

New Jersey Court of Errors and Appeals

MARYAN WILCZYNSKI, Admx. &c.,
of Henry Wilczynski, *deceased*,
Plaintiff-Appellee,

vs.

THE PENNSYLVANIA RAILROAD
COMPANY,
Defendant-Appellant.

Action at
Law. 10
On Appeal
from
Supreme
Court of New
Jersey.

BRIEF OF DEFENDANT-APPELLANT.

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This is an action under the Federal Employers' Liability Act, brought by Maryan Wilczynski, administratrix, to recover damages for the death of her son Henry Wilczynski, an employe of The Pennsylvania Railroad Company, the death being alleged to have resulted from the negligence of the defendant company. The intestate worked on the dock at the Greenville terminal, near Jersey City, New Jersey, as a laborer. He made twelve or thirteen dollars per week. At the time of his death he was twenty years of age, and had worked for the railroad company a little less than a month. (Case, pp. 17-18, 22).

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The accident occurred between two and three o'clock in the morning of May 20th, 1915, while intestate was on board the "Advance," a barge or lighter owned, operated and controlled by the Hudson River Lighterage Company, where he had been working since six or seven o'clock the evening

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previous, assisting in the transfer of large steel girders from the dock to the boat (Case, pp. 16, 23, 31, 32, 35, 37, 39, 41, 42, 49, 57, 69, 77, 78, 82).

The transportation of the girders by the railroad company terminated at the dock, and its compensation for the carriage of the shipment ended at that point. Consignee accepted delivery there, had its own men to look after the shipment, and sent its own transportation medium to receive the girders, viz: the Hudson River Lighterage Company, which was in no way a part of The Pennsylvania Railroad Company (Case, pp. 60, 61, 92, 93, 95, 96). The transferring of the girders from the dock to the boat and the loading of the boat were wholly in charge of the boat's captain, and he and the crew were paid by the lighterage company (Case, pp. 33, 44, 45, 56, 59, 60, 71, 72, 74, 94). The railroad company, had no control over it, but had a tally-man, or "checker," present to keep an account of the material taken. His function ended there (Case, p. 82, 83, 94, 95). Sometimes the dock men were used by the boat captains to help them load, but on such occasions the men's time was charged up to the lighterage company, at the same rate as allowed by the railroad company, and credited to the men on the railroad company's books. In this way their compensation came from the lighterage company for the work done for it (Case, p. 94). It was while intestate was thus engaged, with several other Pennsylvania men, that he met with the accident resulting in his death (Case, pp. 22, 23, 25, 27, 32, 37, 50, 85). Upon those occasions the dock men were in the charge and subject absolutely to the direction and control of the captain of the lighter; but there is no evidence to show that the intestate in this instance knew of the change of relation or assented to a change of masters, nor is it contended by the defendant that he did.

40 The girders weighing about 5 tons each (Case,

p. 66), were piled in five tiers or rows, about a foot or eighteen inches apart, and from four to seven or more in height. This was the usual manner of loading (Case, pp. 24, 25, 31, 32, 38, 49, 52, 61, 62, 74, 75, 76, 81, 83). The workmen were not required to be in any particular part of the boat during the process of loading, but were supposed to be stationed where they were most useful (Case, pp. 28, 33, 43, 44, 64). The testimony shows clearly that intestate had been standing between two piles of the girders just before he was hurt, and that he must have been caught by the shifting of the top girder on the outside pile, which was displaced in the operation of the boom and thrown against the second pile, in turn causing the top girder on that pile to shift its position in such a manner as to crush intestate (Case, pp. 40, 44, 46, 49, 51, 52, 74, 78, 79, 82, 84).

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Attached to the boom, which swung from the boat to the dock and back as the girders were unloaded, was a guy rope, by means of which the boom was controlled (Case, pp. 29, 34, 44, 45, 62, 68, 71, 72, 73, 75). The mate of the boat operated the boom (Case, p. 63, 71, 72, 75). The other end of the guy rope was fastened to the outer rail of the boat, which prevented the boom from swinging in-shore beyond the length of the rope (Case, pp. 71, 73).

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The uncontroverted testimony shows that the top girder of the outside pile was displaced by the pressure of the guy rope upon it as the boom hung in-shore over the dock, plus a slight movement or tipping of the boat which was natural as the weight of the boom shifted from one side to the other (Case, pp. 26, 27, 28; 29, 34, 41, 50, 52, 53, 54, 62, 63, 65, 77, 80, 81).

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Motions for non-suit and directed verdict in favor of the defendant were made at the trial and denied, objections to the Court's rulings being duly noted (Case, pp. 55, 56, 96, 104). A ver-

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dict for \$2000. was rendered in favor of plaintiff, and judgment entered accordingly (Case, p. 13).

The case is now before this Court on appeal. The grounds of the appeal are set forth in the State of the Case at pages 2-5.

I.

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The Federal Act of 1908, and the Amendment of 1910, upon which the action is based, are as follows:

AN ACT RELATING TO THE LIABILITY OF COMMON CARRIERS BY RAILROAD TO THEIR EMPLOYEES IN CERTAIN CASES.

