load of radiators.

RALSTON CONNELL—Direct

Q. A load of radiators? A. Yes, sir.

Q. Did you see any of McCullough's trucks coming from Bayonne that morning? A. Yes, sir.

Q. About what place? What street were you on at that time? A. Between Gates and Coaster avenue.

Q. On Garfield avenue? A. Yes, sir; between Gates and Coaster avenue. 10

Q. Between Gates and Coaster avenue? A. Yes, sir.

Q. What kind of truck did you see coming from Bayonne? A. A big red truck.

Q. Driven by horses? A. Yes, sir; driven by two horses.

Q. Was it loaded? A. Yes, sir.

Q. Who was the driver? A. Well, I never seen the man before. 20

Q. You never saw the man before? A. No, sir.

Q. What condition was he in?

Mr. SULLIVAN—I object, your Honor.

THE COURT—Why?

Mr. SULLIVAN—On the ground that he is not competent to testify to a man's condition.

THE COURT—I will allow it. 30

Q. The question is what condition was he in?

THE COURT—Answer the question. What did you see about him?

A. When I seen him he was sitting on the seat with the lines in his hands, swinging from side to side.

THE COURT—Go on. 40

RALSTON CONNELL—Cross

Q. Did he have the reins in his hands? A. Yes, sir.

Q. Was the roadway smooth? A. No, sir.

Q. Was there any reason for him to swing from side to side that you could see?

10 MR. SULLIVAN—I object, your Honor.

Q. That you could see? A. No, sir.

Q. There was no reason for it? A. No, sir.

Q. Did you see his face? A. Yes, sir.

Q. Did you ever see a drunken man? A. Yes, sir.

Q. Did he look like one? A. Yes, sir.

Q. Did you think he was drunk? A. Yes, sir.

Q. That is all.

20 *Cross examination by Mr. Sullivan.*

Q. How far away from you was this man when you first saw him? A. A little further than I am away from you.

Q. You were driving a truck? A. No, sir; sitting alongside the driver.

Q. You were walking on the side walk? A. No, sir.

30 Q. Where were you? A. Sitting alongside the driver on the automobile.

Q. On the motor truck? A. Yes, sir.

Q. You were riding on the motor truck? A. Yes, sir.

Q. And you were as near to him as you are to me now? A. No; a little bit further.

Q. About how far? A. Well, about from here to the pole.

Q. To which pole? A. That middle pole (indicating column in the court room).

40 Q. And you say he was swaying from side to side? A. Yes, sir.

RALSTON CONNELL—Cross

Q. And had the reins in his hands? A. Yes, sir.

Q. What street was this on? A. Garfield avenue.

Q. Garfield avenue? A. Yes.

Q. You testified he looked to you as if he was drunk. What do you mean by that? A. You could see he was drunk the way— 10

Q. (Interrupting). How could you see? Just tell me what you could see. A. The actions of him.

Q. What were his actions? A. Moving from side to side. He was half asleep.

Q. He was half asleep? A. Yes.

Q. Anybody else on the truck? A. Not then.

Q. He was driving along Garfield avenue? A. Yes, sir.

Q. Was the truck going fast? A. No, sir; just at a walk. 20

Q. How fast were you going? A. About nine or ten miles an hour.

Q. How fast? A. Nine or ten miles an hour.

Q. Nineteen miles an hour? A. Nine or ten miles an hour.

Q. Nine or ten?

THE COURT—A team?

