THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

New Jersey Court of Errors and Appeals.

HATTIE KLOTZ, Administratrix &c.,
Petitioner-Appellee,

v.

NEWARK PAVING COMPANY,
Respondent-Appellant.

Appeal from Supreme Court.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Supreme Court affirming certain proceedings brought before that court upon *certiorari* to the Court of Common Pleas of Essex County. The case arose under the Workmen's Compensation Act, and the judgment of the Common Pleas, which has been affirmed by the Supreme Court, awarded compensation under that law to the appellee who is the administratrix of the Estate of Charles Klotz, her husband. The Common Pleas judge awarded compensation to the appellee for the death of her husband, computing it upon the basis of the surviving wife and four children. Of the four children for whom allowance was made, two only were children of Klotz, the other two were his step-children. The facts will sufficiently appear from our discussion under the next head of this brief. The matters in respect of

which it is claimed the Court of Common Pleas and the Supreme Court erred, are as follows:

FIRST: In concluding that the husband of the appellee was injured by an accident arising out of and in the course of his employment.

SECOND: In denying the claim of subrogation asserted by the respondent, and

THIRD: In the allowance of compensation on account of the step-children.

I.

The injury to Mr. Klotz did not occur through an accident arising out of and in the course of his employment.

There is no doubt that Mr. Klotz was killed by an accident. It is equally clear that it was not an accident arising out of and in the course of his employment, and therefore not such an accident as to come within the operation of the statute. At the very least the burden which rested upon the petitioner to prove that the accident did arise out of and in the course of his employment was not met. Klotz was an employee of the Newark Paving Company. The accident happened on the morning of Sunday, December 8th, 1912. Klotz was one of a gang of men employed by the respondent to wheel stone and cement to a concrete mixer at work on Elizabeth Avenue on the repavement of that street. He went at his work at seven o'clock in the morning, but when he arrived there, it was found that owing to the pipes of the concrete mixer having been frozen, no work could be done until this had been repaired. The men therefore could do nothing whatever, and about 7:40, and at least

an hour before the mixer was fixed so as to permit the resumption of work, Mr. Klotz was struck by a car of the Public Service Corporation and killed. Under the facts, it does not appear that Klotz was injured by an accident arising out of and in the course of his employment, the burden, which is on the petitioner, to show this has, therefore, not been met. Whatever proof there is indicates rather the contrary. Three witnesses were produced who were on the job at the time of the accident, and saw it, namely: Johnson Lee, John Reynolds and John Egan. From their testimony it appears clearly that the pipes of the mixer were frozen (pp. 31, 32, 46, 52), and that while the mixer was being fixed, the men had nothing to do, as Mr. Egan expressed it "they stood up". "They had nothing to do" (p. 53, line 15). It was not possible to begin work until after the mixer had been repaired and this was not done until 8:40 or 9:50 A. M. This was after Mr. Klotz had been injured (pp. 32, 46, 54). It is quite clear that none of the gang carted cement and stone prior to the accident. Messrs. Lee, Reynolds and Egan agreed in this (pp. 35, 47, 50, 54). Miss Hug and Mrs. Hug, neither of whom saw the accident, but whose attention was called to the occurrence thereafter, said that they saw men wheeling stone and cement, but I think this was not the fact, certainly not before the accident. The men who were engaged on the work were more likely to have the exact information on this subject than these ladies, who may well have been confused as to time, inasmuch as it is undisputed that during the balance of the day there was work done of this character. As to the occurrence of the accident itself, Mr. Lee says that Klotz was leaning over his wheelbarrow as if he was doing something to it (p. 33). Mr. Lee really did not know what Klotz was doing, but he noticed him leaning over his wheelbarrow.

Mr. Egan, who saw the accident, says that Klotz was leaning over his wheelbarrow (p. 54). He had been fooling and laughing with another party a moment before (p. 54) and was talking and fooling. He appeared to be leaning over the wheelbarrow and resting himself upon it (p. 56). There was nothing in the wheelbarrow (p. 58). On these facts it is respectfully submitted that it cannot be said that the accident arose out of and in the course of his employment.

We respectfully submit that the finding of the learned Common Pleas Judge to the contrary cannot be sustained upon the evidence taken. He was in error not only in his main conclusion of fact, but also in his finding of certain of the facts which led to his main conclusion. Thus he says in his opinion (p. 62):

> "Klotz, however, wheeled some stone across the tracks before the accident. After taking a few loads across the tracks, he was near the tracks repairing or working on his empty wheelbarrow and was struck by one of the cars of the Public Service Railway Co., &c."

There is not the slightest basis in the record for this finding. On the contrary, as pointed out above, the uncontradicted evidence is that neither Klotz or any other of the men carted any material, nor did any work prior to the accident.

In *Bryant* v. *Fissell,* 86 Atl., 458, Justice Trenchard said:

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

And the Court quoted with approval the following language of Buckley, *L. J.,* in *Fitzgerald* v. *Clark,* 1908, 2 Kings Bench, 796, as follows:

> "The words 'out of' point, I think, to the origin and cause of the accident; the words 'in the course' to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place."

The language of Cozens Hardy, *M. R.,* in *Craske* v. *Wigan,* L. R. (1909), 2 Kings Bench, 635, is very applicable. He said:

> "I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the Court of Appeal since these Acts came into operation, namely, to hold that it is not enough for the applicant to say 'The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place.' He must go further and must say 'The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger.' Unless something of that kind is established the applicant must fail, because the accident is not one arising out of and in the course of the employment."

And it is, of course, entirely well settled that the burden of showing that the accident arose out of and in the course of the employment is upon the employee or those representing him.

See *Bender* v. *Owners of Steamboat Zent,* L. R., 1909, 2 Kings Bench, 41,

and also

Bryant v. *Fissell, supra,*

where it was said:

> "The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by 'an accident arising out of and in the course of his employment' rests upon the claimant."

The Supreme Court in its discussion of this phase of the case adopts the statement of the facts made by the Prosecutor before it, but adds in addition (p. 74):

> "To this must be added the important fact that at the time he was struck, Klotz was fixing up his wheelbarrow."

As already shown, this was not a fact and the finding of the Common Pleas Judge that it was a fact, is not justified by the evidence. We, therefore, submit that the evidence does not support the conclusion that Klotz was injured by an accident arising out of and in the course of his employment.

II.

Assuming, however, that a cause of action under the act did exist, it has been lost through the claimant's action in delivering a release under seal to the Public Service Corporation, the tort feasor.

It is admitted (p. 10) that a few days after the accident the Public Service Corporation paid Mrs. Klotz, the administratrix, the sum of $800.00 in settlement of its liability for this accident and Mrs. Klotz delivered a release under seal to that Com-

pany. We submit that in view of these undisputed circumstances, there is no longer any right of action against the respondent. This follows because of two reasons; first, because by the delivery of a release under seal the cause of action has been extinguished, and second, because the respondent having been entitled to be subrogated to the rights of the claimant against the Public Service Corporation has been prejudiced by the release of that company without its consent and hence has been discharged thereby.

The cause of action arising out of this accident was extinguished by the delivery of a release under seal.

This point was also discussed by the Common Pleas Court in the case of *Perlsburg* v. *Muller,* 35 N. J. L. J., 202. The Court while admitting the general applicability of the rule that a cause of action is released as to all parties liable thereon by the delivery of a release under seal to any one of them, distinguished cases like that at bar upon the ground that the cause of action as against the employer is *ex contractu,* while the cause of action against the fort feasor is *ex delicto,* and it is said that the rule contended for does not apply. Thus it was said,

> "The release of a claim *ex contractu* does not, however, release an allied claim in tort."

34 Cyc., 1092, and the cases cited in note 29 are cited as authorities for this proposition. An examination of those cases show that they are clearly distinguishable. They hold that where a person has two distinct claims against another, one in tort and the other on contract, that a release of one of these claims, for instance, the contract claim,

though couched in general language, does not release the other claim. That, of course, is true, and relates to where there are two distinct causes of action. In the case at bar, however, there is but one cause of action, broadly speaking, and the fact that it may have two aspects and be from the point of view of the employer an action *ex contractu,* and from the point of view of the tort feasor an action *ex delicto,* does not in any way, we submit, detract from the singleness of the cause of action. There are not two distinct allied claims, but one claim which may be viewed in two aspects, and when the claim is extinguished as to one, it must be extinguished as to the other. We submit that this rule is fully applicable to the case at bar. Thus examining the cases cited in Cyc. this distinction will be found manifest.

Thus in *Hanson* vs. *Fowle,* 1 Sawyer, 539, a seaman who had a cause of action against the Master Mate of the brig for damages for an alleged beating was held not to have released his claim by a general receipt given to the owner of the brig, her officers, &c., where he also had a claim for wages.

To the same effect in *Davis* v. *Diamond Carriage, &c. Co.,* 79 Pac. (Cal.), 596, the receipt of a servant in full of all demands was not held to have released a claim for personal injuries where the servant also had a contract demand for wages.

And in *Bigbee* vs. *Coombs,* 64 Mo., 529, an action for damages for the wrongful killing of a horse was held not to be released by a receipt where there had also been a contract demand for the hire of the horse killed.

The respondent, having been entitled to subrogation against the Public Service Corporation, has been discharged by reason of the release of the Public Service Corporation without its consent.

This is a point which must control this case, assuming that there ever was any liability whatever. This question was not raised in the case of *Perlsburg* v. *Muller, supra.* There is no doubt whatever that the cause of action of the employee against the employer is a cause of action upon contract. It is not in tort and bears no relation whatever to any tortious action upon the part of the employer. It arises by virtue of the provisions of the contract of employment and may arise without any fault whatever upon the part of the employer and is altogether in the nature of an agreement to indemnify the employee against accidents which may happen in the employment. It is in all essential characteristics a contract of insurance. The contract therefore being one for indemnity and the right of the employee to have this indemnity paid by the employer being a right upon contract, it follows upon well-established rules that the right of subrogation exists; in other words, that if the employee is furnished and paid this indemnity and some third person was the actual wrongdoer and also responsible to the injured for the same accident, that the employer is entitled to be subrogated to the right of the injured person against the wrongdoer. This follows on general rules of law without any regard to the specific provisions of the contract of indemnity and is to be inferred wholly regardless of the language of the compensation act. The act does, of course, provide that the provisions thereof shall furnish the full measure of the em-

ployee's right to compensation. That the right under the act is a right *ex contractu* is settled.

See *Deeny* v. *The Wright & Cobb Lighterage Co.*, 36 N. J. L. J., 121.

This is conceded by the Supreme Court.

The situation is altogether analogous to the situation which obtains in the relation of insurer and insured. The law is very well settled that where a third person is responsible for the injury, an insurance company which has, under a policy, made compensation therefor, is subrogated to rights of the injured against the wrongdoer and that if the injured releases the wrongdoer without the consent of the insurance company, the insurance company is thereby altogether discharged.

See *Weber* v. *Morris & Essex R. R. Co.*, 7 Vr., 213. In that case Chief Justice Beasley said:

> "This right of the insurance company is plainly undisputable. So after it has paid the insurance its right to sue in the name of the party injured for the damages sustained by him in case he refuses to prosecute is equally well settled. * * * The claims of the underwriter are completely of an equitable nature, being the right to be subrogated in certain conditions of the case to the party immediately wronged."

A very well considered case is *Peckham* v. *German Fire Insurance Co.*, 46 Atl. (Md.), 1066. There was a fire due to the tort of a third person. The property owner settled with that person and released him. It was held that by his action in this respect he could have no recovery upon his policy of insurance, because in settling with the tort feasor he had destroyed the insurance company's right of subrogation. The Court quoted

with approval the following language from May on Insurance, p. 1067:

> "The insurer is treated as a surety who is entitled to all the remedies and securities of the assured, and to stand in his place, and use his name in an action to recover the money which he has paid. This right is based upon the equitable doctrine that where one has been obliged to pay money to another by the nonfeasance or misfeasance of a third, who, being at fault, ought to bear the loss, the party so paying, as by his direct obligation towards the party suffering the loss he may be compelled to do, shall be allowed indirectly, and through the right which the injured party had, to compel the wrongdoer to bear the burden which was imposed by his fault, although between him and the wrongdoer there is no direct relation upon which to found a cause of action. * * * The liability of the wrongdoer is, in legal effect, first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability."

Many authorities are cited, and we ask the Court's careful consideration of this case.

In *Phœnix Insurance Company* v. *Erie Transportation Co.*, 117 U. S., 312, Justice Gray, speaking for the Supreme Court, said:

> "When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by the salvage, to the benefit of anything that may

> be received, either from the remnants of the goods, or from damages paid by third persons for the same loss."

In *Harding* v. *Townsend*, 5 Am. Rep. (Vt.), 304, the Court in refusing to permit a tort feasor to claim the benefit of a payment which had been made to the injured party by an accident insurance company on account of the injury in question, said:

> "But it is not uncommon that the insurer who has paid a loss is put in place of the injured and subrogated to his rights in respect to his remedies against the others for the injury."

See also

Ætna Co. v. *Tyler*, 16 Wend., 385.
Norwich Co. Ins. Co. v. *Standard Oil Co.*, 59 Fed., 984.
Hall & Long v. *The Railroad Companies*, 13 Wall., 367.
Mercantile, &c., Ins. Co. v. *Calebs*, 20 N. Y., 173.

Support for the view we advance may be found in the principles upon which many other cases have been decided.

Thus in *Texas, &c., Ry. Co.* v. *Eastin & Knox*, 102 S. W. (Tex.), 105, it was held there where an initial carrier shipped cattle over certain connecting lines contrary to the express directions of plaintiffs, thereby becoming an insurer of the cattle, it was entitled to recover against the connecting carrier for negligence of the latter for which it was adjudged liable and to be subrogated to the rights of the plaintiff.

In *Hart* v. *Western Railroad Corporation*, 13 Metc., 99, it was held by the Supreme Court of Massachusetts, speaking by Chief Justice Shaw, that where an owner of a house was entitled to recover from a railroad company the damages caused

by a fire, under the provisions of a statute, an insurance company which had insured the owner was entitled, upon paying the insurance, to be subrogated to the rights of the owner against the railroad company, and that this was a right which the owner could not legally release.

It was said (p. 105):

> "The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or to the insurance company, in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected."

Quite analogous also is the well settled principle that an employer such as a common carrier who is forced to pay damages for the negligence of his servant, is subrogated to the right of the party injured against the servant.

See

Smith v. *Foran,* 43 Conn., 244.

Gaffner v. *Johnson,* 81 Pac. (Wash.), 852.

27 Am. & Eng. Enc. of Law (2nd ed.), 270.

Costa v. *Yoachim,* 28 So. (La.), 992.

The Common Pleas Court was, we submit, in error in his discussion of the doctrine of subrogation. Thus he says (p. 65) that

> "The right of subrogation never follows an actual primary liability, and there can be no right of subrogation in one whose duty it is to pay."

It is very clear that in every one of the cases cited above, and always so in the case of an insurer, there is actual primary liability and duty to pay upon the part of the person entitled to subrogation. The doctrine of subrogation is not one to be narrowly applied. As it was said by the Circuit Court of Appeals for the First Circuit in the case of *Merchants, &c., Co.* v. *Robinson, &c., Co.,* 191 Fed., 769:

> "It follows, therefore, that applying the doctrine of subrogation, no attention should be paid to technicalities which are not of an insuperable character, but the broad equity should always be sought out as far as possible."

The right under the Compensation Act therefore being one for indemnity pure and simple, the relation of the employer being that of an insurer arising out of the contract of employment, it must be true that the right of subrogation existed in this case; that the respondent upon payment to the petitioner would have been entitled to proceed against the Public Service Corporation, and inasmuch as the petitioner has released this right of action and destroyed the right of subrogation, it must be clear that the right of action against respondent has disappeared; and even had the release of the Public Service Corporation been with the consent of the respondent (and it does not appear in the case that it was so) the respondent would at least have been entitled to credit for the $800.00 which the peti-

tioner received, and if the right of action against respondent has not been discharged, the right at least to credit for the $800.00 received would seem to be indisputable. The fact that the recent amendment of the statute (P. L., 1913, p. 312) in express terms now provides for this right of subrogation does not in any way militate against the argument that the subrogation was to be implied from the relation as it existed under the act before it was amended. The amendment simply now makes express what before resulted by reason of the rules of law. Statutes and amendments declaratory of the previously existing common law are, of course, not unusual.