35 *Stat. at Large*, 65; *Chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322*

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BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in

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damages to any person suffering injury *while he is employed by such carrier in such commerce*, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees

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of such carrier, or by reason of any defect or in-

sufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. 10 20

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. 30

Sec. 4. That in any action brought against any common carrier, under or by virtue of any of the provisions of this act to recover damages for in- 40

juries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

10 Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

20 Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

 Sec. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

30 Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and Foreign Nations to their Employees", approved June eleventh, nineteen hundred and six (34 Stat. at L. 232, chap. 3073, U. S. Comp. Stat. Supp. 1909, p. 1148). Approved April 22, 40 1908.

AN ACT TO AMEND AN ACT ENTITLED,
 "AN ACT RELATING TO THE LIABILITY
 OF COMMON CARRIERS BY RAILROAD TO
 THEIR EMPLOYEES IN CERTAIN CASES."
 APPROVED APRIL TWENTY-SECOND,
 NINETEEN HUNDRED AND EIGHT.

BE IT ENACTED by the Senate and House of
 Representatives of the United States of America
 in Congress assembled, That an Act entitled "An
 Act Relating to the Liability of Common Carriers
 by Railroad to their Employees in Certain Cases,"
 approved April twenty-second, nineteen hundred
 and eight, be amended in section six so that said
 section shall read:

Sec. 6. That no action shall be maintained under
 this act unless commenced within two years
 from the day the cause of action accrued.

"Under this act an action may be brought in
 a circuit court of the United States, in the dis-
 trict of the residence of the defendant, or in which
 the cause of action arose, or in which the defend-
 ant shall be doing business at the time of com-
 mencing such action. The jurisdiction of the
 courts of The United States under this act shall
 be concurrent with that of the courts of the sev-
 eral states, and in no case arising under this act
 and brought in any state court of competent juris-
 diction shall be removed to any court of the United
 States."

Sec. 2. That said act be further amended by
 adding the following section as section nine of
 said act:

Sec. 9. That any right of action given by this
 act to a person suffering injury shall survive to
 his or her personal representative, for the bene-
 fit of the surviving widow or husband and children
 of such employee, and if none, then of such em-
 ployee's parents; and, if none, then of the next of
 kin dependent upon such employee; but in such

cases there shall be only one recovery for the same injury."

Approved, April 5, 1910.

II.

At the close of plaintiff's case it was clear that the injury complained of resulted proximately from the acts of the Hudson River Lighterage Company's employes, (either in the piling of the girders or the operation of the boom), who had complete control of the removal of the girders from the dock to the boat. The negligence charged to defendant in the Complaint (Case, pp. 9-10), was the failure to "use reasonable care in the unloading of its said cars, and the loading of its said boats and barges," and in not supplying "a sufficient number of men to attend to the said work," and that it "negligently and carelessly so managed and controlled the unloading of its said cars and the loading of its said boats that certain heavy steel girders, which had been loaded upon its said boat, were so negligently piled thereon, that by reason of which negligent placing and piling of said girders, and by reason of the insufficient number of men to attend to the said work, that was so being done as aforesaid, the said steel girders so piled upon said boat as aforesaid were, by reason thereof, and the rocking of the boat, while in the water, were permitted to roll over and fall upon the plaintiff's intestate."

There was no evidence to indicate in any way that there was an insufficiency of men to perform the work in question, regardless of the fact that the defendant was not performing it.

The evidence showed that it was natural for the boat to tip slightly as the boom swung from one side to the other.

There was no evidence to show that the girders were not properly placed and piled.

The evidence showed clearly that the defendant had no control over the unloading of the cars and the loading of the boat, but that the operation was wholly under the control of the Hudson River Lighterage Company.

There is no allegation in the Complaint of a duty of defendant to furnish a safe place for interstate to work in; but even if there were such an allegation, there was no evidence to show that defendant had failed to exercise reasonable care to provide such a safe place. 10

There was nothing to show that this occurrence was not a usual or common happening, nor was it shown to be of such a nature as to have put defendant on its guard against it, especially with the boat in control of a third party.

Long v. John Stephenson Co. 73 N. J. Law, 186. (Sup. Ct. 1906).

Malatesta v. A. T. & S. R. Co. 96 Atl. Rep. 54. (Ct. E. & Ap. 1915). 20

In the *Long* case, Mr. Chief Justice Gummere, at page 188, says:

“As is stated by Justice Mestrezat in *Sharpley vs. Wright*, 205 Pa. St. 253, ‘It is well settled that an employer is not responsible for an injury sustained by his employe caused solely by unsafe premises which are owned and controlled by a third person, and where the employe’s services are performed.’ ” 30

Other cases to like effect are also cited by the Chief Justice, who then says:

“The principle underlying these and like decisions is that the employer cannot be justly charged with negligence as to matters over which he has no control.”

And in the *Malatesta* case Mr. Justice Swayze, in sustaining a direction of verdict in favor of defendants, says: 40

10 “The proximate cause of the injury was not the character or location of the feed wire, its lack of insulation (if insulation had been practicable), or the lack of guard wires; the accident was due solely to the negligence of Reilly’s engineer Stewart. * * * No amount of care on the part of the defendants consistent with the conduct of their business in the ordinary way, could guard against possible culpable acts of others. The case is within the rule of *Cuff*, *adm. v. Newark & New York R. R. Co.*, 35 N. J. Law, 17, 29, ff., * * * approved in *Del. Lack. & Western R. R. Co. v. Salmon*, 39 N. J. Law 299, at page 308.” * * *

In the *Salmon* case this Court, by Mr. Justice Depue, who also wrote the opinion in the *Cuff* case, said that in the *Cuff* case

20 “The intervention of the independent act of a third person between the wrong complained of and the injury suffered, which was the immediate cause of the injury, was adopted as a test of that remoteness of damage which forbids its recovery.”