30

Q. A team. He was driving a team; was he not? You were on a motor truck? A. Yes, sir.

Q. Did he stop? Did the truck stop? A. No, sir.

Q. Did you stop? A. No, sir; kept right on going.

Q. You got all this at one glance, didn't you? A. Yes, sir.

Q. You saw him swaying from side to side, half asleep? A. Yes, sir. 40

RALSTON CONNELL—Cross

Q. Just casually glanced at him? A. Yes, sir.

Q. And you noticed his face? A. Yes, sir.

Q. What was the matter with his face? A. Nothing the matter with his face—only he was dozing.

Q. He was dozing off? A. Yes, sir.

10 Q. Did you know at that time he was drunk?
A. Yes, sir.

Q. How did you know he was drunk? A. The way he was swaying from side to side; you could tell by his actions.

Q. Could he be falling asleep swinging from side to side? A. Yes, sir.

Q. He could? A. Yes, sir.

Q. You are not sure he was drunk, are you? A. Yes, sir.

20 Q. How are you sure? A. Well, you could tell the way he was going from side to side.

Q. Well, couldn't he be falling asleep going from side to side? A. He went dozed off.

THE COURT—Was there anything about him aside from the swinging that you describe that made you think that he was intoxicated?

A. No, sir.

30

THE COURT—Well, that is all he wants to know.

Q. You are still employed by Mr. McCullough?

A. No, sir. I was employed at that time.

Q. Whom are you employed by now? A. I work in New York—in the paper house.

Q. Who? A. I am working in New York now.

40 Q. Do you live in New York? A. No, sir; I am working there.

RALSTON CONNELL—Re-direct

HOWARD C. BROWN—Direct

Q. Did you talk this case over with anybody before you came here? A. The only man I seen is Mr. Sullivan.

Q. You discussed this case with Mr. Sullivan?
A. He asked me what did I see about him.

10

Re-direct examination by Mr. James A. Sullivan.

Q. Did you ever see a drunken man on a truck before this accident? A. No, sir.

Q. Did you get a good look at this man's face?
A. I didn't get a good look. He was going one way and we were going the other way, and we just happened to pass.

Q. Did you notice his eyes? A. Yes; you could see they were drowsey.

20

Q. He seemed to be heavy and drowsey? A. Yes, sir.

Q. And his body swaying? A. Swaying from side to side.

(Witness excused).

HOWARD C. BROWN, sworn.

Direct examination by Mr. James A. Sullivan.

Q. Mr. Brown, where do you live? A. Garfield avenue.

30

Q. What number? A. 861.

Q. Where is that located? A. Right near Cotterdani.

Q. Were you in that vicinity on the morning of November 23, 1914? A. Seen a truck passing.

Q. You saw a truck passing? Heavy truck, was it? A. Heavily loaded truck.

Q. Heavily loaded truck? How many horses? A. Two.

40

Q. Driver? A. Yes, sir.

HOWARD C. BROWN—Direct

Q. Anybody sitting with the driver? A. No.

Q. In what direction was the truck going? A. Towards the ferry.

Q. Did you notice the condition of the man driving that truck? A. The man was rolling a cigarette.

10 Q. Rolling a cigarette? A. Yes, sir.

Q. With his hands, of course? A. With his hands.

Q. Where were the reins? A. The reins were over the dashboard and his feet over the reins.

Q. His feet were over the lines? Anything around his feet? A. He had a blanket around them.

Q. He had a blanket around his feet. Were the horses going fast or slowly? A. Going slow.

20 Q. Where were you when you saw this? A. I was going—I was just sitting down to eat my dinner.

Q. Well, how could you see the street? A. I looked out of the window to the street. There is a fellow came up to the house. I was going up to see him and I looked up towards Cotterdana and I seen this truck coming down.

Q. Were you standing in the house? A. I was standing in the house by the window.

30 Q. Did you leave the house after you saw him or did you stay in the house? A. I went right out after I seen him rolling a cigarette.

Q. Where did you go after you saw him? A. Up Ocean avenue.

Q. You didn't stay in the house? A. No.

Q. You went up Ocean avenue? A. Yes, sir.

Q. About how far is that? A. That is five blocks from Garfield.

40 Q. Why did you do that? A. I went up and I purchased a loaf of bread.

HOWARD C. BROWN—Cross

Q. Went for what? A. A loaf of bread.

Q. How long did it take you to go? A. About five minutes.

Q. Were you delayed before you started back?
A. I came right back.

Q. Were you delayed in any way coming back? 10
A. Not at all.

Q. When you came back you were going to your home, were you? A. Yes, sir.

Q. Did you see any traces of the truck then? A. No.

Q. When you returned to Garfield avenue did you look around and notice any gathering of people?
A. No. I came right straight down to the side of the house and went right in.