In *Perlsburg* v. *Muller, supra,* the Court said that the English cases were not applicable inasmuch as there is an express provision for indemnity in the English Act, and the Court argued that inasmuch as the legislators in this State did not follow that language of the English Act, it must be taken to be an indication that they did not mean to give this right. That would not necessarily be so, however, inasmuch as the right under the New Jersey Act is *ex contractu,* whereas as pointed out in *Deeny* v. *The Wright & Cobb Lighterage Co.* the claim under the English Act is *ex delicto,* and the right of subrogation arises only by the rules of law where the liability to respond arises from a contractual relation. That the subrogation we contend for is not repugnant to the policy of this state, that the compensation provided for in the statute is to be considered full indemnity, the amendment above referred to makes manifest.

The opinion of the Court below shows what difficulty the Court had in arriving at a conclusion contrary to the contention of the appellant. The basis of the decision of the Supreme Court upon this point (see p. 73) is substantially that the Compensation Act was meant to insure compensation to

workmen not generally, but by way of weekly payments in lieu of wages, that commutation of these payments to a lump sum was against the design of the act, and inasmuch as the claim of subrogation might result in the employee receiving lump payments, it was not to be considered within the design of the act that subrogation should be allowed. Thus the Court said (p. 75) :

> "If the statutory compensations were subject to deductions by reason of payments made by a third person—the tort feasor—to the person injured or to his dependents, in satisfaction of the liability for the tort, this object of the statute would be thwarted and in effect the commutation to a lump sum would take place without any order of the court and at the will of the injured party or his representatives. If on the other hand the employer were allowed to recover of the tort feasor by action in the name of the employee or his representative, he would be able to recover in advance of payments by him and at a time when the extent of his own liability could not be ascertained."

The difficulty with this reasoning of the Supreme Court is that it is as much true under the act, since the amendment of 1913, as it was before that amendment, that the act was meant to insure compensation in lieu of wages. Indeed, as the Supreme Court pointed out, this feature of the act is especially emphasized by the amendment of 1913, which specifically provides that commutation is a departure from the normal method of payment and is only to be allowed under unusual circumstances. Nevertheless, under this very amendment the right of subrogation which we contend arises under the rules of law is expressly recognized. Surely in the amendment there was no deparature from the general scheme of the Compensation Act. Nor would it be so that the employer would be permitted to re-

cover of the tort feasor in advance of payments by him, and that a time when the extent of his own liability could not be ascertained. The right of subrogation at all times is a right of an equitable nature which, while recognized and enforced by courts of law, is administered upon equitable principles. To say that circumstances might arise which would require regulation in the exercise of the right of subrogation, does not by any means prove that the right should be denied absolutely and altogether. Thus again it is stated by the Supreme Court (p. 76) that no provision of the amendment of 1913 (P. L., 312-313) is applicable to the situation presented in the case at bar. The Court, however, in its reference to that amendment, fails to note that provision thereof which provides that in case the employee has received from the person responsible for the injury any amount of money, that credit therefore is to be allowed to the employer upon the payments still to be made by him. The reasons which are given by the Supreme Court in denying the claim of the appellant are not convincing, and indeed the Supreme Court admits that the conclusion which it reaches makes it possible for the employee to secure under the act of 1911, double compensation, which was probably contrary to the true intent of the legislature.

We submit that there is no reason why the true intent of the legislature should not prevail and the right of subrogation arising from the general rules of law and from the situation of the parties should not be given full effect.

III.

Compensation for step-children should not have been allowed.

It was error to allow compensation based upon the existence of step-children. The Court, in figuring compensation, included two step-children of the deceased, this upon the conclusion of law that step-children are included within the language of the act; and second, a conclusion of fact that the children in question were actual dependents upon the deceased. The conclusion of fact is not justified by the evidence. The step-children in question are now of the age of fourteen and fifteen, respectively. There is no evidence whatever that the deceased ever made them a part of his family or ever assumed any liability for their support, or ever did, in fact, support them. There is evidence that Mrs. Klotz, even during the lifetime of her husband, earned money herself. As a matter of law, it cannot be said that the word children in a statute covers step-children. That it does not cover step-children has frequently been decided. While the difference in the present case resulting from the inclusion of step-children is very slight, the point involved may be important in some other case, and therefore, the importance of a proper precedent in this respect also is apparent.

Respectfully submitted,

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June Term, 1914.

The Baker Printing Co., Law Case Printers, 251 Market St., Newark, N. J.

New Jersey Court of Errors and Appeals

HATTIE KLOTZ, Administratrix, &c.,
Petitioner-Appellee,

vs.

NEWARK PAVING CO., a Corporation,
Respondent-Appellant.

On Appeal from Supreme Court.

Brief for Appellee.

The petitioner maintains that by reason of the injuries resulting in death to the petitioner's intestate, Charles Klotz, the right of action under the "Workmen's Compensation Act" has accrued to her as administratrix, &c., and that such right could not be either lost entirely or lessened by any settlement with the *tort feasor,* to whom a general release under seal was given.

THE INJURY TO MR. KLOTZ OCCURRED AS A RESULT OF AN ACCIDENT ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

Klotz was an employe of the respondent, the Newark Paving Company. He had been working the whole day previous to the Sunday, December eighth, nineteen hundred and twelve, on which day his death was caused by being struck with a trolley car of the Public Service Railway Company. Under instructions he reported for work on the *Sunday in question,* together with the other members of his gang, near the corner of Hawthorne avenue, on Elizabeth avenue, at seven A. M. His duties up to the day in question were to wheel stone and cement in a wheelbarrow to a concrete mixing machine which was situated on the east side of

Elizabeth avenue. The stone and cement being on the opposite side of this street, and the trolley tracks being in between. On arriving at work it was found that the pipes of the machine were frozen so that they could not be used immediately. The men, including Mr. Klotz, therefore were forced to do whatever other work was available. A short time later Mr. Klotz, while doing some work on his wheelbarrow near the tracks of the Public Service Railway Company, was struck by one of their cars and received injuries from which he died within a short time. It seems to be without question that the death of the petitioner's intestate was caused at a time when he was performing certain work for the respondent at a time when he should have been performing such work and in a place where it was expected he might do the work during that time. In order to best sustain the above, we desire to call attention to certain excerpts from the testimony of Johnson Lee, John Reynolds, the foreman of the respondent company, Miss Florence Hug and Mrs. Louise Hug, and lastly the examination of the testimony of one John Egan, whose malicious attitude toward the petitioner's case is readily discernible from his frequent contradictory statements. Mr. Klotz certainly was performing some part of his duty at the time he was killed. "He was there fixing wheelbarrows and one thing or another." "He was busy doing something to his wheelbarrow." (Johnson Lee, p. 31, l. 1.) "He went to lean over to fix something at his wheelbarrow right close by the engine." (Johnson Lee, p. 32, l. 28,) and thereafter follows several questions and answers along the line of the above, until the following questions and answers appear in his testimony:

> Q (*By Mr. Laddey.*) Just what was Mr. Klotz doing just before he was struck by the trolley car?
>
> A That is just what I say, I couldn't exactly say what he was doing. He was over there doing

something in fixing his wheelbarrow and between the other things.

Q (*By the Court.*) What is the other things he was doing?

Fixing one thing and then the other.

Q You say he went from one thing to another. Now, what were those things that he went from and to?

A Some of them was greasing the wheelbarrow.

Q You saw him greasing the wheelbarrow?

A Some of them was (p. 34). (Evidently meaning some of the things that Mr. Klotz was doing.)

It is evident that the men before the accident and after also, were carting stone and cement, even the foreman on the job, John Reynolds, a witness produced by the respondent, testifies in this evasive way to the following:

Q Now, meanwhile, while you were working fixing the concrete mixer, was the gang engaged in carting stones?

A Not to my knowledge. I didn't see none of them carting any (p. 47, l. 16).

The witness was not ready to swear that there was no material near the mixer while he was working on the same (p. 48, l. 28).

In response to questions by the court what Klotz was doing there that morning the answer was: "Well, Klotz was there the same as the rest of the gang, your honor, to go to work" (p. 40 of case).

Q You haven't told me what they were doing?

A I had them working.

The witness further testified that he did not tell the men to do anything in particular, nor did he tell them anything not to do (p. 49, l. 9).

Further testimony of the above respondent's witness follows:

Q (*By the Court.*) Who greases the wheelbarrows and looks after them?

A The men that is running them as a rule (p. 50, l. 29).

Miss Hug and Mrs. Hug are probably the best witnesses as to the actual events occurring from the time that they first noticed the condition of affairs until Klotz was finally taken away. What interest could they have had in testifying either for or against the company? It is perfectly reasonable that both, being called to look at this unusual scene across the street from them, would be indelibly impressed with what they saw. In response to a question of the respondent's attorney, Miss Florence Hug explained why she remembered it so clearly.

Q However, you took notice that they were carting stones?

A Because I thought myself, there that man lay so unconscious and nearly dead, etc. (p. 41, ll. 23-28).

The women told what they actually saw and what they did not see they were quick to admit (p. 38, l. 35).

Q (*By Mr. Laddey.*) Tell us what you saw that day?

A Well, I can say from the very start I don't want you to understand that I seen the accident because I didn't.

Q (*By the Court.*) Well, tell us what you saw, madam, and then we will understand.

A Why my attention was drawn to go to the front and see what had happened and when I got there, there was a trolley standing in the way and I couldn't see just what did happen until the trolley backed back and the ambulanec came and then I saw that there was a man lying there. * * *

> But I want to say that while the man was laying there the other workmen were carrying broken stone and other stuff in wheelbarrows from our side of the street to the other side where the mixer was. Now, I don't want to say that the mixer was working because I couldn't tell you that, but I know that they were working with these wheelbarrows (p. 38, l. 35, to p. 39, l. 24).

This agrees entirely with what John Reynolds did not like to say, and that is that the men were working at the time of, and before the accident, carting materials in their wheelbarrows, and the petitioner's intestate was doing that same thing until he stopped to fix something on his wheelbarrow.

Mrs. Hug corroborates in every particular what Miss Hug says (see pp. 42 to 44).

We come now to the one witness in the whole case considering both the respondent's and the petitioner's, who attempts to show that Klotz was not killed in an accident arising out of and in the course of his employment.

Egan testified "that Klotz was *laying* on the wheelbarrow" (p. 54, l. 3): "That he *didn't know* whether the barrow was *right side up or upside down*" (p. 54, l. 12); "that he was *standing* talking to another about five or ten feet of me" (p. 56, l. 20); that "he was *resting himself* on the wheelbarrow" (p. 56, l. 20); "that he had his *two hands on the barrow*" (p. 57, l. 30); "that the barrow was *upright*" (p. 57, l. 37); "that the *wheelbarrow was not struck at all* when the car struck Klotz" (p. 58, l. 18); "that he *didn't know* that the car striking Klotz moved the wheelbarrow around" (p. 58, l. 29); "*that he saw the barrow empty after it was struck*" p. 58, l. 35); "*that he did not look at the wheelbarrow* after the accident" (p. 58, l. 33); "*that he did look at the wheelbarrow after the accident*" (p. 59, l. 22); "*that he saw Klotz laying down on the wheelbarrow*" (p. 60, l. 14).

With all these changes from negative to affirmative, we submit that he is not a creditable witness.

Egan in his testimony states positively that no one was working, while both Johnson Lee and John Reynolds state that some of the men were working.

> "A servant will be regarded as employed during a reasonable time before actual employment commences." Boyd's Workingmen's Compensation, p. 1065, sec. 486, l. 8; *Sharp* vs. *Johnson*, 92 L. T., 675.

The fact that the respondent of its own accord allowed the decedent's wages on the day of the accident from the time he reported for work to the time of his death, is a substantial refutation of its contention that his death was not due to an accident arising out of and in the course of his employment. (See State of case, p. 23, last line.)

On the above facts we most respectfully contend that the accident arose out of and in the course of Klotz's employment. "We conclude, therefore, that an accident arises in the course of the employment if it occurs while the employe is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time." *Bryant* vs. *Fissell*, 86 Atl. Rep., 458.

It is certain that Klotz was doing something in the scope of his employment when he was fixing or greasing his wheelbarrow, and that when he was told to report at seven A. M. and was fixing his wheelbarrow near the tracks at seven-forty, this action was within a time during which Klotz was employed, and since it was necessary to carry stone from the one side of the street to the other side in order to put it into the mixer, Klotz at the time of his death was at a place where he might reasonably be during that time.

Klotz's contract of service certainly included the use of the wheelbarrow. *Bryant* vs. *Fissell*, 86 Atl. Rep., 458.

It is also stated that any risk which might have been contemplated by a reasonable person when entering the employment as incidental to it, is a risk arising out of the employment.

What is an incidental risk to an employment depends entirely upon the particular employment and the circumstances and conditions surrounding such employment.

See *Challis* vs. *London & Southwestern Railroad Co.* (1905), 2 K. B., 154: "An engine driver while driving a train under a bridge was injured by a stone dropped by a boy from the bridge. It was held that his injuries were caused by an accident arising *out of and in the course of his employment.*" The opinion stated that the dropping of stones upon a locomotive engineer from the bridge was something that boys very often did, and therefore was incidental to the risk which the engineer took. It is obvious that it is incidental to the risk of a street paver who is working on a street where there are trolley cars running and where in the course of his duties it is necessary to cross and recross the tracks, and where he has to wheel a wheelbarrow near to the tracks, that he may be struck by one of these trolley cars and injured or killed.

See testimony of respondent's witness, Reynolds:

Q When the people come in the morning do you have to give them (referring to wheelbarrows) out or do they grab them?

A No, sir; they go in and pick out their wheelbarrow. As a rule they work on the wheelbarrows; some of them have got them marked so that they get the wheelbarrow to-morrow that they had to-day, and so on. See State of Case, p. 49, l. 30, to p. 50, l. 30.

The Supreme Court will not review any determination of facts made by the trial court, if there was any evidence at all adduced at the hearing to support the

conclusions of the trial court. The Supreme Court will not weigh the evidence in such an action as the one under discussion any more than it would the finding of fact by a District Court Judge sitting without a jury. See *Long* vs. *Bergen Common Pleas*, 86 Atl. Rep., 529; *Bannister* vs. *Kriger*, 85 Atl. Rep., 1027. See P. 20 of Employers' Liability Act of 1911, *re certiorari* to Supreme Court.

A DELIVERY OF A RELEASE UNDER SEAL TO A THIRD PARTY UNDER CIRCUMSTANCES SUCH AS THE CASE AT BAR, DOES NOT RELEASE WHOLLY OR IN PART WHAT IS DUE FROM THE EMPLOYER TO THE INJURED EMPLOYEE UNDER "THE WORKMEN'S COMPENSATION ACT OF 1911."

The all-important question is whether the respondent was entitled to subrogation against the Public Service Corporation, and whether, by the delivery of a release under seal destroying that right, released the respondent from the duty of making such payments, as is provided in the Compensation Act under circumstances as those at bar.

We must first consider under what circumstances this claim for compensation arose. If, for example, this accident had happened at some date prior to the passage and approval of the Compensation Act, the petitioner would have had no cause of action against the respondent. At common law, an employee of one company being injured through the *tort* of another company or its servants was forced to look to the *tort feasor* for damages. The damages were recoverable only through proof of negligence on the part of the *tort feasor*, and freedom from contributory negligence on the part of the claimant. The employer was not called on to answer in any suit as the one at bar. The Compensation Act was then passed, providing a system by which an injured employee might recover in an

action on contract some part of his wages from his employer in case he were injured in an accident arising out of and in the course of his employment. The act provides that the provisions thereof shall furnish the full measure of the employee's right to compensation. It means that under this act, if he received an injury mentioned in the schedule, a certain compensation was to be paid and that amount was a fixed one. The liability of the employer is one fixed by a legislative act, which being clear and unequivocal and not invading any constitutional right of the employer, is not a subject for the court's interpretation. The court's findings on the law is merely a ministerial act, as he is told in the act how much to allow for each and every injury or death, or in the absence of the injury being mentioned in the schedule, to find the compensation which shall bear such relation to the amounts stated in the schedule as the disabilities bear to those produced by the injuries named in the schedule. If, by chance the particular accident is caused by a *tort feasor* while the injured is within the scope of his employment, the act under which this suit is brought, and which at best provides only for partial compensation, nowhere provides specifically or by implication that an employee shall be deprived of his right to compensation thereunder merely because the accident gives rise to a right of recovery against the third party. (*Bryant* vs. *Fissell,* 86 Atl. Rep., 458-461. Opinion by Trenchard, *J.*)

Even assuming for the purpose of argument that there might be a right of subrogation to the employer, such a right would primarily have to be based on the existence of a legal liability on the part of the third party. There is no evidence here whatever that such is the case. The payment made by the Public Service Corporation may have been made for the purpose of avoiding a threatened suit at law for substantial damages or also out of a sense of commiseration for the

bereaved widow and children. We cannot guess at the moving causes for the payment made by the Public Service Corporation. It was the duty devolving upon the respondent to have shown the existence of a legal liability of the third party for the death of Charles Klotz. The respondent as master, may still pursue his remedy against the third party who has deprived the respondent of his servant's services.