30 The acts of the Hudson River Lighterage Company, plus the natural tipping of the boat in the water, plus intestate’s uncalled for position in the narrow space between the girders, equal the injury to intestate. The defendant does not figure in the equation. It is submitted, therefore, that plaintiff’s case disclosed no situation which could fix liability upon the defendant, and a non-suit should have been granted.

III.

40 At the conclusion of the whole case the situation was beyond question as above stated, and

there was still a failure on the part of plaintiff to establish the negligence of the defendant necessary to sustain plaintiff's allegations and her right to recover. A verdict should have been directed in favor of the defendant.

Under the Federal Act upon which the action is based, it is necessary that defendant, through some "officer, agent or employe," should have been negligent, and that its negligence should have been the proximate cause of the injury.

Thornton, "Federal Employers' Liability Act," (3rd ed.), sec. 66, p. 111.

Roberts, "Injuries Interstate Employes," sec. 12, p. 19; sec. 13, p. 23; sec. 15, p. 30; sec. 23, p. 55; sec. 117, p. 222.

Seaboard Air Line v. Horton, 233 U. S. 492; 58 L. Ed. 1062.

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The negligence charged in the Complaint must be proved, to enable plaintiff to recover.

Thornton, *supra*, pp. 291-292.

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The proximate cause of intestate's death indisputably was the act of the Hudson River Lighterage Company's servants in the handling of the boom, plus such natural action of the boat as attended the shifting of the boom from side to side, plus intestate's own act. Over this, defendant had no control; and whether the cause can be attributed to negligence or unavoidable accident, in any event it cannot be connected with defendant in a way to convict it of negligence or fault and render it liable to plaintiff.

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Long v. John Stephenson Co., 73 N. J. Law, 186, *supra*;

Cuff v. N. & N. Y. R. R. Co., 35 N. J. Law, 17, *supra*, aff. *Id.* 574.

Conway v. Furst, 57 N. J. Law, 645.

The *Cuff* case, cited *supra*, has been approved 40

and followed in a large number of cases in our Courts, some of which are as follows:

	39 N. J. Law, 308;
	44 " 252;
	45 " 65;
	46 " 35;
	52 " 131;
	55 " 651;
	57 " 647;
10	58 " 414;
	61 " 244;
	63 " 474;
	68 " 438;
	72 " 472;
	67 Fed. Rep. 368;
	<i>Davenport v. McClellan</i> , not yet reported.

In *Conway v. Furst*, 57 N. J. Law, 645, Mr. Justice Van Syckel, speaking for this Court, citing the *Cuff* case, at p. 647, said:

20 "This evidence was uncontradicted, and it shows that the elevator was, at the time of the injury to Conway, in the course of construction by contractors exercising an independent employment and, therefore, Conway is without remedy against his employer."

In *Slingerland v. East Jersey Water Company*, 58 N. J. Law 411, Mr. Chief Justice Beasley, speaking for the Supreme Court, at p. 414, said:

30 "In the second place, admitting a cause of action, the defendant would not be the party to be implicated. Gillespie was an independent contractor to do this work in behalf of the East Jersey Water Company. * * * Under such conditions of the case the defendant could not be held liable for the wrongdoings of the contractor in putting the water pipes in place. In such cases the principal is
40 exempted from all responsibility if the act

contracted to be done be legal. This rule has always been enforced by the courts of this state, as will appear by reference to the case of *Cuff v. Newark, &c. Railroad Co.*, 6 Vr. 17, 22."

In *Potts v. Batt*, 72 N. J. Law 470, Mr. Justice Dixon, speaking for this Court, at p. 472, said:

"In *Cuff v. Newark and New York Railroad Co.*, 6 Vr. 17, Mr. Justice Depue, after a full examination of cases, summed up the general doctrine as to the necessary connection between tort and recoverable damage in these words: 'Damage to be recovered must be the natural and proximate consequence arising from the wrong complained of,' and his views were afterwards approved by this court, Id. 574. In *Hammill v. Pennsylvania Railroad Co.*, 27 Id. 370, 379, it was said that the efficient and predominating cause, the *causa causans*, must be looked to in determining liability. The plain import of these and similar expressions is that the tort of the defendant must be the efficient cause of the damage sustained in order to hold him responsible therefor."

And the most recent approval of the *Cuff* case is found in *Davenport v. McClellan*, decided by this Court March 6, 1916, not yet reported, in which Mr. Justice Bergen said:

"An intervening cause is the act of an intervening agency which destroys the causal connection between the negligent act of the defendant and the wrongful injury, the independent act being the immediate cause, in which case damages are not recoverable because the original wrongful act is not the proximate cause."

The clear cause of the injury was an agency

which defendant neither *chose* nor *controlled*, and its nature was such that it contained nothing to apprise defendant of a danger against which, under the circumstances of this case, it was its duty to safeguard the intestate.