By the Court.

20

Q. Did you see this driver whom you say you saw rolling a cigarette laying on the street or anything?

A. After I came down I was sitting down to my dinner, and the people sits across the street, and I see them going down, look down the street—seen a lot of people running down. I went out to see what was the matter and I seen this huge bundle in the street. I went down to see what it was and it was the same driver who was rolling the cigarette, with the cigarette in his mouth, lying there with the blanket around him. 30

Q. Was he on the sidewalk? A. The body was in the street.

Q. Did you see the truck? A. The truck was gone. There was a couple of boys brought them back—brought the truck back. Who the boys is I don't know.

Cross-examination by Mr. Sullivan.

Q. You didn't notice anything out of the ordi- 40

WILLIAM McCULLOUGH—Direct

nary about his appearance? A. I couldn't tell you.

Q. From the glance that you had at him he appeared to be all right? A. He appeared to be a sober man.

(Witness excused.)

10

WILLIAM McCULLOUGH, sworn.

Direct examination by Mr. James A Sullivan.

Q. William McCullough? A. Yes, sir.

Q. Where is your place of business? A. 276 Warren street, Jersey City.

Q. What business are you in? A. In the trucking business.

Q. You are a truckman? A. Yes.

20 Q. How long have you been in business? A. 22 years.

Q. In Jersey City? A. Yes, sir.

Q. Where do you generally do your business between? A. Why, between New York and Jersey City, the horse trucks. Of course, we go all over with automobile trucks.

30 Q. How do you hire your men, Mr. McCullough? A. Why, we hire them in rotations; the longer a man is with us, of course, he is placed up first all the time.

Q. You hire the men personally, do you? A. Why, at some times, yes; sometimes I am not down as early in the morning as I ought to be, if I worked late. The night man he generally puts them on; he puts them on in rotation according as they go there.

Q. About how many horse trucks have you? A. Why, I had one time—now, do you mean? I got 48 horses now.

40

Q. 48 horses? A. Yes, sir.

WILLIAM McCULLOUGH—Direct

Q. Have you got automobile trucks? A. Yes, we have nine automobile trucks.

THE COURT—What is the purpose of this?

Mr. J. A. SULLIVAN—It is to show that this man is careful in the selection of his employees. 10

THE COURT—It is absolutely immaterial. It has nothing to do under this act. No question of that kind can arise here that I can see.

Q. Well, did you know Mr. James Napoleon, Mr. McCullough? A. Yes, sir.

Q. He was employed by you, was he? A. Yes, sir; on and off. 20

Q. Did you see him on the morning of November 23, 1914? A. No, I did not.

Q. Do you know that he was in your employ at that time? A. I did when I came down to work; yes, sir.

Q. Did you know that he went to Bayonne for freight? A. Yes.

THE COURT—How did you know it? A. I seen it on the list. It is marked up. 30

THE COURT—You didn't see him go? A. No; I didn't see him go.

THE COURT—What do you know about the accident? A. Well, that is all I know about it.

THE COURT—Anything else of this witness?

Mr. J. A. SULLIVAN—No. (Witness excused.)

Mr. J. A. SULLIVAN—I have a picture of 40

STEPHEN J. FITZGERALD—Direct

the condition of the street. Any objection to this?

MR. SULLIVAN—Why, yes.

MR. J. A. SULLIVAN—What is the objection?

10

MR. SULLIVAN—I don't know anything about that picture.

MR. J. A. SULLIVAN—Very well. I will call a witness.

STEPHEN J. FITZGERALD, SWORN.

Direct examination by Mr. J. A. Sullivan.