See Dawbarn on Workingmen's Compensation, p. 175. Apart from the act (English act) employers have no right of indemnity at all against third parties. (Dawbarn, p. 199.)

The circumstances of this case cannot be considered analogous to one where an insurance company seemed to be entitled to the right of subrogation from the assured against a *tort feasor*.

> "It is understood, of course, that the English act differs from the New Jersey Compensation act in that, the injured under the former has a right of action *ex delicto*, while in the latter case his right of action is *ex contractu*." *Deeny* vs. *Wright & Cobb Lighterage Co.*, 36 N. J. L. J., 121.

The English act provides that an injured employee may have a right of action against the *tort feasor* and against his employer, but he may not recover both damages and compensation. The framers of that act saw the legal responsibility of all parties and provided against a double recovery on the part of the injured. See Dawbarn on Workingmen's Compensation, p. 175. The framers of the New Jersey act failed to provide against a double recovery, but seeing that the act as it stood allowed both damages and compensation, passed an amendment to the same in April of nineteen hundred and thirteen, in which substantially the same enactment was made as the English act contained relating to double recoveries. Until the nineteen hundred and thirteen amendment of our act was

approved, the employee certainly was not deprived of his common law right of suing the *tort feasor* and he also had the additional right of compensation against his employer. The system under which the employee was working as long as we can remember, was faulty and our Legislature stepped in and, in passing our Compensation act made absolute unconditional provisions for the employee in case he were injured and for his dependents in case he were killed.

This in no way is analogous to the ordinary contract between an insurance company and an assured. It was a question of public policy on the part of our State. We think the relationship of insurer and assured is entirely different from that of employer and employee under the Compensation act of New Jersey, and that the right of subrogation does not exist in the latter case. If subrogation cannot exist in favor of the employer against the *tort feasor,* it matters little whether the release of the injured employee given to the third party is with or without the consent of the employer. The trial court has exhaustively considered this question in its determination of facts and conclusions on p. 65, ll. 9 to 40 of the state of the case.

That Klotz's administratrix accepted such an inadequate amount from the Public Service Corporation would tend to prove that she did not intend to relinquish her right under the Compensation act against the contractual obligor.

The above rule has been established in the case of *Hanson* vs. *Fowle,* 1 Sawyer, 539, "where a seaman who had a cause of action against the master mate of the brig for damages for an alleged beating, was held not to have released his claim by a general receipt given to the owner of the brig, her officers, &c., where he also had a claim for wages."

It cannot be argued that the word "wages" here, is not the same as "compensation" as the purpose of a Compensation act is to continue an injured man's

wages during the period of his disability, in a lesser amount of course. (See sec. 21 of the Amended Compensation Act of New Jersey in regard to commutation.) If this is agreed, then we have in this case an argument in favor of the petitioner's contention, since the English case held that a release to the *tort feasor* did not release the injured's claim for wages.

The same argument may be made in regard to the case of *Davis* vs. *Diamond Carriage &c. Co.*, 79 Pac. (Cal.), 596. If subrogation exists in cases such as the one at bar, then the provision of the act regarding the commutation of compensation could in every such case be easily circumvented by the injured or the dependents, settling with the third party in order to obtain a lump sum payment.

There has been a very recent decision by the Supreme Court in the case of *Inter-State Telephone & Telegraph Company* vs. *Public Service Electric Company,* argued February Term, 1914, and decided June 3, 1914, and which opinion is very applicable to the situation presented in this case. This case came before the court on a motion for determination before trial under Rule 70. The motion raised the question that the right of an employer to recover of a *tort feasor* moneys agreed to be paid to an employe. The case is one of first impression. We are referred to no authority precisely in point and we have found none. The fact that the legislature of 1913 made special provision for such a case is evidence that in the contemplation of that body the right did not exist under the act of 1911, but it is not conclusive since the act of 1913 might be said to limit a pre-existing right of recovery of the employer under the principles of the common law, instead of giving him a new right. We must deal with the question therefore upon principle.

It is certain that the intent of the act was to secure compensation to workmen for the perils of their employment, the risk of which it had been previously

thought they assumed as a part of the contract of employment, for which they were supposed rightly or wrongly to be compensated in their wages. In any event the right to the statutory compensation is a part of the compensation of the employee for services rendered, for which the employer receives a *quid pro quo*. If it were not so, the employer would cease to employ. The compensation is no more a loss to him than other wages paid for work done, and it is none the less compensation for labor done because the statute directs that its payment shall be distributed over a certain number of weeks in the future. It is one of the necessary expenses of the business against which the employer must protect himself by a higher price for his product or lower regular wages for his employees.

It is to be remembered also that this action is brought under the Compensation act, prior to the amendment of 1913.

We have as a result of the above-mentioned accident two distinct allied claims, and not one claim with a double aspect as the respondent maintains; an action in *tort* based upon negligence against the Public Service Corporation and another against the respondent on contract, which contractural relationship exists by reason of an act of public policy of the State of New Jersey. Therefore, no right remains to the respondent to make any deduction on account of the settlement agreed upon by the Public Service Railway Co. and the administratrix of Charles Klotz. The respondent if it cared to, had the alternative of not being placed in the position where a man could have a double recovery, by giving a notice to the man that he should work for them under sec. 1 of our act, but it did not choose to do so.

Our Supreme Court has given its approbation to such a thought. (*Creagh* vs. *Nitram Co.*, 86 Atl. Rep., 435.)

STEPCHILDREN MAY BE DEPENDENTS UNDER THE ACT OF 1911.

Where the stepfather receives the stepchild into his family and treats it as a member thereof, he stands in the place of the natural parent and the reciprocal rights, duties, and obligations of parent and child continue as long as such relation continues. 29 Cyc., 1667. Therefore in contemplation of law the decedent was in *loco parentis*.

Dissenger's case, 39 N. J. E., 227. *Haggerty* vs. *McCanna*, 25 N. J. E., 48. *Snover* vs. *Prall*, 38 N. J. E., 207; *Yohe* vs. *Erie R. R. Co.*, 36 N. J. L. J., 154.

No doubt the legislative intent was to include stepchildren actually dependent.

It is most respectfully submitted therefore, that the judgment under review be affirmed in *toto* with costs to the petitioner.

Respectfully submitted,

JOHN V. LADDEY,

Attorney for Petitioner-Appellee.

KALISCH & KALISCH,

Of Counsel.

INDEX.

TESTIMONY FOR PLAINTIFF.

TESTIMONY FOR RESPONDENT.

Notice of Appeal.

Filed March 19, 1914.

New Jersey Supreme Court

HATTIE KLOTZ, administratrix, &c. of CHARLES KLOTZ, deceased,
Respondent-Defendant,
vs.
NEWARK PAVING COMPANY,
Prosecutor-Appellant.

On Certiorari, &c.

Take notice that the prosecutor appeals to the Court of Errors and Appeals from the whole of the order or judgment entered in this cause on the twenty-fifth day of February, nineteen hundred and fourteen, on the following grounds:

First. Because the New Jersey Supreme Court ordered that the proceedings brought up by the writ of *certiorari,* heretofore allowed herein, be affirmed.

Second. Because the New Jersey Supreme Court ordered that the said proceedings brought up by the said writ of *certiorari* be affirmed; whereas the said proceedings should have been set aside for one or more of the reasons assigned by the prosecutor above named, in support of its said writ of *certiorari.*

Third. Because the New Jersey Supreme Court ordered that the said proceedings brought up by the said writ of *certiorari* be affirmed; whereas the said proceedings should be set aside for one or more of the following reasons:

a. Because the said prosecutor, Newark Paving Company, is not nor was in any wise liable to pay to the said Hattie Klotz, as administratrix of the goods and chattels of Charles Klotz, deceased, any compensation under or by reason of an act 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 acts amendatory thereof and supplemental thereto, for the following reasons:

(1) Because the said act is unconstitutional.

(2) Because the injury to the said Charles Klotz did not arise out of and in the course of his employment with the said Newark Paving Company.

(3) Because the right of action, if any, against the said Newark Paving Company, because of the injury and death of said Charles Klotz was merged in and released by a release under seal delivered by said Hattie Klotz as administratrix, &c., to the Public Service Corporation of New Jersey, which was responsible for the injury and death of said Klotz, releasing it from all liability therefor.

(4) Because said Hattie Klotz as administratrix, &c., by a release under seal released the Public Service Corporation of New Jersey, the tort feasor responsible for the injury and death of said Charles Klotz from all liability therefor.

(5) Because the said Hattie Klotz as administratrix, &c., destroyed the right of subrogation which said Newark Paving Company had against the Public Service Corporation of New Jersey, the tort feasor responsible for the injury and death of said Charles Klotz.

b. Because the said Common Pleas Judge erroneously and improperly found and determined the facts from the evidence taken in said proceeding.

c. Because the said Common Pleas Judge erroneously and improperly applied the law to the facts found and determined from the evidence taken in said proceeding.

d. Because the said Common Pleas Judge erroneously and improperly refused to allow credit upon the alleged liability of said Newark Paving Company for the sum of eight hundred dollars, paid to the said Hattie Klotz as administratrix, &c., by the Public Service Corporation of New Jersey, the tort feasor responsible for the injury and death of said Charles Klotz, deceased in discharge of its liability therefor.

e. Because the said Common Pleas Judge erroneously and improperly applied the law relating to the awarding of compensation and allowed compensation in excess of that allowed by statute in that the said Common Pleas Judge allowed a percentage of wages based upon the said Charles Klotz having been survived by his widow and four children, whereas two children of said children for whom allowance was made by said Common Pleas Judge were step-children of said Charles Klotz.

f. Because the said proceedings are in divers other respects irregular, unjust, illegal and oppressive to the prosecutor.

McCARTER & ENGLISH,
Attorneys of Prosecutor-Appellant.

To

JOHN V. LADDEY, ESQ.,
Attorney of Respondent-Defendant.

Served on attorney of appellee March 18, 1914.

Writ of Certiorari.

NEW JERSEY, *ss.*

The State of New Jersey to the Court of Common Pleas in and for the County of Essex and Joseph McDonough, clerk of said court, and Hattie Klotz, Administratrix of the goods and chattels of Charles Klotz, deceased, GREETING:

We being willing for certain reasons to be certified of and concerning a certain determination and judgment rendered on the fifteenth day of July, nineteen hundred and thirteen, by the Honorable William P. Martin, one of the judges of the said Court of Common Pleas in and for the said County of Essex in certain proceedings brought on behalf of Hattie Klotz, administratrix of the goods and chattels of Charles Klotz, deceased, petitioner, against Newark Paving Company, respondent, for the determination and recovery of compensation under an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an 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 fourth, nineteen hundred and eleven and the acts amendatory thereof and supplemental thereto, we command you that the said determination and judgment together with all proceedings for the making of the same and all things touching and concerning the same as fully and entirely as before you they remain or are in your custody and control, you do certify and send together with this writ to our Justices of our Supreme Court of

Judicature at Trenton, on the thirtieth day of August, nineteen hundred and thirteen, that therein may be caused to be done what of right and according to law ought to be done.

Witness, the Honorable William S. Gummere, Chief Justice of our said Supreme Court at Trenton, this eleventh day of August, nineteen hundred and thirteen.

WM. C. GEBHARDT,

Clerk.

McCARTER & ENGLISH,

Attorneys.

Endorsed.

Allocatur.

WILLIAM S. GUMMERE,

C. J.

Petition.

Filed March 14, 1913.

Essex County Court of Common Pleas.

HATTIE KLOTZ, Admrx., &c., *Petitioner,* *vs.* NEWARK PAVING CO., a corporation, *Respondent.*	*On Petition for Compensation, etc.*

To His Honor, WILLIAM P. MARTIN, President Judge of the Essex County Court of Common Pleas:

Your petitioner, Hattie Klotz, respectfully shows as follows:

1. Petitioner is a resident of the City of Newark, County of Essex and State of New Jersey.

2. That the respondent is a corporation conducting the business of street paving and road making, with its principal office at 133 First street, Newark, New Jersey.

3. That on or about December eighth, nineteen hundred and twelve, the petitioner's husband, Charles Klotz, was in the employ of the respondent and while in said employment it became and was his duty to cart stone, cement and sand in a wheelbarrow to a mixing machine.

4. That on or about the eighth day of December aforesaid, while in the employ of the above respondent and while in the performance of his duties as aforesaid, the deceased was struck by a trolley car of the Public Service Railway Co., and died within a short time from the injuries received thereby, on the same day.

5. That at the time of the death of the deceased he left him surviving, as the only next of kin and heirs-at-law who were entitled to receive compensation under Chapter 95 of the Laws of 1911, otherwise known as the "Compensation Act," the administratrix, who is the petitioner herein, Robert, Anna, Charles and Tessie, all under the age of sixteen years, children of the deceased, all of whom were actual dependents of the deceased.

6. At the time of the death of the deceased, he was receiving wages of thirteen dollars and fifty cents per week from the above respondent.

7. That the said respondent had notice of the injury and death of the said Charles Klotz.

8. That 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, &c.," approved April 4th, 1911; the said petitioner by reason of the said death of Charles Klotz is entitled as administratrix of his estate, to fifty-five per cent. of the weekly earnings of the said deceased for a period of three hundred weeks, no part of which compensation has been offered up to the present time.

9. It is for the interest of justice that the periodical payments due from this respondent to the petitioner be commuted to one or more lump sum payments.

Your petitioner therefore prays that your honor will determine the compensation to which she is entitled by reason of the said accident, and that your petitioner may be awarded the costs of this proceeding.

And your petitioner will ever pray, &c.

HATTIE KLOTZ,
Petitioner.

Petition.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

Hattie Klotz, of full age, being duly sworn according to law on her oath, says that she is the petitioner named in and who executed the foregoing petition; that she has read the said petition and knows the contents thereof; that the statements of fact therein contained are true.

HATTIE KLOTZ.

Sworn and subscribed to before me
this 13th day of March, 1913.

HENRY CARLESS,
A Master in Chancery
of New Jersey.

Order Fixing Time and Place of Hearing.

Filed March 14, 1913.

ESSEX COUNTY COURT OF COMMON PLEAS.

HATTIE KLOTZ, Admrx., &c.,
Petitioner,

vs.

NEWARK PAVING CO., a corporation,
Respondent.

On Petition for (commutation of) compensation under "An Act prescribing the liability of an employer to make compensation for injuries, received by an employee in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder." Approved April 4, 1911.

A petition having been filed in this cause by the petitioner praying for commutation of the compensation payable by the respondent to the petitioner, it is, on the application of John V. Laddey, attorney for the above named petitioner, on this fourteenth day of March, 1913.

ORDERED, that the hearing of said matter be and hereby is set down for Thursday, the tenth day of April, 1913, at the Court House (Common Pleas Court Room, Part I), in the City of Newark, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard. And it is further

ORDERED, that a true, but uncertified copy of this order (together with a copy of the petition, upon which this order is based) be served upon the respondent, within four days after the date of this order.

March 14, 1913.

WM. P. MARTIN,
Presiding Judge, Essex County Court of Common Pleas.

Answer.

Filed March 22, 1913.

ESSEX COMMON PLEAS.