IV.

10 The charge of the Court set forth in the third ground of appeal (Case, p. 3) is erroneous. It is as follows:

20 “The duty of this defendant company toward this intestate, if he was their servant at the time he was doing the work there, was the duty to use reasonable care in and about the work of loading the barge or boat with the iron girders. If they are proven not to have used reasonable care in that particular they might be held negligent. If there is not a case made out by the greater weight of the evidence to manifest that they did not use reasonable care in and about the work of loading the barge, why then of course you would have to find a verdict for the defendant.”

30 This charge assumes that the defendant was loading the boat, whereas the evidence shows, without dispute, that the defendant had nothing to do with the loading, *supra*.

The evidence was insufficient to go to the jury, and its clear weight was in favor of the defendant. The Court should have directed a verdict for defendant, pursuant to the Federal rules, regardless of any rule of the State courts (Case, p. 103).

40 *Brown v. Paper Co.*, 40 Vr. 474, 475;
Baldwin v. Shannon, 14 Vr. 596;
Impt. Co. v. Munson, 14 Wall. 442, 448.
Pleasants v. Fant, 22 Wall. 116;
Thornton, supra, sec. 24, p. 42;

Roberts, supra, sec. 8, p. 15; sec. 12, p. 22; sec. 18, p. 34.

St. L. & Ry. Co. v. McWhirter, 229 U. S. 265; 57 L. Ed. 1179;

Norfolk & R. R. Co. v. Ferebee, 238 U. S. 269.

As was said by Mr. Justice Gray, speaking for the United States Supreme Court, in *Randall v. B. & O. R. R. Co.*, 109 U. S. 478; 27 L. ed. 1003: 10

“It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict, for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.”

V.

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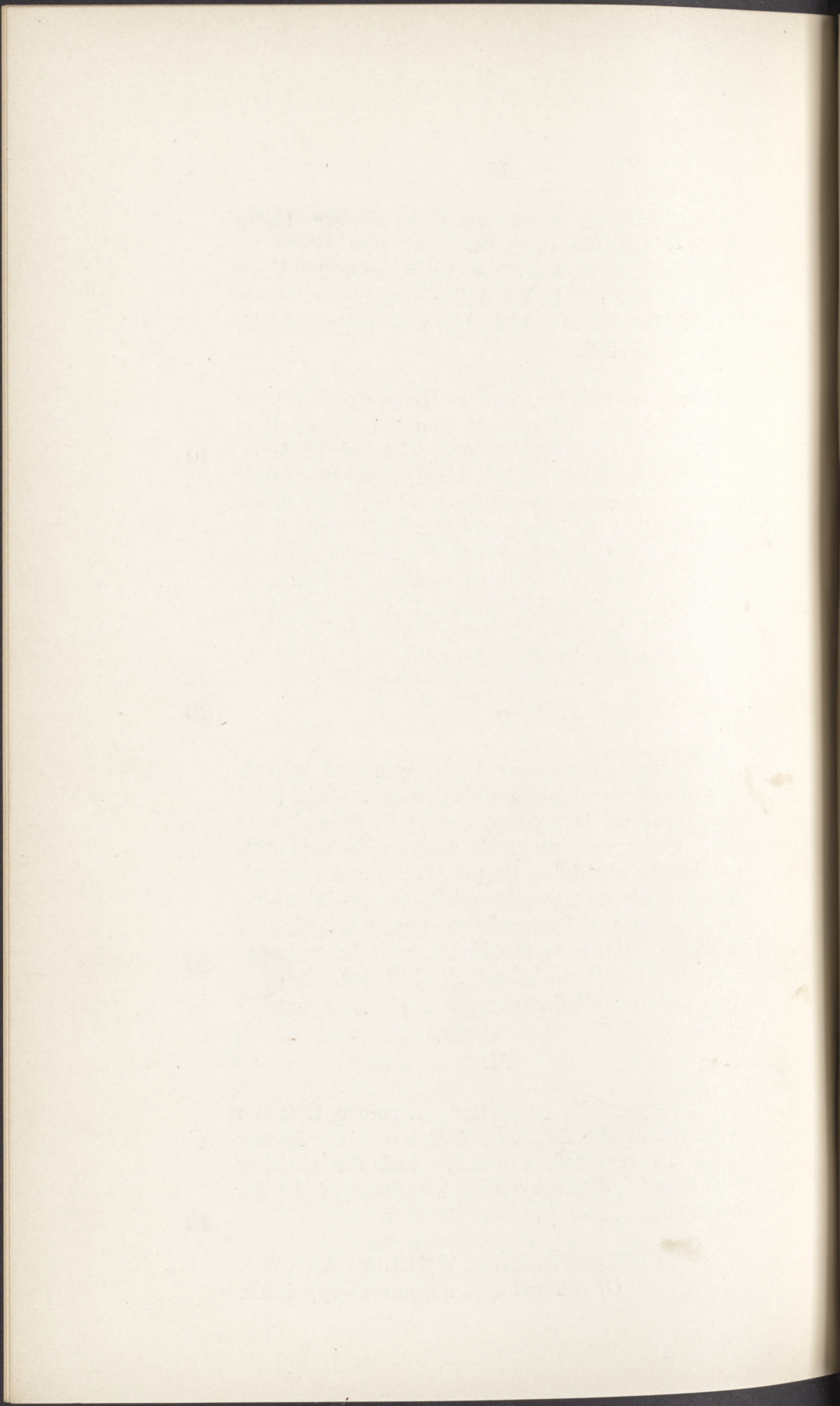
Defendant's rights are to be adjudged according to the Federal Act and decisions, and the trial court's refusal to so rule denies to defendant a right, privilege or immunity under a Federal statute, thereby abridging its privileges and immunities as a citizen of the United States, and denying it due process of law and the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States. 30

Cases cited supra.