Q. Mr. Fitzgerald, do you know Mr. McCullough?

20 A. Yes, sir. I do.

Q. Do you know what business he is engaged in?

A. General truckman.

Q. Do you know of an accident which occurred to one of his employees on November 23, 1914. A. I do.

MR. SULLIVAN—We admit the accident.

Q. Do you know the place where James Napoleon was injured? A. I do. I did.

30 Q. What street was it? A. Garfield avenue.

Q. When did you go there? A. About three days after the man's accident.

Q. That was about the 26th of November. A. About that date.

Q. Where did you derive your information that you draw a conclusion that James Napoleon fell at a certain place on Garfield avenue. A. They were in the employ of a party by the name of *Prest* and *Fallon*.

40 Q. Who had seen the man fall in front of that building?

STEPHEN J. FITZGERALD—Direct

MR. SULLIVAN—I object to this as hearsay, and on the ground that it is absolutely immaterial.

THE COURT—It is hearsay testimony.

MR. J. A. SULLIVAN—It is the best evidence we have, if your Honor please. 10

THE COURT—I cannot help that.

By the Court.

Q. You didn't see it, did you? A. No, I didn't see it.

THE COURT—It is only his deduction from the facts that he gathered.

MR. SULLIVAN—And you don't know whether or where this happened except from what someone told you, do you? 20

THE COURT—He is not through yet. Mr. Sullivan are you?

MR. SULLIVAN—No, not yet.

Q. Did you ever see that place? A. Yes.

THE COURT—What place.

Q. On the picture. (Showing picture to witness.) I believe the number is about 871 or something. 30

Q. About what? A. 871 Garfield avenue.

Q. 871 Garfield avenue? A. Yes, sir.

Q. Who took that picture? A. Mr. Kuhn, 500 Jersey avenue.

THE COURT—How do you know, by just looking at it?

A. No. I had him take it. 40

WILHELMINA NAPOLEON—Direct

Q. Were you there at the time that picture was taken? A. I was present; yes, sir. There is a small cross in there; that is just about where the truck was, and we have marked it with an x.

10 Q. Did you go along Garfield avenue when that picture was taken? A. I did.

Q. In what condition did you find the roadway? A. Good.

Q. Is it a granite pavement? A. It is a granite block, yes, sir.

Q. No holes in the street anywhere? A. Not near there; no. The street is very good there.

Mr. J. A. SULLIVAN—Do you admit this as evidence, Mr. Sullivan? Do you take any objection?

20 Mr. SULLIVAN—Yes.

Mr. J. A. SULLIVAN—All right.

THE COURT—Any questions of this witness?

Mr. SULLIVAN—No cross-examination.

(Witness excused.)

WILHELMINA NAPOLEON, sworn.

THE COURT—What do you propose to prove?

30 Mr. J. A. SULLIVAN—I propose to prove the condition of the man when he left the house that morning; that is all.

Mr. SULLIVAN—No objection to that.

THE COURT—What time of day did the accident occur?

Mr. J. A. SULLIVAN—Between half past eleven and twelve, your Honor; noon-time.

Direct examination by Mr. Sullivan.

40 Q. You are the wife of James Napoleon? A. Yes, sir.

PATRICK O'HARA—Direct

Q. What time did he leave the house on the 23rd of November, 1914? A. Six o'clock in the morning.

Q. Six o'clock in the morning? A. Yes, sir.

Q. What was his condition? A. All right.

Q. That is all.

10

Mr. SULLIVAN—That is all.

(Witness excused.)

PATRICK O'HARA, sworn.

Direct examination by Mr. Sullivan.

Q. Where do you live? A. 65 Newark avenue.

Q. By whom are you employed? A. By Philip Corrigan.

Q. What business? A. Truckman.

20

Q. Were you ever employed by Mr. McCullough?
A. Yes.

Q. Were you employed by Mr. McCullough on the 23rd of November, 1914? Yes, sir.

Q. In what capacity? A. Foreman.

Q. What were your duties as foreman? A. Put the drivers to work in the morning.

Q. Did you know Mr. James Napoleon? A. Yes, sir.

Q. On the 23rd of November, 1914, did you put him to work? A. Yes, sir.

30

Q. What was his condition that morning? A. Sober.

THE COURT—What time was that?