HATTIE KLOTZ, Administratrix, etc., *Petitioner,* *vs.* NEWARK PAVING COMPANY, a corporation, *Respondent.*	*On Petition for Compensation.*

The answer of the respondent to the petition of the petitioner says:

1. It admits the first paragraph of the petition.

2. It admits the second paragraph of the petition.

3. It admits that Charles Klotz prior to December 8th, 1912, had been in the employ of the respondent, and while in said employment it was his duty to cart stone, cement and sand in a wheelbarrow to a mixing machine, but it denies that said Charles Klotz was so employed on December 8th, 1912.

4. It admits that on December 8th, 1912, said Charles Klotz was struck by a trolley car of the Public Service Railway Company, and died within a short time thereafter, but it denies that the said Charles Klotz was so struck and killed while in the employ of the respondent.

5. It has no knowledge of the matters contained in the fifth paragraph and leaves the petitioner to make proof thereof.

6. It denies the sixth paragraph of the petition.

7. It admits the seventh paragraph of the petition.

Answer.

8 and 9. It denies that by virtue of the provisions of the said Compensation Act it is liable to respond in damages for compensation or otherwise for the death of the said Charles Klotz. And this respondent says that the death of the said Charles Klotz was not caused by an accident arising out of and in the course of his employment with this respondent, and that the said respondent is not required to respond in damages therefor. This respondent further says that the injury and death of the said Charles Klotz was caused by the negligence of the Public Service Railway Company, its servants and agents, and that said Public Service Railway Company has recognized its liability therefor by paying to this petitioner as administratrix of said Charles Klotz the sum of $800, in consideration of which she has executed and delivered to said Public Service Railway Company a release of all her claims and demands whatsoever against it. This respondent further says that the said petitioner is not entitled to recover a second time for the death of the said Charles Klotz, and respondent says that the said petitioner has been fully compensated for the accidental death of the said Charles Klotz, and that she is not entitled to recover further compensation from this respondent, and that this respondent is in nowise liable to said petitioner under the said Compensation Act.

McCARTER & ENGLISH,
Attorneys of Respondent.

Answer.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } *ss.*

Frank J. Casey, being duly sworn upon his oath, says that he is secretary of Newark Paving Company, a corporation, the respondent in the foregoing answer named. That he has read the said answer and knows the contents thereof, and that the statements of fact therein contained are true.

FRANK J. CASEY.

Sworn to and subscribed before me
this 20th day of March, 1913.

CLAUDE E. WHEATLEY,
(SEAL) *Notary Public,*
State of New Jersey.

ESSEX COUNTY COURT OF COMMON PLEAS.

May 15, 1913.

HATTIE KLOTZ, Admr.,
Petitioner,
vs.
NEWARK PAVING CO.,
Respondent.

John V. Laddey, Esq., and Isadore Kalisch, Esq., for petitioner.

Arthur F. Egner, Esq. (McCarter & English), for respondent.

It is admitted by the respondent that the place, time, and result of the accident are as stated in the petition.

It is admitted by the petitioner that $800 was paid by the Public Service Corporation to the petitioner and that petitioner has delivered a release under seal to the said Public Service Corporation, releasing it from all liability on account of this accident.

Letters of administration marked Exhibit P. 1.

HATTIE KLOTZ, sworn.

Direct examination by Mr. Laddey.

Q Where do you live? A Corner of Grove street and South Orange avenue.

Q Are you the widow of Charles Klotz? A Yes, sir.

Q Were you appointed administratrix of the estate of Charles Klotz, deceased? A Yes, sir.

Q Do you remember December 8, 1912? A Yes, sir.

Q When did your husband leave for work that morning? Did your husband work on that day—leave for work? A Yes, sir.

Q Did he leave as usual? A Yes, sir.

Q Describe the circumstances of his leaving for work? A Quarter after five.

Q Time and &c. Take his lunch with him? A Yes, sir.

Q Did he ride to work or walk to work? A Walked to work.

Mr. Egner. I do not see how it is material.

Mr. Laddey. I will withdraw it if there is any objection.

Q When did you see Mr. Klotz next? A Saw him when they brought him home dead in the basket Sunday night nine o'clock.

Q Who brought him home? A People's undertaker.

Q Did Mr. Klotz work regularly? A Yes, sir.

Q How much did he bring home to you? A According to the way the weather was. From $19 to $22 a pay.

Q How often? A Well, every two weeks.

Q Every two weeks? A Yes, sir.

Q $19 to $22? A Yes, sir; according to the weather.

Q Did he always leave home for his work at a regular time? A Yes, sir.

Q And what was that? A Half-past five—quarter after five.

Q Have you any children? A Yes, sir.

The Court. Just give us the names and date of birth.

Q The name of the youngest child? A Tessie Klotz.

Q When was she born? A She will be nine years old the 30th of May.

Q This coming 30th of May? A Yes, sir.

Q Next oldest is who? A Charles Klotz. Fifth of September he will be thirteen.

Q And the next oldest? A Annie Rittershofer; she will be fourteen the 24th of July.

Q And the next oldest? A Is Robert Rittershofer.

Q How old is he? A He was fifteen—fourteen—fifteen the 24th of March.

Q This year? A Yes, sir.

Mr. Laddey. There are other children who are beyond the statutory age of sixteen years.

The Court. You had better prove them. If the amendment affects the status then the children under eighteen will come in.

Q What is the name of the next oldest child? A Elizabeth Rittershofer, seventeen.

The Court. You mean she is now seventeen?

Witness. Yes, sir.

The Court. When was she seventeen?

Witness. She was seventeen the 15th of November.

Q She will be eighteen November 15th this year? A Yes, sir.

Q Did Mr. Klotz support these children? A Yes, sir.

Q Did he buy all their clothes and shoes for them? A Yes, sir.

Q All these children that you have just named? A Yes, sir.

Q Are any of these children working? A Only Elizabeth and Robert.

Q Were they working at the time? A Yes, sir.

Q That Mr. Klotz was killed? A Yes, sir.

Q Did they earn sufficient to support themselves, Mrs. Klotz?

Mr. Egner. Why not ask what they earn?

Q What do they earn? A Elizabeth earns according to the work.

Q What is Robert earning? A Three dollars.

Q And the other child that is working? A Elizabeth, according to the work; they have piece work—week work ninety cents a day.

The Court. About what does she get?

Witness. They get ninety cents a day, time work. About five dollars a week.

The Court. About five dollars a week?

Witness. Yes, sir.

Q Did the children earn sufficient money to support themselves?

Mr. Egner. That is a matter of conclusion.

The Court. That is a question that the court has got to answer.

Q Did you expend any additional money for their support in addition to what they brought you home? A Yes, sir.

Cross examination by Mr. Egner.

Q Did you do any work, Mrs. Klotz? A Yes, sir; do washing.

Q What, washing? A Yes, sir, home.

Q Did that contribute to the support of the children? A Yes, sir; at present I have to.

Q I mean before your husband was killed? A Well, once in a while I used to go out working.

Q You helped out that way? A Yes, sir.

Q Now Annie Rittershofer was not a child of Mr. Klotz, it was a child of you by former husband? A That is Tessie is my child by Mr. Klotz.

Q By Mr. Klotz? A Yes, sir.

Q Charles is from— A Is from his first wife.

Q Charles is his child by the first wife? A First wife; yes, sir.

Q Annie is your child? A By Rittershofer.

Q By the first husband? A Yes, sir.

Q Not by Mr. Klotz? A No, sir.

Q Robert is a child by Mr. Rittershofer? A Yes, sir.

Q And Elizabeth is your child by Mr. Rittershofer? A Yes, sir.

Re-direct.

Q Mrs. Klotz, if the court should allow a lump sum payment of this payment or a part thereof what would you do with it? A Start a little fancy store —millinery.

Q Millinery and fancy store? A Yes, sir.

Q Where? A Either up in Irvington or South Orange.

Q In the vicinity of where you now live? A Yes, sir.

Q Have you had experience? A Yes, sir.

Q For how long and when? A About thirty years.

Q You have done that sort of work all your life? A Yes, sir; all along from a girl of nine years old.

Q How much would you require for that purpose? A Well, about $500.

Q About $500? A Yes, sir.

Q How many of the children that are now home go to school? A Three.

Q With the work that you are now doing can you attend to them properly? A Well I take the work home. I take the washing home.

Q Do you get sufficient remuneration—sufficient money to support them by that? A Well, I try to get along.

Mr. Egner. I think the proper thing to do is to have this lady say what she does earn now.

The Court. I sustain the objection.

Witness. My earning is $2.25 at present a week now, and what the children bring home.

Hattie Klotz, re-cross.

The Court. What were you getting when your husband died?

Witness. Why what I got from the children. One week $3—

The Court. What were you getting from your washing?

Witness. From washing? Oh, I didn't wash very much at that time, when Mr. Klotz was working. I only worked washing later—since Mr. Klotz is killed.

The Court. Since he is killed then you have been compelled to work?

Witness. Yes; I am compelled steady to work now.

Re-cross.

Q Mrs. Klotz, the day after Mr. Klotz was killed you received $800 from the Public Service Corporation? A On the day after—after he was buried—two days after he was buried, they come up to the house to settle.

Q You got $800? A Yes, sir.

Q What did you do with that money? A I paid the debts that I had and my rent; I clothed the children and saved some; put some money aside. $200 I loaned out.

Q What did you do? A I loaned out money; $200, to protect myself if I hadn't anything further on.

Q Yes. You loaned out $200? A Yes, sir.

Q To whom? A To Mrs. Ramish.

Mr. Laddey. I do not think these facts are material to the issue, what she did with that $800. We admit that.

Mr. Egner. It is very material on the commutation.

The Court. She says she has to take in washing—and it is material on commutation on that account, isn't it?

Mr. Laddey. I don't see now what she did with that money would be material.

The Court. If she has had $800 and fooled it away don't you think that that fact is some evidence of the fact that she is not capable of taking care of money and that the court ought not to allow any further commutation of the sum?

Mr. Laddey. It is not proof that she cannot engage in that particular work which she says she will now engage in.

The Court. Why isn't it? And why isn't it the best proof in the world? How do you gauge anybody's ability except by what he has done?

Mr. Laddey. A man may be a spendthrift in one way and in the business in which he is employed he may be the most saving person on earth. You will find lots of such men.

The Court. Your objection is overruled.

Exception prayed and allowed.

Q Now Mrs. Klotz, you say you have loaned out $200 to somebody? A Yes, sir.

Q To Mrs. Ramish? A Yes, sir.

Q Is she a friend of yours? A Yes, sir.

Q And how was that loaned out? A It was loaned out on a promise note.

Q On a note? A On a note. When she asked me for $200 for the loan I loaned it to her and she give me a note and it says a promise note.

Q Who made out that note? A Some lawyer in Broad street.

Q Do you know his name? A No, sir.

Q And when is that note to be paid to you? A In two years.

Q In two years? A Yes, sir.

Q Is there any security for the note? A No, sir.

Q And do you get any interest? A Yes, sir; six per cent. on the dollar.

Q Has she paid you any interest yet? A She gave me $13 out of it for my rent.

Q For your rent? A Yes, sir.

Q When did she give you that? A She gave me that last Friday night.

Q Now how much were the funeral expenses? A Well Mr. Laddey has got all the papers. I can't remember things.

Q Well now aside from this $200 which you loaned to Mrs. Ramish, did you have any other money left out of that $800? A Well I paid my debts. I had debts. And I clothed my children.

Q How much were your debts? A My debts were about $400.

Q When were those debts incurred? A Sir?

Q When did you incur those debts? A Well I got all my papers home.

Q Who did you owe that $400 to? A Butchers and grocers and rents and bought clothes and lived the rest of the time.

The Court. Were they debts of yours or were they debts of your husband?

Witness. Why sure I paid them. I wouldn't want—

The Court. Were they debts of yours or debts of your husband?

Witness. Of my husband—while my husband was alive.

Q How much of this $400 represented new clothes that you bought? A Bought clothes for me, shoes and stockings. I can't remember. It is everything down. I aint spent one penny unnecessary.

Q You say you spent $400 and there is $200 all that you now have? A This $200.

Q That you loaned out. Is that all that is left? A Yes, sir.

Q Out of $800? A Yes, sir.

The Court. Haven't any left?

Witness. No, sir; just only $200.

Re-direct.

Q Did Mrs. Ramish, when she borrowed the $200, give any reason for borrowing that $200?

Mr. Egner. I object.

The Court. You opened it. I overruled the objection.

A Why she said she would take it and count it out—I would have some money when a stormy day comes.

The Court. Then she took it to take care of it for you, isn't that it?

Witness. Yes, sir.

Q And you can't get it back until two years after the time you let her have it? A No, sir; she will give me any time money if I wish any.

The Court. Her promissory note reads that she will pay you in two years.

Witness. Yes, sir.

The Court. So as a matter of law don't you know that you can't get it back, unless she wants to give it to you, before the two years?

Witness. I don't know.

The Court. You don't know?

Witness. No. I loaned it to her as a friend. I thought she wanted it and that is how I come to lend it to her.

The Court. We are not criticising your friendship. The only point is whether it is sound business and whether you are capable of taking care of money.

How old a corporation is the Newark Paving Company?

Mr. Egner. 1896.

Re-cross.

Q Have you ever run a store before, Mrs. Klotz? A No, sir.

Q Never ran one? A No, sir.

WILLIAM RITTERSHOFER, sworn.

Direct examination by Mr. Laddey.

Q Are you the son of Mrs. Klotz? A Yes, sir.

Q Do you remember going to the Newark Paving Company to collect your stepfather's wages? A Yes, sir.

Q Tell us what took place there? A I went over the 9th of November.

Mr. Egner. I would like to know what this is supposed to prove?

The Court. What is the purpose of this?

Mr. Laddey. I want to prove by this witness the period of time for which wages were paid.

The Court. You want to prove what?

Mr. Laddey. The last period of time for which wages were paid.

Mr. Egner. What do you mean, that nothing has been paid since his death?

Mr. Laddey. That he received wages up to his death.

The Court. Do you admit the rate of wages that he received?

Mr. Egner. We do admit the rate, but it depended upon the amount of time he worked. Mrs. Klotz said he brought home between $19 and $22 every two weeks, and I am frank to say that that is about what our testimony would be. It depended on the weather—outside work—and they were paid by the hour. Sometimes it was more than $19.

The Court. This question is to bring out an admission against interest.

Mr. Egner. I admit he was paid up to the time of his death.

The Court. They may have the answer.

Q When did you go there to collect wages? A Ninth of November.

Q That was the day after the accident? A Day after the accident.

Q Then you mean the 9th of December, don't you? Did you say December or November? A December. That is right. 9th of December.

Q When did you go there? A In the morning.

Q What was said?

Mr. Egner. First, who did you see? I object unless it is shown somebody competent to bind the company.

The Court. Do you know who it was you saw?

Witness. Why I guess it was the bookkeeper.

The Court. You saw the bookkeeper?

Witness. Yes, sir; two of them there.

The Court. Two gentlemen. Do you see those gentlemen in the room?

Witness. I do not see them here.

The Court. Do you see either of them here?

Witness. No; I couldn't just tell you, it is so long ago.

The Court. You can't be certain about that?

Witness. No, sir.

Q Where was this man that you saw? Where was he? A In the office.

Q In the office? A Yes, sir.

Q Describe—did he seem to be an authority there? A Yes, sir.

Mr. Egner. I object.

The Court. Objection sustained. Strike out the answer.

Q Did you go there again? A Yes, sir.

Q Did you see the same man there? A Yes, sir.

Q At what time was this you went there the second time? A Between five and six the same night.

Q Did he give you anything? A Yes, sir—that is, he didn't give it to me, he gave it to a brother of mine.

Q Your brother was with you? A Yes, sir.

Q What did he say to you at the time he gave you this?

Mr. Egner. I object until it is shown who he is and that he had authority to bind us by anything he might have said.

Q Were you referred to this person with whom you talked by any one? A Why I was sent to the office with the check by my mother to collect his wages.

Q And did this person who gave you this envelope exact this slip from you? A Yes, sir.

Mr. Egner. He is trying to get it in backwards. The first thing to do is to show who this clerk was.

The Court. Your mother told you to go there and get the wages.

Witness. Yes, sir; with the check.

The Court. And you went to the office?

Witness. Yes, sir.