VI.

It is respectfully submitted, therefore, that the judgment of the Supreme Court of New Jersey should be reversed, set aside and for nothing holden, and judgment directed in favor of the defendant-appellant. 40

VREDENBURGH, WALL & CAREY,
Of counsel with defendant-appellant.



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NEW JERSEY
Court of Errors and Appeals.

MARYAN WILCZYNSKI, Adm. &c.,
of HENRY WILCZYNSKI, de-
ceased,

Plaintiff-Respondent,

vs.

PENNSYLVANIA RAILROAD COM-
PANY,

Defendant-Appellant.

*On Appeal
from Supreme
Court of
New Jersey.*

Brief for Plaintiff-Respondent.

This action was tried in the Supreme Court before the Honorable William H. Speer and a jury and resulted in a verdict for the plaintiff.

STATEMENT OF EVIDENCE.

By the answer of the defendant to plaintiff's interrogatories (fols. 10-30, p. 16, case), it appears that on May 20th, 1915, when plaintiff's intestate was injured, the defendant was unloading steel girders from one of its cars, and loading them upon a Hudson River lighter "Advance." "The girders were standing on ends in the car. Shackles placed on each end of girder, then raised to sufficient height to clear car, and swung in toward boat, and landed on top of similar girders tiered flat with scantlings placed between each girder." "These girders had been received by the defendant at Edgemoor, Delaware, and were consigned to Post and McCord Co., New York City" (fol. 30, p. 16, case).

STANISLAW MOROWSKI testified:

These girders each were about 40 to 45 feet long, and about a foot and one-half square, and were piled up in tiers, lengthwise of the boat, and piles of girders were six or seven high. "Nothing was tied around them, and *they were piled in such a way that when placed on the boat, the boat got lop-sided and the girders shook.*"

"The weight of the girders turned the boat on one side. The plaintiff's intestate was holding a lantern when he was injured, to give light to the rest of the men, when the boat turned one side, then the guy pushed the girder, and the girder moved."

Q. Which one of these girders was it that moved, was it the top one or the bottom one or the middle one? A. The one that was from the side near the guyer.

Q. Now you say when the boat moved it caused this girder to move. How far did the girder move? A. It fell over onto the other girders.

Q. Which one, the top one? A. No; as he indicates, there was girders laying here, and girders in the middle, and there was a pile laying on one side, the centre girders they were lying low, and two sides, so—one side there was a pile higher and the other side there was a lower pile, and one from the lower pile fell over the other side—skipped the centre pile and fell on top of the other pile.

Q. And where was that girder in reference to Wilczynski—this one which fell when you saw him on the deck? A. About three or four feet.

Q. Three or four feet from him, away from him? A. Yes, sir; from him.

Q. And was this girder which had been on the pile then lying on the floor of the boat? A. No, sir. It did not lay on the floor; it fell from laying on top of the other girders.

There were *four piles of girders*. Vladislav Zanowicz testified that *"he was working for the Pennsylvania Railroad Co., on May 20th, on boat "Advance."* Was working with Henry Wilczynski (plaintiff's intestate). The boat was a flat deck boat. "We were placing girders on the boat. One of the piles of girders was higher than the other."

Q. What was the position of the boat as to being flat or lopsided as described by the other witness at or about the time you last saw Wilszynski? A. *It was somewhat lopsided towards the water side.*

Q. And it was lopsided on the side on which this highest pile of girders was, was it not? A. There was not a very big pile. *Some piles were more than others, but the boat was twisted—turned towards the water side. The reason that the boat was turned lopsided was because when the girders were let down from the cars onto the dock—onto the boat—* While I was in the boiler room I heard some of the girders fall.

Q. When you came out of the boiler room did you observe whether any of the girders had fallen or not while you were in the boiler room? A. Yes, sir; I saw one of the girders laying on the other pile. I went directly from the boiler room and saw this girder laying on the pile.

Q. And when you started from the boiler room this girder which you afterwards saw lying on the other pile was on which pile? A. It was laying on the other pile near the water.

Q. And where had it been just before you started for the boiler room? A. From the other corner at the end of the girders—from one end of the girders.

Q. This girder which fell from one pile to the other, was that the top girder of the pile which it had fallen from? A. Sure, from the top.

Q. And about how high was that top girder which had fallen from the deck of the boat?

THE INTERPRETER—He indicates with his hand about the height of the pile.

Q. No; the top girder of the pile which it had fallen from. It fell from one pile onto the other?

A. Yes, sir.

Q. And how high was the pile which it had fallen from? A. The other one, the one the highest, was about here (indicating), and the other pile that it fell onto was a little lower.