A. About five minutes after six.

THE COURT—Any questions?

Mr. J. A. SULLIVAN—That is all. No cross-examination.

(Witness excused.)

40

TIMOTHY J. DRISCOLL—Direct and Cross

TIMOTHY J. DRISCOLL, sworn.

Direct examination by Mr. Sullivan.

Q. Where do you live, Mr. Driscoll? A. 122 West 34th street, Bayonne.

10 Q. By whom are you employed? A. Bayonne Supply Company.

Q. Bayonne Supply Company. I show you a delivery slip from the American Radiator Company to the Bayonne Supply Company. I ask you is that your signature? A. It looks like it; yes, sir.

Q. Did you know Mr. Napoleon? A. No, sir.

Q. You didn't. This is dated November 23, 1914. Do you know what time you signed that slip? A. No, sir.

Q. You do not? A. No, sir.

20 Q. On that day did you deliver eleven pieces of boiler sections, etc.? Did you deliver that stuff to an intoxicated man? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. If he was intoxicated would you remember it? A. Why, I think so.

Q. What would you do if an intoxicated driver came there? A. Make a report to the office.

Q. Did you make a report this day of an intoxicated driver? A. Not that I remember.

30 Q. If this man had been intoxicated you would have made a report? A. Naturally, yes, sir.

Q. Would you have delivered the goods to him if he had been intoxicated? Or would you have received the goods? A. I should have gone to the office first for instructions.

Q. You would go in the office? A. First.

Cross-examination by Mr. J. A. Sullivan.

40 Q. Mr. Driscoll, you don't know whether this man was intoxicated or not, do you? A. No, sir.

Q. That is all.

MARY HERLIHY—Direct

THE COURT—Well, did you see anything about the man who showed you this slip, or about any man that day, that would indicate that he was intoxicated to your notice?

A. I don't remember.

10

(Witness excused.)

MARY HERLIHY, sworn.

Direct examination by Mr. Sullivan.

Q. Where do you live, Mrs. Herliby? A. 188 avenue.

Q. Did you know Mr. Napoleon? A. No, sir.

Q. On November 23, 1914, did you witness an accident? A. Yes, sir.

20

Q. Where did it happen? A. On Garfield avenue.

Q. What part of Garfield avenue? A. That I could not—It is between Carteret and—I could not tell you the other street.

Q. Was it near your house? A. Well, it is right back of there.

Q. Where? A. Right at the back of my house.

Q. Right at the back of your house? A. Yes, sir.

Q. You saw it from the rear of your house? A. I saw it from the rear window.

30

Q. What was the nature of the accident? A. Well, of course, I didn't see him fall. I only seen the crowd coming down. I went down too.

Q. And what did you see when you got down? A. When I went down the men had this man carried in on this—pile of stablemen, you know. Some men had him carried, and he was laying there, and I could see the man was dying and there was a small boy there, and I sent him up to my home and

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MARY HERLIHY—Direct and Cross

told him to bring down some liquor that I had up there, and I got two men to hold him up and put a small drop in his mouth, and it ran down each corner; and the man had like an inward revulsion, and I could see a good gash over his ear.

10 Q. He was unconscious? A. Yes, sir.

Q. And you sent to your house and got liquor for him? A. Yes, sir.

Q. Gave him a drink of liquor? A. Yes, sir.

Q. You didn't see the accident? A. No, sir.

Cross-examination by Mr. James A. Sullivan.

Q. What was it, a heavy truck that you saw?
A. Yes, sir.

Q. Two horses? A. Yes, sir.

20 Q. Did you see any blanket around the man or near the man? A. Yes, sir; they had taken the blanket off the truck and covering him over; it was so severe cold.