The Court. And who did you see there?

Witness. I guess two of the officers.

The Court. Who were they, the same people that you talked about before?

Witness. Yes, sir; the very same ones.

The Court. Then you were not referred to them by anybody except told to go see them by your mother?

Witness. With the check to collect the wages.

The Court. Isn't that so?

Witness. Yes, sir.

The Court. What did you have, the time slip?

Witness. Yes, sir.

The Court. Your father's time slip?

Witness. Yes, sir.

The Court. You got from his clothing, did you?

Witness. I don't know where it come from. I know I got it. My mother handed it to me.

The Court. Then you went to the office and gave him the time slip and got his pay?

Witness. I didn't get it right away, no. I had to come back again.

The Court. You had to go back?

Witness. They said I would have to wait until the boss came in to get the money.

The Court. Who did you give the time slip to?

Witness. The office man or pay master.

The Court. This man that you say looked like a bookkeeper, is that it?

Witness. Yes, sir.

The Court. Did you get the pay from him?

Witness. Yes, sir.

The Court. Did your brother get the pay from him?

Witness. Yes, sir; the very same man we seen in the morning.

Q Was this person who gave you this envelope in the office? A Yes, sir.

Q Behind a partition? A Yes, sir.

Q Did he say anything to you when he gave you the money? A Yes, sir; he says it is an awful bad thing—

Mr. Egner. I object.

The Court. Proceed.

Mr. Egner. That question merely calls for an answer yes or no. Did he say anything to you?

The Court. Yes, answer whether or not—"did he say anything to you" first?

Witness. Yes, sir.

Q Now what did he say?

Mr. Egner. I object.

The Court. State your objection.

Mr. Egner. I object because it isn't shown that this person had any authority to bind the defendant by anything that he might have said. All that is shown is that he was in the office and behind a railing and that he handed out the pay to this witness's brother. Now that is all very consistent with his having been some subordinate. It is quite apparent that he did not think he had power in the morning to pay out that money—had to come back again—and I think the reasonable inference is that he had to see somebody else. The mere fact that he was the conduit for passing over the money certainly does not indicate that he had any authority to say anything—make any binding admission on this respondent.

The Court. I will take the answer subject to your objection, allow you an exception and you may move to strike it out later.

Q What was said to you—what did he say? A He says to me "It is an awful bad thing that your father was to be killed on the job."

Mr. Egner. I ask that that be stricken out.

The Court. Strike it out. What else did he say, if anything?

Witness. He says to me there was an extra hour's pay there for his work on Sunday morning—my father's work.

Mr. Egner. I ask that that be stricken out.

The Court. Can't strike it out yet. Is that all he said?

Witness. That is all; yes, sir.

Mr. Egner. I ask that it be stricken out.

The Court. What is the point, Mr. Laddey?

Mr. Laddey. Why the defense is that this man was not working on Sunday and I want to prove that he had been paid for that hour's work on Sunday—for an hour's work whereas he only worked for one-half hour, and that the envelope contained pay including one hour's work on Sunday.

The Court. Why do you bring it into the case and then proceed to rebutt the proposition and overcome it. Why not leave it out of the case? Your adversary is perfectly willing to let you keep it out.

Mr. Egner. I am not trying to say to the petitioner what she should prove or should not prove, but I am submitting that he ought to prove his case according to the rules of evidence. Now he is trying to prove something against us. I do say, by our answer—I am frank to admit—that this action did not happen in the course of this man's employment and while he was employed. Now he is trying to show by an admission—trying to bind us by somebody's admission—somebody's statement—that the man was working when this accident happened. Now I think, therefore, it is very essential that the authority of this man, whoever he was, to make this admission, which he says is going to control the case, ought to be shown, and ought to be more than the fact that somebody in the office who handed over this envelope and who himself says looked like the bookkeeper, says "It was too bad

this happened while he was working," or something like that.

Witness. While he was on the job.

Mr. Egner. I submit that is not the proper way to prove that, if it be a fact. The admission must be made by somebody competent to make an admission. Therefore I object to any testimony of what this man said.

The Court. It is in the case now. Now what is the next question.

Mr. Egner. I made a motion, if your honor please that that answer be stricken out.

The Court. Hasn't the court already denied the motion?

Mr. Egner. No, sir.

The Court. The court will deny the motion and allow you an exception with the privilege of renewing the motion later in the case.

No cross examination.

RECESS.

JOHNSON LEE, sworn for the petitioner.

Direct examination by Mr. Laddey.

Q Where do you live, Mr. Lee? A 23 Nassau street.

Q For whom do you work now? A Newark Paving Company.

Q For whom did you work on December 8th, 1912? A Why I don't know the date.

Q Do you remember the day that Klotz met with an accident? A On Sunday morning, yes, sir.

Q For whom did you work on that day? A Newark Paving Company.

Q Did you work for the Newark Paving Company the day preceding the day of the accident? A Yes, sir.

Q All day? A Yes, sir.

Q Did you work all day for them on that day? A Yes, sir; all day that day.

Q Do you remember whether Mr. Charles Klotz was a member of your gang? A Well I couldn't exactly say that, I know he was working in our gang.

Q You know he was working on your gang, did you say? A Yes, sir.

Mr. Egner. He said he didn't know.

Q What is your answer? (Answer read.) Do you remember—where did you work on that day? A On Elizabeth avenue.

Q Can you describe a little more in detail just where on Elizabeth avenue?

Mr. Egner. What day is that, "that day?"

Q December 7th or December 8th?

The Court. The witness doesn't understand the question. Reframe it, please.

Q I would like you to describe to the court where you were working on Elizabeth avenue on December 7th and 8th? A We were working there along near Hawthorne avenue—near the corner of Hawthorne avenue.

Q Is that up near the entrance to the park? A No; way this side of the park.

Q It is on that part of Elizabeth avenue which is past the corner towards Elizabeth—past the corner of Hawthorne avenue towards Elizabeth, is that correct? A Right along there; yes, sir.

Q When did you start to work on December 8th? A That morning.

Q What time? A About seven o'clock.

Q When did you quit work that day? A Five.

Q Did you get paid for all that time? A Yes, sir.

Mr. Egner. I object as irrelevant.

The Court. Why?

Mr. Egner. I don't think it makes a particle of difference whether this man is paid or not. Further more, whether he was paid for all that time or not I don't see how that has any bearing on the question of whether this particular man that was hurt was in the employ of this respondent. Certainly whether this man was paid for all day— (Interrupted.)

The Court. This man is dead. He is not able to testify. He can't say that he was told to go there. If he was in the gang with this man or this man saw him working or doing something on that day it may be that there would be enough from that to draw the inference that he was working there in your employment on that day. Now do you admit that this man was in your employment that day and working on the ground, December 8th?

Mr. Egner. We admit that this man was in our employ that day and working, but we say that he was not working at the time of this accident.

The Court. This man here (indicating the witness)?

Mr. Egner. This man here. The man on the stand. My point is that even if he were paid for the entire day it doesn't necessarily show that he was engaged in our work during the entire day. The way to find out is to ask him whether he worked that day and whether all day. It seems to me that is the logical way to find out.

The Court. Objection overruled and exception allowed.

Q What time did Mr. Klotz start to work on that Sunday, December 8th? A Well, the machine had stopped.

Q No. A We are supposed to go to work at seven o'clock.

Q Supposed to be there at seven o'clock? A Yes, sir.

Mr. Egner. I ask that that be stricken out as not responsive.

The Court. Do you mean by saying that you were supposed to go to work that you actually went to work?

Witness. Yes, sir.

The Court. Do not say "I suppose" when you mean it was actually done. Now what time did you go to work Sunday morning, December 8th, the day that you say Klotz was killed?

Witness. Seven o'clock.

The Court. Seven o'clock?

Witness. Yes, sir.

The Court. He uses the word "supposed" apparently, in a different way than the ordinary use of that word.

Mr. Egner. I do not think he does, if your honor please, but I will leave that for the cross examination.

The Court. I will grant your motion to strike out the "supposed." I will grant your motion as requested.

Q Were you told the evening before that Sunday when to report the next day by the foreman?

Mr. Egner. Objected to as leading.

Question withdrawn.

The Court. I will admit it. Do you want to press the question?

Mr. Laddey. I will ask the question. I will have the stenographer read it.

The Court. Objection overruled and exception allowed. The court is acting upon the theory that this man was employed that day by you.

Mr. Egner. Denied in our answer. Of course we haven't made our case yet. I think the burden is on the petitioner to show that he was employed, not for us to prove the negative.

The Court. Were you told by the foreman the day before to go to work there on Sunday, December 8th, at seven o'clock?

Witness. Were we told to go to work? Yes, sir.

The Court. Who told you?

Witness. The foreman. We was to work Sunday.

The Court. Did you work regularly every Sunday?

Witness. No, sir; not regularly. Only sometimes.

The Court. Speak up.

Witness. No, sir; not every Sunday we don't work. It is only sometimes when we are a little kind of busy.

The Court. A little kind of what?

Witness. Busy—kind of behind, in that way.

Q Do you know whether or not Mr. Klotz reported on that Sunday at seven o'clock to work?

Mr. Egner. I object.

A Yes, sir; he was there. I seen him. Talking to him.

The Court. You saw him there on the work?

Witness. Yes, sir.

The Court. Where?

Witness. At Elizabeth avenue, where the machine was at.

The Court. What kind of a machine?

Witness. Mixer.

The Court. Mixing machine?

Witness. Yes, sir.

The Court. What time?

Witness. About seven o'clock.

The Court. How long did he stay?

Witness. He stayed there until he was carried away.

The Court. He stayed there until he was carried away. What time was that?

Witness. I couldn't exactly say what time it was.

The Court. Well, about what. What is your best recollection?

Mr. Laddey. What time do you admit it was?

Mr. Egner. Seven-forty in the morning?

Witness. I couldn't say what time it was.

The Court. What is your recollection? Was it in the morning?

Witness. Yes, sir; it was in the morning.

Q Did you or did you not see Mr. Klotz cart cement or other material in his wheelbarrow towards the mixing machine? A No, sir.

Mr. Egner. I object as plainly leading.

The Court. Objection sustained. What did you see him do?

Witness. I didn't see him cart no cement.

The Court. What did you see Klotz do? You say you saw him there at seven o'clock and that he staid there until he was carried away after the accident?

Witness. Well, he was there. He was simply around there fixing wheelbarrows and one thing or another. I couldn't say exactly no particular work he was doing the present time.

The Court. What were you doing?

Witness. I was helping fixing the water pipes on the sidewalk.

The Court. Now tell us what you saw him do to the best of your recollection.

Witness. Best of my recollection what I seen him do was simply fixing up his wheelbarrow. He was busy doing something to his wheelbarrow. What it was I don't know.

Q Do you know whether or not Mr. Klotz had his working clothes on? A Yes, sir; he had his working clothes.

Mr. Egner. That is also a leading question. I wish counsel would stop asking them.

The Court. Yes; and the danger is when you ask leading questions that you then cover the subject and the answer may not be considered of much value.

Mr. Laddey. I would like to state that it was unintentional.

Q Was anything the matter that morning, Mr. Lee? Was anything the matter? A What with, the machinery?

Q Well, was there anything the matter with the machinery? A No; just the pipes—the water pipes.

Q What was the matter with the pipes? A Yes, sir.

Q What was the matter with the pipes? A Supposed to be froze up. The water didn't run through them as it ought to be—the water didn't run through as it ought to do. Seemed to be froze up, something of the sort.

Q What was the effect of that on the work? A I suppose on account of its being a little kind of cold—made the water freeze—froze up.

The Court. Did you use water? What were you doing there? What was the Newark Paving Company doing there?

Witness. Concrete.

The Court. Laying concrete?

Witness. Yes, sir.

The Court. Did they use water with it?

Witness. Yes, sir.

Q What did you use the water for? A To mix the concrete.

Q Did you start to mix while the pipes were frozen? A No, sir; not until you got water.

Q What were you doing in the meantime? A I myself was busy fixing the water pipe—me and some more other fellows. I couldn't exactly call all the names that was on the water pipe, but fixing up them.

Q In what location do you remember seeing Mr. Klotz on that morning? A How do you mean; when he got hit with the car or—

Q Yes; and just before he was hit with the car? A I see him doing something with his wheelbarrow. I don't know what he was doing, but he went to lean over—to lean over to fix something on his wheelbarrow.

Q How far was he from the engine? A Right close by the engine.

Q How many feet from the engine? A I couldn't say that. I don't know how many feet he was from the engine.

Q Well, give us your best estimate, please? A I wouldn't—I couldn't say. I had no measure and I can't say that.

Q Was he within reach of it—three feet or so? A About that, more or less.

The Court. What did Mr. Klotz usually do down there. What did Mr. Klotz do on December 7th, the day before he was killed?

Witness. Wheeling stone.

The Court. He was a laborer there, was he?

Witness. Yes, sir.

The Court. Wheeling stone?

Witness. Yes, sir.

Q You testified that he was leaning over his wheelbarrow? A Yes, sir; as if he was doing something to it.

Q That was the wheelbarrow with which he was supposed to do work, and cart stone is that correct? When you say "his" do you mean his to work with? A (No answer.)

Q How far was he from the place where you changed your clothes? A I couldn't answer that.

Mr. Egner. I don't see that makes any difference.

The Court. If there is such a place. It doesn't appear yet. Objection sustained.

Q Where do you change clothes?

The Court. Do you change clothes?

Q You changed clothes? A No, sir. Work in what you go there with. Don't do any changing at all. Only pull off your overcoat or something of that sort—or your coat.

Q Did you see Mr. Klotz being struck by the trolley car? A I see this car that hit him.

Q Now tell us what Mr. Klotz was doing just before that happened?

Mr. Egner. I think this witness has already been interrogated about that.

The Court. If he has he hasn't made it very clear.

Mr. Egner. He said all he knows, I think.

The Court. Objection overruled. Proceed.

Q Just what was Mr. Klotz doing just before he was struck by the trolley car? A That is what I say I couldn't exactly say what he was doing. He was over there doing something—fixing his wheelbarrow and between the other things.

The Court. What is the other thing he was doing?

Witness. First one thing and then the other.

The Court. You say he went from one thing to another. Now what were those things that he went from and to?

Witness. Some of them was greasing the wheelbarrow.

The Court. You saw him greasing the wheelbarrow?

Witness. Some of them was.

Cross examination by Mr. Egner.

Q Now you say, Mr. Lee, that you generally go to work at seven o'clock and you started to go to work at seven o'clock that morning? A Yes, sir.

Q Now when you got down to the work you found out that the mixer—the pipes leading to the mixer were frozen, weren't they? A Yes, sir; they were froze.

Q And the mixer wouldn't work? A No, sir; wouldn't work.

Q Now Mr. Klotz, you say, used to wheel stone from the stone pile to the mixer? A Yes, sir.

Q And did you do the same thing? A Well sometimes I did, but most—sometimes I wheeled sand, mostly.

Q But Mr. Klotz wheeled stones from the stone pile to the mixer? A To the mixer, yes, sir.

Q Now did the mixer work when you got there that morning? A No, it did not; couldn't work on account of the water being—

Q On account of the water being—and how long was it until that mixer was fixed? A I couldn't exactly think to tell you—I couldn't exactly put that time in.

Q Was it fixed before Mr. Klotz was struck? A No, sir.

Q Not until after Mr. Klotz was struck? A No, sir.

Q So that the gang didn't begin to work on that job until after the mixer was fixed, isn't that so? A No, sir.

Mr. Laddey. I object. I think Mr. Egner is placing evidence before the court which is not in the case. The witness has testified that they did not start to work. They wheeled the stuff over to the mixer but the mixer didn't work. I do not think you can say because the mixer did not work that the men had not started to work.

The Court. Possibly on some theory the question might make the situation a little clearer. Objection overruled.

(Last question and answer read.)

Q Is that right? A Yes, sir.

Q While that mixer was being fixed none of the men carted any stone for it? A No, sir; there was no stone carted—I didn't see them.

Q Mr. Klotz didn't cart any stone for it? A No, sir.

Q And you say the mixer was not fixed until after Mr. Klotz was hurt? A Until after he was hurt.

Q Now you say you saw Mr. Klotz by his wheelbarrow? A Yes, sir.