MR. HARTPENCE—Indicating the chest; isn't that right?

THE INTERPRETER—Indicating the chest, and the other one a little lower.

ALEXANDER IVANOWSKI, testified:

Q. Did you see this man hurt? A. (Interpreted) I saw him.

Q. How was he hurt? A. A girder struck him. (In English.) A girder slipped out and struck him. (Interpreted.) The girders slipped and struck him.

Q. Where had this girder been before it slipped and struck him? A. Sure, I saw it. They was lying on the boat where the captain told us to place it.

Q. And was it on a pile of girders, the one that slipped and struck this man? A. It was laying on top of a pile.

Q. How many were on the pile—about how many? A. (In English) four girders.

Q. And about how high was the top of the pile? A. Six or seven pieces on top—on top of the pile.

Q. Where was Wilczynski standing just at the moment this girder slipped and struck him? A. (Interpreted.) What he told me—I did not see him.

standing. I did not see him; I saw it when the girder was all ready fell over, but I did not see it fall. *There was a heavy pile of girders laying on a pile, that is the reason the boat turned one side.*

Q. What was the position of the boat just before this girder slipped, as to being flat or otherwise?
A. When the water was lower the boat was flat on the water.

Q. When the water was lower the boat was flat on the water? A. Yes, sir; when the water would leave, then of course the dock was higher than the boat and the boat was lower than the dock.

Q. Was the boat at the time this girder slipped level or flat on the surface of the water, or was it tipped sideways (illustrating)? A. (In English.) Shore side. (Interpreted.) It was on the shore side; it turned towards the cars.

Q. When you say it turned, you mean it tipped one side—one side was lower than the other? A. (Interpreted.) When the boat turned somewhat it turned toward the car.

Q. And the side it was lowest down, is that the side where this pile of girders were? A. *When the boat tipped the girder fell off towards this side.*

Q. When he says this side, ask him if he means the side nearest the dock. A. Towards the dock.

Q. And which side was Wilcznski standing on, between the pile or girders and the dock? A. He stood in the centre of the boat at the end near the fire room.

Q. Had you seen him before he was hurt? A. I saw him.

Q. The last time you saw him before he was hurt what did you see him doing? A. He kept—he held the lamp for him.

Q. How far away from this girder which slipped did you say you were when you saw it slip? A. I

was on the car. We were about twenty feet, maybe more; I cannot say exactly.

Q. *And what caused it to slip so far as you could see?* A. *Because the boat swung on one side and the girder moved off the top of the pile.*

MIKE MCCAULEY, on behalf of the defendant, testified:

Q. Now these other men that were working there, there were some other men working on the boat, weren't there? A. Yes, sir, the gang of course.

Q. *Where did they come from?* A. *They belonged to the Greenville people, Pennsylvania Railroad Company.*

Q. They came from the dock? A. Yes, sir.

Q. But you used them in transferring girders from the car to the boat, is that right? A. Yes, sir; they did their work in the boat; *they stored them wherever I wanted them put.*

Q. When you left the boat and went to the car which you say was about ten minutes before, what was the position of the boat with regard to its being level or being tipped? A. *When the derrick is midships the boat is generally level. Of course when the boom goes over on the car the boom has a good weight and throws it off a little bit, and then when she hooks onto the girder, which weighs about five or six tons, she lays over a little more.*

Q. *So as the boom swings over the deck it will tip the boat?* A. *Yes.*

Q. *It ordinarily does that?* A. *Yes, every time.*

Q. *Then when you get your heavy girder on it it tips more?* A. *Yes; and the heavier the load is the more she will go down.*

Q. *Well, does the boat tip from the weight of the girders on one side or the other as you stow them?* A. *Yes, sir; if there were one girder on the offshore*

side it might pull it over a few inches more until the next girder is put on the inshore side, and that will make her level again.

CHARLES P. GALLAGHER testified on behalf of the defendant:

Q. *As that boom swings off shore and on shore—*

A. *Back and forth.* Q. *Does it have any effect upon the boat?* A. *Oh, yes, sir.*

Q. *What does it do?* A. *The weight of the boom will make the boat lay the way the boom is, whatever side the boom is on the boat will lay over.*

Q. *It will tip with the motion of the boom?* A. *Yes, sir.*

DANIEL MCALLISTER, on behalf of the defendant, testified:

Q. *Were any of the girders on the offshore pile displaced or moved?* A. *What time are you referring to?*

Q. *At the time you heard that Wilczynski had been injured.* A. *After he was hurt or before?*

Q. *I say at the time you heard of Wilczynski's injury was any girder on the offshore pile out of place or moved?* A. *Oh, yes.*

Q. *Which one was it?* A. *There was two of them was shifted.*

Q. *Two of them were shifted?* A. *Yes, sir.*

Q. *Do you know when they were shifted?* A. *I heard them shifted.*

Q. *When was that?* A. *That was in the morning.*

Q. *What time was it when you heard them shift?* A. *I do not know the exact time—between two and three.*

Q. *Was it before or after you heard of Wilczynski's injury?* A. *Well, it was half an hour or so after he was picked up that I know of it—half an*

hour or so before them girders slipped that I knew he was hurt.