Q. How far away was the man's body from the truck? A. Well, the men had carried it up near the stable, off the street.

Q. Did you notice the street that way—what was the condition of the street? A. Well, it is cobblestones; that is all I can tell you.

30

THE COURT—He means is it smooth or rough.

A. I could not tell you, Judge.

Re-direct examination by Mr. Sullivan.

Q. Before you gave him the liquor how close were you to him? A. I was kneeling alongside of him.

40 Q. Could you smell any liquor upon his body?
A. Yes, sir; I could; because he was puckering up

MARY E. BROWN—Direct

and I was keeping it wiped off with the horse blanket.

Q. Was that before you gave him the liquor? A. Yes.

Q. Could you smell liquor from him? A. I certainly could.

Q. That is all.

10

(Witness excused.)

MARY E. BROWN, sworn.

Direct examination by Mr. Sullivan.

Q. Where do you live, Mrs. Brown? A. 861 Garfield avenue.

Q. Did you know Mr. Napoleon? A. No, sir.

Q. Did you witness an accident on November 23, 1914? A. I didn't witness the accident. I saw the man passing my door.

20

Q. What time? A. Well, I couldn't exactly just tell you the time; I didn't look.

Q. Around what time? A. Well, when they got him down I think it was about twenty-five minutes to one.

Q. Twenty-five minutes to one? A. Yes, I think it was about that time as near as I can guess.

Q. Did he pass the front of your house? A. Yes, he passed by with a double truck, loaded truck.

30

Q. Was there anything out of the way? A. I didn't see anything out of the way. He was rolling a cigarette.

Q. He was rolling a cigarette when he passed your house? A. Yes.

Q. And you didn't notice— A. (Interrupting.) I didn't.

Q. (Continuing) Anything the matter with him? A. No, sir, I didn't notice anything the matter.

Q. He looked to be sober? A. He seemed to be

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MARY E. BROWN—Cross ANNA BANTEN—Direct

as far as I noticed. He was holding his head down and rolling a cigarette. He seemed to be all right. That is all I seen.

Cross-examination by Mr. J. A. Sullivan.

10 Q. Where was this truck when you saw it? A. Passing my door; right down be—between Garfield and Carteret; pretty near Carteret avenue.

Q. Was he rolling a cigarette with his hands? A. He was rolling a cigarette with his hands as he passed.

Q. With his hands? A. Yes, sir; with his hands; he was stooping, rolling a cigarette.

Q. Did he have anything else in his hands? A. No; nothing but the cigarette.

20 Q. Did you notice anything around his legs? A. He had the blankets around him, the way they have when they are driving.

Q. Were the horses going fast or slowly? A. They were going very slow; quite slow.

(Witness excused.)

ANNA BANTEN, sworn.

Direct examination by Mr. Sullivan.

30 Q. Where do you live? A. 959 Garfield avenue.

Q. Did you know Mr. Napoleon? A. No, sir.

Q. Did you witness an accident on November 23, 1914? A. I didn't see the accident.

Q. Did you see a horse and truck? A. I didn't see the horses nor the truck.

Q. Did you see Mr. Napoleon after the accident? A. I did.

Q. You didn't see him before at all? A. No, sir.

Mr. J. A. SULLIVAN—No cross-examination.

40

(Witness excused.)

FRED SMITH—Direct

FRED SMITH, sworn.

Direct examination by Mr. Sullivan.

Q. Where do you live? A. 165 Warren street.

Q. Did you know Mr. Napoleon? A. Why, I have seen him going past the stable where I work at Jim Price's there. 10

Q. Did you witness an accident on November 24, 1914? A. Yes, sir.

Q. Where did it occur? A. Sir?

Q. Where did the accident happen? A. Well, it was right across the street there from Jim Price's barn.

Q. How far away were you from it? A. I was about ten feet away.

THE COURT—How far? 20

A. Ten feet.

THE COURT—As far as from you to Mr. Sullivan or a little further?