Q And he was leaning over the wheelbarrow? A Yes, sir.

Q But you can't say positively, can you, that he was fixing it? A I don't know what he was doing to it.

Q Don't know what he was doing to it? A I don't know what he was doing to it.

Q All you can say is that he was by his wheelbarrow and leaning over it? A Yes, sir.

The Court. You know he was doing something to it?

Witness. He was doing something but I couldn't say what he was doing.

The Court. You mean you don't know what he was fixing but he was working with his hands about the wheelbarrow?

Witness. About the wheelbarrow.

Q Do you know he was fixing anything? A I don't know what he was doing—what he was fixing.

Q Isn't it true that you just saw him leaning over the wheelbarrow? A Just as he leaned over the wheelbarrow the car run by.

Q That is all you saw? A That is all I seen.

Q And the men of your gang didn't begin their work until after that accident? A Not until after the accident.

Mr. Laddey. I think that is a misstatement. I think that is a conclusion as to what would start the work. If it is necessary to say that the mixer had to work before you could say that the men had started to work, that is all right.

The Court. Starting to work is a conclusion of law, and if you had objected to the question at the proper time the court undoubtedly would have sustained the objection.

Mr. Laddey. Then I will ask to have it stricken out on the ground that it is a conclusion of law.

The Court. Can't strike it out on that ground.

Mr. Egner. Can't strike it out because it is responsive to the question, I take it.

The Court. It is responsive to the question. You went there to go to work at seven o'clock, didn't you?

Witness. Yes, sir.

The Court. And you were already to go to work at the usual work but you did not do that because the pipe was frozen?

Witness. On account of the pipes being in that condition.

The Court. Then what you mean by saying that you did not start in to work until after the accident is that you did not go to work at the regular work until after the accident, because you had to fix up the pipes first?

Witness. Yes, sir, thaw out the mixer, that is right.

Q Now did Mr. Klotz help along on thawing out those pipes? A Did he?

Q Yes? A No, sir; he did not.

Q He did not? That is all.

Re-direct.

Q How many men in the gang, Mr. Lee, were engaged in helping to thaw out those pipes? A I couldn't tell you how many men.

Q I mean besides yourself? A Sir?

Q Any others beside yourself? A Oh, yes; some others, but I couldn't tell you how many was with us.

The Court. Were there one or two or ten? How many was it? Can't you give us some estimate?

Witness. No, sir; I could not, how many there was. There was the whole gang.

The Court. How many were there in the whole gang?

Witness. I couldn't tell you that either, how many men that day was in the gang.

The Court. Do you recollect there were as many as five?

Witness. I know there was more than five; how many I couldn't say.

The Court. Were there as many as ten?

Witness. Oh, sir, I wouldn't say. I may make a mistake. I don't know how many in the whole gang; I couldn't exactly say.

Q Had you done anything, Mr. Lee, before you found that the machine was out of order? A No, sir; we couldn't unless we get around, fix up the pipes —that is all we could do.

Q Just when did you find the machine was not working? A Found it out when I got there—when I started—started to—we couldn't work the machine until we got water into it.

FLORENCE A. HUG, sworn for the petitioner.

Direct examination by Mr. Laddey.

Q Where do you live? A 325 Elizabeth avenue.

Q Do you remember the day when an occurrence took place in front of your house? A Yes, sir.

Q Do you remember what day of the week it was —do you remember the 8th day of December? A I can't just say that I remember what date it was, but I know it was on Sunday morning.

Q On what floor do you live at 325 Elizabeth avenue? A Third floor.

Q Do you get a good view of the street there? A Yes, sir.

Q Tell us what you saw on that day? A Well, I can say from the very start I don't want you to understand that I seen the accident, because I didn't.

The Court. Well tell us what you saw, Madame, and then we will understand.

Witness. Why my attention was drawn to go to the front and see what had happened and when

I got there there was a trolley standing in the way and I couldn't see just what did happen until the trolley backed back and the ambulance came and then I saw that there was a man lying there.

Mr. Egner. I ask that this testimony be stricken out because it appears from the story of the witness that she did not observe the scene until after the accident had happened.

The Court. From the conditions as seen after the accident you may raise a very strong logical inference as to the manner in which the accident occurred. Motion denied.

Exception prayed and allowed.

Q Go ahead. A But I want to say that while the man was lying there the other workmen were carrying broken stone and other stuff in wheelbarrows from our side of the street to the other side, where the mixer was. Now I don't want to say that the mixer was working, because I couldn't tell you that, but I know that they were working with these wheelbarrows.

Mr. Egner. Now I ask that this be stricken out. There is so much that is improper in it that I do not think we can sift the grain from the chaff, and I think this witness ought to be examined by question and answer so that I may have an opportunity to object as these parts of the testimony come forward. I think the answer ought to be stricken out.

The Court. The answer is harmless. She says I didn't see something but I did see the men at that time carrying stone across the street. That part of it is perfectly proper. The rest of it can be stricken out but it is a waste of time to find it and take it out.

Q At about what time was that, Miss Hug? A It was between seven and eight.

Cross examination by Mr. Egner.

Q Now what time did you get up that morning? A Why I was in bed when my father called me to get up and go to the front to see what had happened.

Q And then how long did you remain looking out the window? A Until the man's body was carried away.

Q And when was that? A Well, I can't just tell you, but it took about ten minutes—about ten minutes for the ambulance to come, and I stayed there until the ambulance goes off and the man's blood was covered up by a couple other men there.

Q Did you get right out when your father called you? A From bed?

Q Yes. A Yes, sir.

Q Now when this accident happened did all these men go look at the place and look at the man that was hurt? A I can't tell you. I didn't see the accident happen.

Q Well, when you did see the scene weren't all the men gathered around? A No, sir.

Q Was anybody there? A I think there was a few men there.

Q Few men? A Yes, sir.

Q And all the rest of the men did not pay any attention to the scene? A They kept on working, the men with the wheelbarrows.

Q They were carting stones; and where did they cart the stones, to the other side of the street? A To the mixer, I suppose.

Q Now what you suppose. Was the mixer on the other side of the street from you? A Yes, sir.

The Court. Which side of the street are you on?

Witness. On the left hand side I think.

The Court. You are on the side away from the alms house or on the same side of the street as the alms house?

Witness. No, sir, on the opposite side from the alms house.

The Court. Opposite side. Then you are on the west side of Elizabeth avenue.

Witness. Yes, sir.

Q Now was the pile of stones on the opposite side of the street from the mixer? A Yes, sir.

Q And every time they crossed the street they crossed the tracks, did they? A Yes, sir.

Q And was this at eight o'clock that you looked out and saw these men? A No, sir. I don't know what time it was. It was between seven and eight.

Q Between seven and eight, and therefore, it was between seven and eight that you saw these men carting the stones? A Yes, sir.

Q How many were there carting the stones? A I didn't count them.

Q Well, about how many? A I don't know.

Q Haven't you any idea? A Well, I didn't take any notice. I just took notice of them working.

Q However, you took notice they were carting stones? A Because I thought myself, there that man lay so unconscious and nearly dead and these others working, without a bit of sense, not letting on that that man was laying there at all.

Q And did you not observe—

Mr. Laddey. Let her finish the answer. Is that all?

Witness. What?

Mr. Laddey. That is all the answer you were going to make?

Witness. Yes, sir.

Q And you didn't count how many men there were? A No, sir.

Q Were there more than three or four, as near as you can recollect? A Well, I think there was.

Q There were more?

The Court. Did you see any colored men there?

Witness. I think there was a colored man there, or around the place, but I don't know what he was doing.

The Court. Is your father here in court to-day?

Witness. No, sir; he is an invalid.

Q Doesn't he go out? A Well, not very much. We don't trust him out.

Q Does he go out with you ever? A No; he never—very seldom goes out.

Q Does he ever go out? Can he go out? A Well, he don't go out any because he don't like to trust himself out. He has got palsey and creeping paralysis.

LOUISE HUG, sworn for the petitioner.

Direct examination by Mr. Laddey.

Q Are you the mother of the witness who has just testified? A Yes, sir.

Q And where do you live? A 325 Elizabeth avenue.

Q Do you remember the Sunday in question? A When the accident happened?

Q That has just been testified to, do you? A Yes, sir.

Q Will you tell us your recollection of the occurrence that took place? A Well, I didn't see any more than the daughter.

The Court. Were you home that day?

Witness. Yes, sir.

The Court. About what time did you notice something unusual?

Witness. When my husband called me.

The Court. And what time was that about?

Witness. Between seven and eight in the morning.

The Court. And did you look out in the street then?

Witness. Yes, sir.

The Court. Well, what did you see?

Witness. Well, I didn't see anything. The car was right in front of the man that was hurt. We didn't really see the man that was hurt until the car backed away to have the ambulance take him away; then I saw this man lying there unconscious.

Q Did you see any other men there? A Yes, sir.

Q What were they doing? A They were working.

Q What were they working at? A They were carting stone and sand.

Q From where to where? A From our side of the street to the opposite side.

Q You are sure that was the case while the injured man was lying there? A Yes, sir.

Cross examination by Mr. Egner.

Q How far away is your house from the place where this man was struck? A Just across the street.

A Across the street? A Yes, sir.

Q Was it directly in front of your house? A Slanting. Just a little bit opposite.

Q A little bit opposite? And your husband called you also? A Yes, sir.

Q And you didn't see the man until the car backed away? A No, sir.

Q Now are you sure, Mrs. Hug, that it wasn't after eight o'clock that you saw these men carting this stone and sand? A No, sir; it was not after eight o'clock.

Q Didn't they work there all day after that? A Yes, sir.

Q And you are positive that immediately after the accident, at the time that this car backed away,

the men were carting stone and sand? A They were carting stone previous to when the car backed away.

Q When you first had your attention called they were still carting stone? A Yes, sir; they were still working.

Q Are you positive about that? A I certainly am.

The Court. Did you see the men working in the street before the accident?

Witness. No, sir; I did not. My husband did.

Mr. Egner. I ask that that be stricken out.

The Court. Strike out "My husband did."

PETITIONER RESTS.

Mr. Egner. I think that this petition ought to be dismissed, and I wish, in connection with this motion, to move to strike out testimony of the son given this morning as to the alleged admission made by somebody in the office of the respondent.

The Court. What do you understand that admission to be, not the purport of it, but the admission itself?

Mr. Egner. The admission, is this, that this man handed him his pay and said "It is too bad your father was hurt on the job." Now I assume that counsel means to show by that remark an admission on the part of the respondent that the man actually was hurt in the course of his employment and that he was engaged upon his employment at the time he was hurt. Now if that remark does not include that or counsel says they do not propose to use it for that purpose, why then I think they have not shown what the burden is upon them to show, that the man was hurt in the course of his employment.

The Court. I will grant your motion and give the exception to the other side. I will strike it out. Now what is your motion to dismiss.

Mr. Egner. I do not see that the burden has been met which is upon this petitioner, to show that this man was at the time engaged in his employment—that this accident arose while he was employed. The only witness produced who was present at the time of the accident and before the accident is Mr. Lee, and he says that while it is true they went down there at seven o'clock, the mixer was frozen and they could not proceed with their work until after it was fixed and it was not fixed until after the accident.

The Court. I think there is enough to bring the case plainly within the legitimate inference that this man was there in and about some business of yours. I will deny the motion and allow you an exception.

JOHN REYNOLDS, sworn for respondent.

Direct examination by Mr. Egner.

Q Mr. Reynolds, are you employed by the Newark Paving Company? A Yes, sir.

Q And were you employed by them on December 8th? A Yes, sir.

Q And what were your duties? A My duties there? As foreman.

Q As a foreman? A Foreman.

Q And what did you have charge of? A I had charge of that gang of men on that concrete mixing.

The Court. What do you mean by that?

Witness. The concrete mixing.

The Court. What one?

Witness. Elizabeth avenue.

Q How many were there there? A What?

Q How many concrete mixers did you have? A Had one.

Q Only one on the job? A There was two on the job—no; not that day.

Q Only one on the job that day? A That I know of.

Q One on the job that day? A Yes, sir.

The Court. Only one gang?

Witness. There were two gangs.

The Court. Is that so, or two mixers?

Witness. There was one concrete mixer—I don't know whether the other one was on Elizabeth avenue that day or not.

Q You know there was one there? A Yes, sir; there was one there.

Q And you had charge of the one that was there? A Yes, sir.

Q Now when did you get down there that morning—at what time? A I was down there quarter to seven.

Q And what did you notice as to the concrete mixer? A Well I noticed that the pipes was frozen leading from the fire hydrant to the concrete mixer.

Q Now in order to work that concrete mixer you had to have water, don't you? A Yes, sir.

Q Could the mixer work without water? A No, sir; not very well.

Q Well, did you try to work it? A No, sir.

Q What did you do then? A Well, I took the frozen pipes off and put the pipe that wasn't frozen on.

Q Now the men in the gang, what was their work down there—what did they do? A What do they do?

Q Yes. A Well, as a rule they wheel sand, stone, cement—

Q Up to the mixer? A When the concrete mixer is working; yes, sir.

Q And it is put in the mixer? A Put in the mixer.

Q And it turns out concrete and then cart it away? A Yes, sir—the machine carted it away herself.

Q Oh, the machine deposits it right out in the street? A Yes, sir.

Q Well, how long did it take you to fix this concrete mixer? A Well, to the best of my opinion, it must have been about twenty minutes to nine or thereabout when I got her started?

Q Until you got her started? A Yes, sir.

Q Now meanwhile, while you were working fixing the concrete mixer, was the gang engaged in carting stones? A Not to my knowledge. I didn't see none of them carting any.

Q You didn't? A No, sir.

Q Of course, while you were fixing the mixer—fixing those pipes was the mixer working? A No, sir.

Q And you know, of course, that Mr. Klotz was hit by the trolley car? A Well, I heard somebody holler, "There is a man hit."

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

Q Was the repair of the concrete mixer completed before or after this accident? A Well, it was pretty near an hour after.

Q Pretty near an hour after? A Pretty near an hour, through the excitement and—

Q And what is your recollection as to the time when the carting of stone commenced with reference to the repair of the mixer? A Well, as soon as the mixer started the men went to work and carted stone, cement, and sand.

Q Started in carting stone and cement and sand? A Yes, sir.

John Reynolds, cross.

Cross examination by Mr. Laddey.

Q While you were fixing this engine where were the other— A We were fixing the machine.

Q While you were fixing the mixer— A The pipes.

Q Pipes of the mixer? A Well, some of them were standing around; some of them I don't know what they were doing.

Q You don't know where some of them were? A I couldn't say.

Q Do you know what men—or whom can you recall that were standing around? A Well, I couldn't say.

Q You couldn't say? A No, sir.

Q You don't remember any of them? A No, sir; I was busy at that time myself.

Q Do you know where Mr. Egan was? A No, sir.

Q Do you know where Mr. Lee was? A No, sir —well, Mr. Lee was helping me on the pipe for one.

Q Do you know where Mr. Klotz was? A Well, he was around.

Q He was around too. Now did you—was there any material there near you ready to be put in the mixer as soon as you got it started? A Not to my knowledge.

Q Not to your knowledge? A No, sir.

Q You are not positive? A Not to my knowledge.

Q You don't recall any? A I wouldn't swear to that.

Q You wouldn't swear to it. That is all.

By the Court.

Q What was Klotz doing there that morning? A Well, Klotz was there the same as the rest of the gang, your Honor, to go work.

Q You haven't told us what they were doing? A Had them working—

Q You told Klotz to come there at seven o'clock, didn't you? A Yes, sir.

Q You ordered him there. Now he arrived at seven o'clock, didn't he? A Yes, sir.

Q And after you got there did you tell him anything to do in particular? A No, sir; I didn't tell him anything.

Q Did you tell him anything not to do? A No, sir.

Q Did you see him actually engaged in any work? A No, sir. I never speak to one man personally in the gang unless I want something particular.

Q Well you saw him there? A Yes, sir; I seen him there.

Q Do you run the time cards? A No, sir.

Q Are you responsible for reporting the time into the company? A No, sir; the time keeper; got a time keeper to take up the time twice or three times a day.

Q The time keeper does that? A Yes, sir. If a man goes away between time he gives me the number, I turn it in to the time keeper.

Q Who has charge of the barrows there for the company—who has charge of the wheel-barrows? A I have full charge of the whole gang.