Q. *What caused them to slip?* A. *Well, the list of the boat—and the guy rope—together.*

Q. What do you mean, the list of the boat and the guy rope together? What did the guy rope have to do with it? A. *Well, the guy rope there, the strain of the guy rope, the boom leaning this way and the boat leaning over, the guy rope was touching the girder.*

Q. And that produced a pressure on the girder? A. That produced like a push on the girder and sent it over.

Q. That guy rope came right down on the girder? A. Yes; leaned against it; leaned against the edge of it.

Q. And as the boom swung over the car it pulled up against the girders with that guy rope and that caused it to move, is that right? A. Yes, sir.

Q. How many slipped over? A. Only one slipped over, and it hit the other and sent that one over.

Q. Was that the top one that slipped? A. Yes.

Q. How far over did it slip? A. It had to slip a foot I guess before it could hit the other one.

Q. What do you mean, before it hit the other one? A. There were two tiers of them, you know, and it hit the other girder.

Q. Oh! It slipped over and hit the other tier of girders? A. Yes.

Q. Did you put it back again? A. The captain put it back, yes, sir.

Q. *Did any of them drop out of place except this one you referred to?* A. *Well, the ones that that man got hurt on, those are the only two I know of.*

Q. Which was the one he got hurt on? A. The one he got hurt on was on the second tier, between the second and third tiers.

Q. Between what? A. The second and third tiers.

Q. Did you see him hurt? A. No, sir.

Q. How do you know where he got hurt? A. I seen him pull himself through.

Q. You what? A. I saw him pull himself out of it.

Q. Out of what? A. Out of between the girders.

Q. When was that? A. After I heard the girders sliding.

Q. Right after you heard the girder slide? A. Yes.

Q. Well, I understood you to say that the only girder that was misplaced was the one on top of this offshore pile. A. The one on top? No, sir, I said it only slipped one foot and hit the other one and slid the other one.

Q. How many piles of girders were displaced? A. Two.

Q. Two piles? A. The two top ones in each pile.

Q. Which piles were they? A. The two piles that were offshore.

Q. That was the one nearest offshore and the one right next to it; is that right? A. Yes, sir.

Q. And when the guy rope moved the one nearest—that is the offshore pile—the one on top—that one went over against the ones next to it, is that right? A. Yes, sir.

Q. And moved that one? A. Moved that one.

Q. Was it right after that that you saw Wilczynski pull himself out from between them? A. Pull himself out.

JAMES BERGEN, testified on behalf of the defendant that he is checker of the Pennsylvania R. R. Co., on the opening dock, at Greenville, on May 20th, 1915, and was there when Wilczynski was hurt.

Q. Now as the boom swung across the deck from

one side to the other did it have any effect on the position of the boat? A. Why, yes, sir.

Q. What would it do? A. Whatever way the boom would go the boat would list a little bit from it.

Q. It would tip over? A. Yes, sir.

Q. As the boom went toward the shore the boat would tip towards the shore? A. Yes, sir.

Q. And as it came out it would tip the other way? A. Yes, sir.

Q. Did it tip enough to upset the pile of beams ordinarily, or girders? A. No, sir.

Q. If the girders were piled properly it would not have any effect of upsetting the girders, is that right? A. Yes, sir.

Q. Well, suppose the guy rope caught over the edge of the girders as it did on this occasion, then there was force enough in the boom to displace the girder; is that right? A. The guy rope is laid on the end of the girders, but it has to have a good strain on it before it can do any harm.

Q. Have you ever seen it misplace the girders before this one occasion you have spoken of in that same way? A. I have seen them slide, yes, sir.

Q. When the boom would bring the pressure on the the girders? A. Yes, sir.

Cross-examination by Mr. Hardenbrook.

Q. What was about the distance between these piles of girders? A. One foot.

Q. And you say you heard the girder of one pile slip? A. I heard it slide, yes, sir.

Q. And it slid over across the space between that pile it was on and the adjoining pile and struck the top girder of the adjoining pile, is that right? A. Yes, sir.

Q. And what did it do with the top girder of the adjoining pile when it struck it? What did it do to

that girder? A. The girder on the outside when it struck? Shifted it over.

Q. Knocked it off? A. No; it did not knock it off completely; it only shifted it about six inches.

Q. *And this man Wilczynski who was hurt at that time was in between the two tiers or two piles of girders, was he?* A. Yes, sir.

Q. About what was the relative height of those two piles of girders at that time, measuring from the deck to the top? A. From the deck to the top? I guess about four and three quarters feet—four and a half.

Q. About four to four and a half feet you say from the deck? A. Four and a half—it was over four—over four and a half too.

Q. Did you have anything to do with the unloading of the girders from the car and the loading on the boat itself except to keep tally of what was unloaded? A. Just to keep tally, and to tell the men where the cars were, that is all.

Cross-examination by Mr. Hardenbrook.

Q. *This night you were engaged in checking the freight or the girders which came out of the car and were being placed on the boat, were you not?* A. Yes, sir.

Q. *And you were in the employ of the Pennsylvania Railroad Company?* A. Yes, sir.

Q. *Checking that freight. And at the time of this accident to this man had the car been entirely unloaded?* A. No, sir.

Q. *About how much of the car had been unloaded—about?* A. Well, there was just three girders in the car.

Q. There were three girders left in the car? A. No; two left in the car.

Q. There were two girders still left in the car,

and to be put on the boat when this accident happened? A. Yes, sir.