A. Yes, sir.

Q. What did you see? A. I was standing by Jim Price's barn at noon; about twenty-five minutes to one. I happened to see him come down the street with a cigarette in his mouth. Well, he made a jounce and off the truck he went and hits the cobblestone, and right on the sidewalk he went. So there was two fellows come along, just happen to bring him up and bring him across the street there to the stable. I went over and helped wrap the blanket around him; and this woman here, Mrs.— I forget her name there—Mrs.— 30

Q. Herlihy? A. Herlihy. She had a glass, about two teaspoonful, about— 40

FRED SMITH—Direct

THE COURT—Well, you saw her giving him some stimulant.

A. Yes, sir.

Q. How far away were you when you first saw him? A. When I first saw him I was only about ten feet away.

Q. Did you notice anything out of the way about him? A. No, sir.

Q. Did he appear to you all right? A. He appeared to me all right.

Q. Did he have the reins in his hand? A. Why no; he didn't have no reins in his hand when I seen him.

Q. He was smoking? A. Smoking a cigarette.

Q. To all appearances he was all right? A. As far as I know.

Mr. J. A. SULLIVAN—No cross-examination.

(Witness excused.)

Mr. SULLIVAN—That is our case, with the exception of the records of the city hospital. They will show the condition of the man when he went in there.

THE COURT—You mean to show that he was not intoxicated?

Mr. SULLIVAN—That he was not intoxicated. We admit the man was unconscious.

THE COURT—Well, I will hear you on the case.

Mr. SULLIVAN—If your Honor please, William McCullough, the evidence shows, has been in business in Jersey City for about twenty-two years. He is a prosperous business man engaged in the

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trucking business. Part of his prosperity depended upon the employment of competent, capable employes. He has several men working for him and he admits that he used proper diligence and caution in engaging Mr. Napoleon.

10

THE COURT—The only question in the case is whether there was wilful negligence, or whether the intoxication was the proximate cause of the happening.

Mr. SULLIVAN—That is our defense.

THE COURT—I will hear you on that point.

Mr. SULLIVAN—From the testimony of Mr. Hermans, an employe of the radiator company, employed there for about twelve years, it appears that on the morning of November 23, 1914, James Napoleon called at their office—their place of business—and he noticed that James Napoleon was intoxicated. His business fits him to testify in that capacity. He is a shipping clerk, and he comes in contact with the various drivers, both of horses and of automobiles. He testifies that he especially called the attention of Napoleon to his own condition by asking in a sort of common colloquialism “Where did you get it?” I suppose he meant by that “Where did you get all of the liquor” which rendered him in the condition in which he was at that time. He testifies, and it has not been contradicted, that James Napoleon was assisted upon that truck and that Napoleon went upon his way to make the consignment tendered to him. As far

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10 as that evidence is concerned it has not been contradicted by the petitioner. He has shown in no way, either by testimony or by written evidence, that Mr. Hermans did not tell the truth. For that reason the testimony of Mr. Hermans must stand.

20 Concerning the testimony of Mr. Connell, a young man who has to all appearances good eyesight—and he seems to have a pretty good intellect—he testifies while he was on Garfield avenue on the way down to Bayonne he saw Napoleon sitting on the seat of the truck swaying and in a dazed condition. A man would either have to be intoxicated or very physically disabled to act in that condition, especially when he was a trained driver. That testimony has not been contradicted and it stands.

30 The testimony of Mr. Brown, whose house is a short distance from the place of the accident, is that on November 23, about 12.30 o'clock, he saw from the window of his house two horses drawing a laden truck; that the driver was rolling a cigarette while the wagon was in motion, and that the reins were out of the driver's hands. That evidently constitutes gross negligence on the part of the petitioner.

THE COURT—Suppose it did?

40 Mr. SULLIVAN—And I do not think that a man who was not intoxicated would take such chances.

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THE COURT—Do you think there is a distinction between gross negligence and wilful negligence?

Mr. SULLIVAN—I do.