Further cross.

Q When the people come in the morning do you have to give them out or do they grab them? A No, sir; they go in and pick out their wheel-barrow. As a rule they work on the wheelbarrows—some of them have got them marked so that they get the wheelbarrow to-morrow that they had to-day and so on.

Q But they are under your charge? A They are under my charge.

By the Court.

Q What do you mean by that, Mr. Reynolds, "They work on their wheel-barrows," you mean that they do something about it? A Sometimes they think, your Honor, that one wheel-barrow is better than another. They think it is better than another because they give a little more care to it than another.

Q One man takes better care of his than another? A That might be.

Q And then he wants that same wheel-barrow again? A As a rule.

Q Do you know whether Klotz had a wheel-barrow that he called his own? A I couldn't say that.

Q You remember Klotz, don't you? A Yes, sir.

Q You remember the man? A Yes, sir.

Further cross.

Q Do you remember seeing some of the men take their wheel-barrows that morning? A No, sir.

Q You didn't see him? A No.

Re-direct.

Q A certain wheel-barrow is not assigned to every man, is it? A No, sir; no, no.

Q Takes whatever wheel-barrow he finds at hand? A Yes, sir; first come, first served.

The Court. Who greases the wheel-barrows and looks after them?

Witness. The man that is running them as a rule.

The Court. The man who is running it?

Witness. Yes, sir.

Q I understood you to say, Mr. Reynolds that they did not begin to run these wheel-barrows until after the mixer was fixed? A No, sir.

Q They did not? A They didn't have any use for them until after it was fixed.

The Court. What is it that fixes that in your mind?

Witness. Fixes what?

The Court. The fact that they didn't go to work until after the accident?

Witness. They were standing around; they can't go to work until the mixer was ready to go to work.

The Court. Weren't the men at that particular time wheeling sand and stone across the street —across the tracks?

Witness. No, sir.

The Court. Sure about that?

Witness. Yes, sir; I am sure about that.

The Court. Do you know whether or not the company allows pay for that time that they waited?

Witness. That is something I couldn't say, your Honor.

The Court. You don't know?

Witness. No, sir.

Q Did you get paid from seven o'clock that morning?

Objected to.

The Court. It don't appear that he is in the same class of labor. Objection sustained.

Q Where are the barrows left when the laborers quit at night? A Right on the job.

Q Where do they put them? A Put them—stand them up along side of the curb.

Q Alongside of where? A Alongside of the curbline.

By the Court.

Q In the street? A In the street; yes, sir.

Q Were they put there or were they put in an empty lot somewhere? A No, sir; put on the street, wherever we quit, they put them, with a night watchman there with them.

JOHN EGAN, sworn on the part of respondent.

Direct examination by Mr. Egner.

Q Mr. Egan, where are you now employed? A I am employed for the Public Service.

Q Were you in December employed by the Newark Paving Company? A Yes, sir.

Q And when did you stop working for them? A I started to work for them that Sunday morning at ten minutes—

Q I mean when did you stop working for them? A Stop working?

Q Yes. When did you go with the Public Service? A Two weeks ago.

Q Did you work with the Newark Paving Company up to two weeks ago? A Yes, sir.

Q Now you say you worked for them on December 8th? A Yes, sir.

Q Did you know Klotz? A Yes, sir; I brought back the trolley car and put him in the ambulance.

Q You knew him personally? A No; I had never seen him until that morning.

Q You knew him that morning, didn't you? A Yes, sir.

Q You were part of the same gang, weren't you? A Yes, sir; I was.

Q Now what time did you get down there that morning? A I got down there about ten minutes to seven.

Q What, if anything, did you find out about the mixer? A Well, the water pipes were all froze up that was leading from the hydrant to the mixer and we could get no water and the men couldn't start

to work and the superintendent brought fifteen of the men over to the Park View Yard to run the stone off the cars.

Mr. Laddey. I would ask that the witness testify by question and answer, as Mr. Egner suggested, because it is difficult for us to follow it.

Q You say part of the men were sent over to another job at Park View? A Park View Yard to cart stone off the car, and the rest of them stood—

Q Never mind about that. We are just interested in this place where the accident happened. Now the men who didn't go over to Park View, what did they do? A They stood up. They had nothing to do.

Q When were those pipes repaired leading to the mixer, about what time in the morning? A Well, they were ready to go to work about ten minutes to nine in the morning.

Q About ten minutes to nine in the morning? A Yes, sir.

Q Was that after Mr. Klotz was hit? A Yes, sir; Mr. Klotz got hit about 7.40.

Q Now what work did Klotz do? A Well, he at the time—

Q What work did he generally do in the gang? A I have never seen him until that morning, sir. I didn't work with that gang until that morning.

Q What work did the gang do—what were they supposed to do?

The Court. He never was in the gang before.

Q What work did the gang do that day? A The gang, some of them, was left standing up.

Q I mean after you started in to work? A They started to bring stone and sand and cement and level concrete on the street, gave it about seven inches high or five inches high, whatever the specifications called for.

Q Did you see Mr. Klotz when he was hit? A Yes, sir.

Q Where was he? A He was leaning on the wheelbarrow.

Q What? A He was laying on the wheelbarrow; himself and a little fellow was fooling and laughing couple minutes before that, as you would do, and then he went and laid on the wheelbarrow, on the west side of the car track and as the car was going down he raised his head up this way and the forehead got hit against the moulding of the car.

Q What hit him? A The moulding of the car.

Q In what position was the wheelbarrow upright or upside down? A By gosh, I don't know, sir.

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

The Court. Then why did you say he was laying in the wheelbarrow?

Witness. Your honor, he was this way on it (indicating) and the wheelbarrow went this way (indicating) and the car track runs this way (indicating) and he was this way (indicating), and he raised his head towards the car and the moulding of the car hit him and knocked him over.

Q Was he carting stone at the time he was hit? A No, sir; because the machine wasn't working.

Q Were any of them carting stone at the time of the accident? A No, sir.

Q And when, that morning, did the men begin carting stone and sand? A Ten minutes to nine.

Cross examination by Mr. Kalisch.

Q You worked as a laborer for this company? A Yes, sir.

Q How much did you get a day? A I got eighteen cents an hour.

Q How much do you get on Sundays? A Eighteen cents an hour.

Q How many hours—or when did you stop on Sunday—that Sunday? A Five o'clock.

Q For how many hours were you paid on that Sunday? A I got paid for seven hours.

Mr. Egner. I object as irrelevant and immaterial, what this man got.

The Court. I overrule the objection.

Exception prayed and allowed.

The Court. What were the seven hours that you worked?

Witness. I worked from nine o'clock to five.

Q From nine to five. Do you call that seven hours? Now how do you reckon that as seven hours? A Well, three to twelve and four from one until five. That is seven hours.

Q You don't get paid from twelve to one? A No, sir; not a cent.

Q You don't get paid from twelve to one? A No, sir. I have that for my dinner—for my lunch.

Q You don't get paid during that time? A No, sir; not a cent.

Q What time did you get on the job? A I got on the job about quarter to seven.

Q Didn't you say on the 9th of December, the day after this accident, that you would say anything at all— A No, sir. Who said that?

Q In order to help out this company. Now I will tell you who, to Mr. Wolff, Fred Wolff.

Mr. Egner. I object.

The Court. You have got to call his attention to the time, place, circumstances and persons present.

Q Did you not on the 9th of December, the day after this accident, say to Mr. Fred Wolff, in the presence of several of the gang—now don't shake your head until I finish—that you would say anything at all to help the company in this case or in this claim? A No, sir; I did not. It is no such thing. I am on

my oath and I tell the truth. I have never said any such thing. Get Mr. Wolff here.

Q Now you said before that you saw Klotz just before the car struck him? A Certainly I seen him.

Q And he was looking directly at you? A No; he was fooling with a fellow down there—down on the bench there—they were talking and fooling.

Q On the bench? A He is here as a witness (pointing).

Q I don't know what you say. A The man that is here for witness.

Q I say where was he fooling—where was he when you saw him? A Well, right up one side of the track, about a couple of feet out on the track—on the street.

Q Was he with his side towards you; did he have his side towards you? A No; he was standing talking to him—talking, within about five or ten feet of me.

Q You are not answering my question. I asked you whether his side was towards you, one of his sides? A I don't know; he was talking to this gentleman up there on the end.

Q Was he facing you? A No, sir.

Q Did he have his back towards you? A Yes, sir; he had his back to me talking to this—

Q And he was leaning down? A Yes, sir.

Q Now what did you see him do as he was leaning down with his back to you? A He was resting himself on the wheelbarrow.

Q What was he doing? A He was resting himself on the wheelbarrow.

Q He was resting himself on the wheelbarrow? A Yes, sir; nine or ten of them on the street.

Q If he had his back to you there how was he resting himself on the wheelbarrow? A This way. He was leaning on the wheelbarrow. I was standing up.

Q Could you see his hands? A Yes; why wouldn't I.

Q I am not asking you why you wouldn't. I am asking you if you did see his hand? A Yes, sir.

Q Will you explain how you could see his hands when he had his back to you and was leaning down? A Yes, sir.

The Court. Answer the question. Did you hear the question?

Witness. No, sir.

Q (Question read.) A Yes, sir. This is the way he was leaning down. I was standing out where that man is there (indicating) and I could see his hands. You could see mine now. And here is the way he was when he come up and the car hit him, the moulding of the car (indicating).

Q Why did you say his back was towards you then? A Yes, sir. Wasn't my back towards you when I was leaning?

Q No, sir. Your back was towards the person standing over there. A Wasn't my back towards you?

Q How low was he leaning down? A Well, about one or two minutes, that is all.

Q How low was he leaning down, not long? A Well, about a minute.

The Court. How far was he stooping over?

Witness. Well, the barrow is about two feet from the ground, the top of the barrow and he had his two hands on the barrow, your honor.

Q And were the handles of the barrow towards him? A The handle of the barrow was towards him.

Q Towards him? A Yes, sir.

Q The barrow was upright? A Yes, sir.

Q You are sure of that? A Yes, sir.

Q And was he between the two handles? A Yes, sir, and resting on the barrow.

Q He was—did you see in the barrow? A Nothing—did I see in the barrow?

Q Yes. A There was nothing in the barrow.

Q How do you know there was nothing in the barrow? A Why, I seen—there was about ten or fifteen of them there empty.

Q What? A There were about ten or fifteen wheelbarrows there empty.

Q I ask you how you could see that there was nothing in his wheelbarrow? A Why all the wheelbarrows was empty, there was nothing in them.

Q How do you know there was nothing in his wheelbarrow, how did you see that from where you were? A Why, I seen it—after the man getting hit there was nothing in it at all.

Q Was the wheelbarrow struck at all when the car struck Klotz? A No.

Q Didn't it throw him over the wheelbarrow there? A It knocked him over on the broad of his back, his feet towards Elizabeth avenue, his head towards Frelinghuysen avenue.

Q When you looked was the wheelbarrow struck? A I don't know. I went up after the car and brought the car back and come back with the car and telephoned for the ambulance.

The Court. Strike out the answer.

Q Do you know whether that car or the blow of the car striking Klotz moved the wheelbarrow around? A I don't know that.

Q Did you look at the wheelbarrow after? A No; I didn't look after the wheelbarrow.

Q Then how do you know there was nothing in it? A There was nothing in it.

The Court. How do you know?

Witness. Because all of them wheelbarrows was empty after this gentleman got taken away; there was eleven wheelbarrows and all was empty because no one had started to work that morning.

Q Then you don't know whether there was anything in them or not?

Mr. Egner. He says there was nothing in it.

Mr. Kalisch. He hasn't shown there was nothing in it. There is no proof.

The Court. He says he knows there was nothing in it because after they took him away there was nothing in it. Saw it after they took him away.

Witness. I am the man that put him in the ambulance. The officer was there, too.

Q I understood him to say after that that he didn't look at the wheelbarrow? A There was nothing in any of the wheelbarrows.

The Court. Did you look at the wheelbarrows after he went away?

Witness. I looked after them after they went away.

The Court. Did you look in this wheelbarrow?

Witness. Yes, sir; there was nothing in either of them. There was nothing in the wheelbarrow at all.

Q Did you see them move the wheelbarrow over? A No, sir; I did not.

Q Sure of that? A (Witness answered but the stenographer could not understand and asked that it be repeated.) All the wheelbarrows were out right on the job for the men to take and go to work as soon as they got the mixer fixed.

The Court. Before you said instead of "job," "track," didn't you? You said all the wheelbarrows were right at the track waiting until they got the mixer fixed?

Witness. The stone was.

Q (*By the Court.*) Had the wheelbarrows been taken down from the place where they were kept all

night? A Yes, some of them grabbed their wheelbarrows, all ready to go to work.

The Court. The wheelbarrows were stored during the night up against the curb, were they not?

Witness. Well, some of them.

The Court. And this wheelbarrow that you speak of that Mr. Klotz was leaning on was taken away from the curb, was it?

Witness. Yes, your honor.

Q Did you see Mr. Klotz take it over to where he was struck after? A No, sir; I did not see him taking it over. I only seen him laying down on it.

Q Did you take it over there? A No; I did not.

Q See any one else take that wheelbarrow over there? A No, I did not, I did not.

Q Does each man pick out his own wheelbarrow and work it himself, does each man take his wheelbarrow wherever it is to go? A Yes, sir.

TESTIMONY CLOSED.

It is stipulated and agreed that the foregoing is a true transcript of the testimony taken on the hearing before the Honorable William P. Martin, Judge.

JOHN V. LADDEY,
Attorney of Petitioner.

McCARTER & ENGLISH,
Attorneys of Respondent.

Statement and Determination of Facts and Conclusions.

Filed July 15, 1913.

ESSEX COUNTY COURT OF COMMON PLEAS.

HATTIE KLOTZ, as Administratrix of the goods and chattels of CHARLES KLOTZ, deceased, *Petitioner,* *vs.* NEWARK PAVING CO., *Respondent.*	*Summary proceeding under Workingmen's Compensation Act of 1911.*

Mr. John V. Laddey, for Petitioner.

Messrs. McCarter & English (Mr. Arthur F. Egner, of counsel), for Respondent.

MARTIN, *J.*

This is a proceeding brought by Hattie Klotz as administratrix of the goods and chattels of Charles Klotz, deceased, and also as widow of such deceased, on behalf of herself and Tessie Klotz, born May 30, 1904, the child of the petitioner and decedent, Charles Klotz, born September 5, 1900, the child of the decedent and his first wife, Ann Rittershofer or Klotz, the child of petitioner and her first husband, one Rittershofer, born July 4, 1899, and Robert Rittershofer or Klotz, born March 4, 1898, the child of petitioner and her first husband, the said Rittershofer, against the Newark Paving Company, a corporation, respondent, under the act entitled:

> "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of com-

pensation, and regulating procedure for the determination of liability and compensation thereunder."

Approved April fourth, 1911 (Chap. 95, p. 134), known as the "Employer's Liability" or "Workingmen's Compensation Act," and the supplement thereto approved May second, 1911 (Chap. 368, p. 763), in which petitioner prays that the amount due and to be paid the petitioner for herself and said children provided for by the act be ascertained and that judgment be entered therefor. Upon filing the petition a day was duly fixed for hearing, and after due service of process and a copy of the petition upon the respondent, the respondent appeared and answered. At the hearing, in the presence of counsel, witnesses presented by the parties were examined and the matter submitted for decision.

Charles Klotz, deceased, was an employee of the respondent, the Newark Paving Company, engaged as a helper on the Elizabeth avenue paving contract. On the day prior to Sunday, December 8, 1912, he was instructed by his foreman to report for work with other members of his gang on the Sunday in question, near the corner of Hawthorne avenue on Elizabeth avenue about seven o'clock. His duties up to that day were to wheel stone and cement in a wheel barrow from one side of the avenue to a concrete mixing machine which was situated on the other side of Elizabeth avenue. The trolley tracks were in the middle of the avenue. On his arrival at the work at seven o'clock it was found that the pipes of the machine were frozen so that it could not be used immediately, thus delaying the work a short time. Klotz, however, wheeled some stone across the tracks before the accident. After taking a few loads across the tracks he was near the tracks repairing or working on his empty wheelbarrow and was struck by one of the cars of the Public Service Street Railway Com-

pany, receiving an injury as a result of which he died within a short time. The accident arose out of and was in the course of his said employment.

Charles Klotz, deceased, was married to the petitioner, Hattie Klotz, his second wife, and by her had the child Tessie, born on May 30, 1904, now a little over nine years of age, and left him surviving also one child, Charles, born on September 5, 1900, the son of his first wife, now almost thirteen years of age, Ann Klotz or Rittershofer, born July 4, 1899, now about fourteen years of age, is the child of petitioner and her first husband, now deceased, and the stepchild of Charles Klotz, deceased, and Robert Klotz or Rittershofer, born March 4, 1898, now fifteen years of age, likewise the child of petitioner and her first husband, now deceased, and the stepchild of Charles Klotz, deceased, all of whom now are and were at the time of the injuries residing in the City of Newark. The petitioner, the widow of deceased, and all these children and stepchildren were actually dependent upon the deceased at the time of his death.

The deceased did not leave a will.

Hattie Klotz was duly appointed administratrix of the goods and chattels of the estate of Charles Klotz, deceased, by the Surrogate of Essex County on the thirteenth day of December, 1912, and has given a bond for the faithful performance of her duties as such in the sum of sixteen hundred dollars.

The wages received from the respondent by the decedent were nine dollars and fifty cents a week.

The decedent upon his marriage to petitioner received into his family as one of his own children Ann Rittershofer and Robert Rittershofer and supported them up to the time of his decease and they were a part of decedent's household at the time of his death. This places upon him the obligation of support and maintenance. *Dissenger's Case,* 39 N. J. Eq., 227;

Haggerty vs. *McCanna*, 25 N. J. Eq., 48; *Snover* vs. *Prall*, 38 N. J. Eq., 207, and 29 Cyc., 1667. Therefore in contemplation of law the decedent was *in loco parentis*. If a child adopted under the statute is a child within the act (*Yobe* vs. *Erie R. R. Co.*, 36 N. J. L., 154), it is difficult to understand why one who is a child under the common law should not be within the act. These stepchildren are within the purpose of the act, which is to protect actual dependents (*Banister* vs. *Kriger*, 85 Atl., 1027), and they are plainly within the reason of the decision in *Blanz* vs. *Erie R. R. Co.*, 85 Atl., 1030 and are therefore actual legal dependents. The word "child" is frequently construed to include all stepchildren, 7 Cyc., 125 N., 39, and no doubt the legislative intent was to include stepchildren actually dependent upon the decedent.

The respondent denies that the accident arose out of and in the course of the employment, and also insists that there is no legal responsibility resting upon it, because after the accident and before the commencement of this summary proceeding the petitioner made a claim for damages against the Public Service Street Railway Co. for the negligent act of said company and was paid the sum of eight hundred dollars in full satisfaction of the damages sustained by her by reason of the injury and that a general release was made and executed by the petitioner and delivered to the Public Service Street Railway Co.

Respondent contends that petitioner is not entitled to recover because the claim has been merged into the release under seal. This question has been settled adversely to this contention. *Perlsberg* vs. *Mueller*, 35 N. J. L. J., 202; *Houghton* vs. *Root Construction Co.*, 35 N. J. L. J., 332, and there is nothing to the contrary in *Bryant* vs. *Fissell*, 86 Atl., 458-461.

It is argued, however, that as the claim of the decedent is on contract (*Deeny* vs. *Wright & Cobb Lighterage Co.*, 36 N. J. L. J., p. 121) that the

respondent is an insurer of the decedent and as such is entitled, upon the doctrine of subrogation, to be subrogated to the rights of the petitioner against the Public Service Street Railway Co., and that the eight hundred dollars paid should be credited on account of any amount due from respondent to petitioner.

Subrogation is the substitution of another person in the place of the creditor, so that the person in whose favor it is exercised succeeds to the right of the creditor in relation to the debt. The doctrine is one of equity and benevolence and, like contribution and other similar equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential and perfect justice between all parties without regard to form, and its object is the prevention of injustice. 37 Cyc., 363. It cannot be invoked to override and displace the real contract of the parties. 37 Cyc., 367. Subrogation is allowed only in favor of one who under some duty or compulsion pays the debt of another, and cannot be invoked in favor of one who pays a debt in the performance of his own covenant, for the right of subrogation never follows an actual primary liability, and there can be no right of subrogation in one whose duty it is to pay. 37 Cyc., 374.

The statute before the amendment of April 1, 1913 (Pamphlet Laws, p. 302), did not provide for crediting any amount received from a third party to the account of the employer. The amendment referred to specifically provides what credit shall now be given.

The principal difficulty with the position of the respondent is that it is not an insurer but an employer, and is primarily liable on its own contract. Subrogation, therefore, does not apply. In addition to this the doctrine invoked is one of equity which cannot be applied in this court.

The petitioner, on behalf of herself, Tessie, Charlie, Ann and Robert, is entitled to receive fifty-five per centum of the wages received by the decedent at the time of his death, which is the sum of five dollars and twenty-two cents, from two weeks after the death of Charles Klotz until Robert shall become sixteen years of age, on March 4, 1914, and after that petitioner is entitled to fifty per cent. of the wages, or four dollars and seventy-five cents a week, to which the maximum and minimum clause applies, thus making the amount due and payable $5 a week (*Banister* vs. *Kriger, supra.*), for the remainder of the statutory period, three hundred weeks. The petitioner is therefore entitled to judgment with costs.

The legal adviser of the petitioner is entitled to compensation in addition to costs and will be allowed the sum of one hundred and fifty dollars to be paid out of the first payments, now past due.

WM. P. MARTIN,
President Judge, Essex County Court of Common Pleas.

Judgment.

ESSEX COMMON PLEAS.

24836. Tuesday, July 15, 1913.

HATTIE KLOTZ, Administratrix, *Petitioner,* *vs.* NEWARK PAVING COMPANY, *Respondent.*	*On Petition for Compensation. Damages for 300 weeks. Costs Counsel Fee, $150 and costs.*

For petitioner, John V. Laddey, Esq.

For respondent, Messrs. McCarter & English.

The above stated cause having been duly heard by the court without a jury and decision reserved, the court (Judge Martin) in its statement of facts and determination filed this day, saith it finds in favor of the petitioner and assess the damages against the respondent in the sum of five dollars and twenty-two cents ($5.22) per week, payable for a period beginning December the twenty-second, nineteen hundred and twelve until March the fourth, nineteen hundred and fourteen, and the further sum of five dollars ($5.00) per week, payable for a period beginning from said March the fourth, nineteen hundred and fourteen for the remainder of the statutory period, three hundred weeks (300) together with costs.

The legal adviser of the petitioner is entitled to compensation in addition to costs, and will be allowed the sum of one hundred and fifty dollars ($150.00), to be paid out of the first payments now past due.

Return to Writ.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

The determination and statement of facts and judgment, together with all proceedings for the making of the same, and all things touching and concerning the same as fully and entirely as before us they remain or are in our custody or control, whereof mention is within made, we do hereby certify and send under our seal in the schedule hereto annexed, as within we are commanded.

WM. P. MARTIN,

(SEAL) *Judge of the Essex County Court of Common Pleas.*

JOSEPH McDONOUGH,

Clerk of the Court of Common Pleas.

Reasons.

Filed September 5, 1913.

NEW JERSEY SUPREME COURT.

NEWARK PAVING COMPANY, *Prosecutor,* *vs.* THE COURT OF COMMON PLEAS IN AND FOR THE COUNTY OF ESSEX, *et al,* *Defendants.*	*On Certiorari.*

The prosecutor presents the following reasons for setting aside the proceedings, determination and statement of facts and judgment brought before this Honorable Court by the writ of certiorari in the above entitled cause.

First. Because the said prosecutor, Newark Paving Company, is not nor was in any wise liable to pay to the said Hattie Klotz, as administratriv of the goods and chattels of Charles Klotz, deceased, any compensation under or by reason of an act 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 acts amendatory thereof and supplemental thereto, for the following reasons:

(a) Because the said act is unconstitutional.

(b) Because the injury to the said Charles Klotz did not arise out of and in the course of his employment with the said Newark Paving Company.

Reasons.

(c) Because the right of action, if any, against the said Newark Paving Company, because of the injury and death of said Charles Klotz was merged in and released by a release under seal delivered by said Hattie Klotz as administratrix, &c., to the Public Service Corporation of New Jersey, which was responsible for the injury and death of said Klotz, releasing it from all liability therefor.

(d) Because said Hattie Klotz as administratrix, &c. by a release under seal released the Public Service Corporation of New Jersey, the tort feasor responsible for the injury and death of said Charles Klotz from all liability therefor.

(e) Because the said Hattie Klotz as administratrix, &c. destroyed the right of subrogation which said Newark Paving Company had against the Public Service Corporation of New Jersey, the tort feasor responsible for the injury and death of said Charles Klotz.

Second. Because the said Common Pleas Judge erroneously and improperly found and determined the facts from the evidence taken in said proceeding.

Third. Because the said Common Pleas Judge erroneously and improperly applied the law to the facts found and determined from the evidence taken in said proceeding.

Fourth. Because the said Common Pleas Judge erroneously and improperly refused to allow credit upon the alleged liability of said Newark Paving Company for the sum of eight hundred dollars, paid to the said Hattie Klotz as administratrix, &c. by the Public Service Corporation of New Jersey, the tort feasor responsible for the injury and death of said Charles Klotz, deceased in discharge of its liability therefor.

Fifth. Because the said Common Pleas Judge erroneously and improperly applied the law relating to

the awarding of compensation and allowed compensation in excess of that allowed by statute in that the said Common Pleas Judge allowed a percentage of wages based upon the said Charles Klotz having been survived by his widow and four children, whereas two children of said children for whom allowance was made by said Common Pleas Judge were step-children of said Charles Klotz.

Sixth. Because the said proceedings are in divers other respects irregular, unjust, illegal and oppressive to the prosecutor.

McCARTER & ENGLISH,
Attorneys of Prosecutor.

Opinion.

Filed February 24, 1914.

NEW JERSEY SUPREME COURT.

November Term, 1913.

NEWARK PAVING COMPANY
vs.
HATTIE KLOTZ, administratrix.

Submitted November Term, 1913. Decided February , 1914.

1. Where a workman is injured by an accident arising out of and in the course of his employment, and a tort feasor other than his employer, is responsible therefor, the right to compensation under the act of 1911 is not lost by settlement with and a release of the tort feasor.

2. The right to compensation under the Workmen's Compensation Act of 1911, as originally enacted, and the right to recover damages of a tort feasor are of so different a character, that the employer has no right by way of subrogation to the claim of the workman against the tort feasor. The amendment of 1913 is not merely declaratory of the legislative intent under the act of 1911.

3. Dependent step-children who have been supported by a deceased workman are included within the word children in the act of 1911.

Certiorari to Essex Pleas.

Before Justices Swayze and Bergen.

The following statement of facts is taken from prosecutor's brief: "Klotz was one of a gang of men employed by the respondent to wheel stone and cement to a concrete mixer at work on Elizabeth avenue on the repavement of that street. He went to his

It therefore partakes to some extent of the nature of a pension, and we have held that there must be specific findings of fact to warrant an order commuting the payments into a lump sum. *New York Shipbuilding Co.* vs. *Buchanan*, 87 Atl., 86. This object of the act is especially emphasized by the amendment of 1913 (P. L., 309), which declares that it is the intention that the compensation payments are in lieu of wages and are to be received by the employee or his dependents in the same manner in which wages are ordinarily paid; that commutation is a departure from the normal method of payment to be allowed only under unusual circumstances and not for the purpose of enabling the injured employee or the dependents of a deceased employee to satisfy a debt or to make payment to physicians, lawyers, or other persons. Although this enactment is later than the accident for which this suit is brought, it is an express legislative declaration of the intent of the act, an intent which might have been properly inferred from the provisions of the original act. If the statutory compensations were subject to deductions by reason of payments made by a third person—the tort feasor—to the person injured or to his dependents, in satisfaction of the liability for the tort, this object of the statute would be thwarted and in effect the commutation to a lump sum would take place without any order of the court and at the will of the injured party or his representatives. If on the other hand the employer were allowed to recover of the tort feasor by action in the name of the employee or his representative, he would be able to recover in advance of payments by him and at a time when the extent of his own liability could not be ascertained. These considerations suffice to show that the right to compensation under the statute and the right to recover damages of the tort feasor are of so different a character that the rule of law appealed to by the prosecutor is inapplicable. The release, therefore, of the claim

work at seven o'clock in the morning but when he arrived there, it was found that owing to the pipes of the concrete mixer having been frozen, no work could be done until this had been repaired. The men therefore could do nothing whatever and about 7.40 and at least an hour before the mixer was fixed so as to permit the resumption of work, Mr. Klotz was struck by a car of the Public Service Corporation and killed." To this must be added the important fact that at the time he was struck, Klotz was fixing up his wheelbarrow.

Prior to the trial in this case, the petitioner received eight hundred dollars from the Public Service Corporation, and released by a release under seal, that corporation from liability.

The opinion of the court was delivered by Swayze, *J.*

We think the evidence justified a finding that Klotz's death was due to an accident arising out of and in the course of his employment. The case is within the rule of *Bryant* vs. *Fissell,* 86 Atl., 458.

The question of the effect of the release of the street railway company is more troublesome. The defendant appeals to the rule established in *Weber* vs. *Morris & Essex R. R. Co.,* 6 Vroom, 409; 7 Vroom, 213, and in *Monmouth County Fire Insurance Co.* vs. *Hutchinson* and another, 6 C. E. Green, 107. It is true that the present defendant is not an insurer but we are not prepared to say that that fact alone takes the case out of the reason of the rule as stated in the cases referred to and by Chief Justice Shaw in the case on which they relied. *Hart* vs. *Western Railroad Corporation,* 13 Metc., 99. We think, however, that the present case is not governed by that rule for the reason that to so hold would conflict with the intention of the act of 1911, under which this suit is brought. That act was meant to insure compensation to workmen not generally but by way of weekly payments in lieu of wages.

against the street railway could not be a bar to the right to compensation under the statute.

It is true this conclusion makes it possible for the employee to secure under the act of 1911, double compensation.

This was probably not the intent of the legislature though as we think the result of the language of the statute.

The difficulty seems to be obviated by the amendment of 1913 (P. L., 312, 313). It is argued that the amendment amounts to a legislative declaration of the asserted right of subrogation under the original act. The answer is two-fold: (1), it does not support to be a declaration of the meaning of the act of 1911, but an amendment of that act; (2) The employer is only released when the employee recovers of the tort feasor a sum equivalent to or greater than the total compensation payments for which the employer is liable, and the employer is only entitled to receive of the tort feasor a sum equivalent to the amount of compensation payments, which the employer has *theretofore* paid to the injured employee, or his dependents. Neither provision is applicable to the present case.

It is urged that the court erred in allowing compensation as in case of four children, when two of the four were only step-children. The evidence shows that the deceased supported the step-children and bought their clothes and shoes. We think this fact justified the judge in allowing for them as actual dependents. *Mulhearn* vs. *McDavitt*, 16 Gray, 404. The amendment of 1913 (P. L., 305), removes all doubt on this point for cases arising since its passage, and we find nothing in the language of the act of 1911 to prevent us from adopting the same construction. The important words are "actual dependents." The word "children" may well be held to include dependent step-children.

The judgment is affirmed with costs.

Rule of Affirmance.

Entered February 24, 1914.

NEW JERSEY SUPREME COURT.

NEWARK PAVING COMPANY, *Prosecutor,* *vs.* HATTIE KLOTZ, admx., *et al.,* *Defendants.*	*On Certiorari.* *Rule of Affirmance & Remittitur.*

The court having inspected the transcript and the proceedings of the Court of Common Pleas of the County of Essex, returned with the *certiorari* in this cause, and the reasons for error assigned, and heard the argument of respective counsel thereon, and having duly considered the same,

It is ordered, that the judgment of the Court of Common Pleas of the County of Essex entered in the above stated cause be in all things affirmed, with costs, and that the record be remitted to the Court of Common Pleas of the County of Essex to be proceeded with according to law and the practice of said court.

Entered February 25, 1914.

On motion of

JOHN V. LADDEY,
Attorney.