THE COURT—What is the distinction?

Mr. SULLIVAN—Gross negligence is generally attributed to the party who has been injured. 10

THE COURT—You say he was grossly negligent. Does that make any difference? Can't he recover if he were guilty of gross negligence?

Mr. SULLIVAN—On that, if your Honor please—only as a presumption that intoxication was the cause of the accident. 20

THE COURT—It must come under one or the other. It is either wilful negligence or gross negligence, and wilful negligence includes intoxication. If intoxication is the proximate cause of the injury you have to get it under the proper heading; otherwise I should be unable to deduce any conclusions. 30

Mr. SULLIVAN—He became wilfully negligent in the performance of his duty by rolling a cigarette and having the reins out of his hands.

THE COURT—There is another feature of the case that you have perhaps overlooked, and that is that under the fifth section of the act the burden of proof to establish wilful negligence is upon the defendant. 40

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Mr. SULLIVAN—It is a very difficult thing for a defendant or any other person to prove intoxication upon the part of another.

10 THE COURT—I wouldn't spend any time on that. He had been drinking; there is no question about that at all. I will determine this case now. All the facts in the case were admitted. There has been no statement, however, submitted to the Court. I will take it now by word of counsel. Who are the dependents?

Mr. SULLIVAN—There are six dependents.

20 THE COURT—How many children are there?

Mr. SULLIVAN—Five children. The oldest is nine years of age. They are all dependents.

30 THE COURT—It is agreed in the case that the petitioner's husband was employed by the respondent and that his wages were sixteen dollars a week; that he was a driver; that on the 23d day of November, 1914, he was engaged in the course of his employment; that while so engaged he met with an accident, falling or being thrown or jostled in some way from the truck which he was driving and fell to the ground, and was so injured that he died in the city hospital shortly after.

40 The answer of the respondent substantially admits all these facts, but sets out as a defense that the petitioner's husband was intoxicated at the time of the in-

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jury, and the respondent claims, therefore, that he is not responsible for the happening.

The first section of the act under which these proceedings are brought provides that the petitioner shall receive compensation from his employer in case of personal injury, provided the employee was himself not wilfully negligent at the time of receiving such injury. In the 23d section of the act as it is now amended by the Session Laws of 1913 it says that wilful negligence for the purpose of the act is defined to be either a deliberate act or deliberate failure to act, or such conduct as evidences reckless indifference to safety.

Third, intoxication operating as the proximate cause of the injury.

By the fifth section of the original act it is provided that the burden of proof to establish wilful negligence shall be upon the defendant.

In this case it is urged that the deceased was intoxicated at the time of the injury. There is evidence both for and against that statement and I might readily be left in doubt as to whether he was so intoxicated that the cause of the injury was the intoxication. At any rate, it is obvious that he either fell from or was thrown from his truck. There is only one witness who testifies to the accident itself, and by his testimony there is nothing to show that the intoxication

WIELMINA NAPOLEON, recalled—Direct

operated as the proximate cause of the injury.

10 Because of the fifth section of the act, already referred to, namely, that the burden of proof is upon the respondent, I shall give judgment for the petitioner in this matter, and counsel may submit an order; if counsel can agree as to the form it may be sent to me. If not, you will have to give the usual notice under the rule provided in these cases.

Will you admit that the funeral expenses were over one hundred dollars?

Mr. SULLIVAN—No.

20 THE COURT—You will have to prove it, then. Go on and prove it.

WIELMINA NAPOLEON, recalled.

Direct examination by Mr. Sullivan.

Q. Mrs. Napoleon, what were your expenses with regard to the burial of your husband? A. \$170.00.

Q. What? A. \$170.00.

Q. Who buried him? A. Duff.

30 Q. Did you pay that bill yet? A. Yes, sir.

Q. Have you got the bills with you? A. Yes—no, no; not with me.

THE COURT—Oh, you gentlemen ought to agree on that. Step down, madam.

(Witness excused.)