Q. *Did you know the men that were on the boat?*

A. *I knew the men in my gang, yes.*

Q. *The men in your gang. How many men were there in your gang?* A. *Eight men.*

Q. *When you refer to your gang what do you refer to?* A. *The gang of men at work down the dock.*

Q. **And who were they working for?** A. **Pennsylvania Railroad**

Q. *And there were eight of those men on the boat you say?* A. *No, sir.*

Q. *About how many of those men were on the boat, how many of those eight?*

Mr. HARTPENCE—That is objected to unless the time is specified when they were on the boat.

Q. *At the time this accident happened?* A. *At the time the accident happened, to my knowledge there were two.*

Q. *What is that?* A. *To my knowledge there were two men.*

Q. *One man besides this man—* A. *Not counting this man that was killed.*

Q. *There were two besides this man in your gang?* A. *Yes, sir.*

Re-direct examination by Mr. Hartpence.

Q. *When did you bring them down to the dock?* A. *Seven o'clock.*

Q. *The night before?* A. *The night before, yes, sir.*

Q. *Then what did you do with them after you got them to the dock?* A. *Well, I showed them the car and I showed them the boat and told them to go to work.*

Q. Then who took charge of them after that? A. The captain took charge of them.

Q. Captain who? A. The captain—

Q. The captain of the boat Advance?

Mr. HARTPENCE—Stand up, Captain McCauley.

Q. This man? A. Yes, sir.

Q. And he directed all their motions after that? A. Yes, sir.

Q. And you simply kept track of the stuff that was taken out of the car and put on the boat; is that right? A. That is right.

POINT I.

The defendant could not create the relation of master and servant between the plaintiff and the Lighterage Company without his knowledge or consent.

The defendant claims that it transferred the work of plaintiff's intestate, to a lighterage company, and consequently at the time he was injured, he was the employee of the lighterage company, and not that of the defendant. The plaintiff's intestate was in the employ of the defendant at the time he was injured and was ordered to work on the boat by the defendant's foreman or checker Bergen as appeared by his evidence (fol. 20, p. 86, case).

Q. Did you have anything to do with the unloading of the girders from the car and the loading on the boat itself except to keep tally of what was unloaded? A. Just to keep tally *and to tell the men where the cars were*, that is all.

Cross-examination by Mr. Hardenbrook.

Q. This night you were engaged in checking the freight or the girders which came out of the car and

were being placed on the boat, were you not? A. Yes, sir.

Q. And you were in the employ of the Pennsylvania Railroad Company? A. Yes, sir.

Q. Checking that freight. And at the time of this accident to this man, had the car been entirely unloaded? A. No, sir.

Q. About how much of the car had been unloaded—about? A. Well, there was just three girders in the car.

Q. Did you know the men that were on the boat? A. I knew the men in my gang, yes.

Q. The men in your gang. How many were there in your gang? A. Eight men.

Q. When you refer to your gang what do you refer to? A. The gang of men at work down the dock.

Q. And who were they working for? A. Pennsylvania Railroad.

Q. And there were eight of those men on the boat you say? A. No, sir.

Q. When did you bring them down to the dock? A. Seven o'clock.

Q. The night before? A. The night before, yes, sir.

Q. Then what did you do with them after you got them to the dock? A. Well, I showed them the car and I showed them the boat and told them to go to work.

If there was any transfer of the plaintiff's intestate's services over to the lighterage company, it nowhere appears in the testimony that the transfer was made with his knowledge or consent. Upon this question, the Trial Court charged the jury:

"That brings us to inquire whether or not this plaintiff's intestate was the servant of the defendant company at the time of the happening of the accident, because there was some evidence in the case that the work on this lighter or steamboat or

whatever it was where the accident is alleged to have happened was being done by the Hudson River Lighterage Company; and as bearing upon the question whether or not he was the servant of the Pennsylvania Railroad Company it is laid down as follows:"

"A general servant of one person may for a particular work or occasion become for that time the servant of another person so that the latter will not be liable to him for injury occasioned by the negligence of other servants engaged with him in a common employment. To establish the relation of master to such servant it must appear that the servant has expressly or by implication consented to the transfer of his services to the new master and to accept him as his master pro hac vice and has entered upon such service and has submitted himself therein to the direction and control of the new master."

That brings us to consider whether or not the services of the plaintiff's intestate had been transferred to the Hudson River Lighterage Company by his assent, either express or implied, for if they were transferred by his assent, either express or implied, the verdict in this case would have to be for the defendant, but if they were not transferred to the Hudson River Lighterage Company by the assent of the intestate, express or implied, why then you would have to determine whether or not the negligence of the defendant company in the light of the rule which I have given you with respect to that negligence was the proximate cause of the injury to the intestate.

On the motion for a non-suit, the following appears:

MR. HARTPENCE— We move for a non-suit on the ground that there is no negligence shown on the part of the defend-

ant company. My argument is that the testimony shows that this was a boat of the Hudson River Company. There is no evidence to show that it was a boat of the Pennsylvania Railroad Company, and that the captain of the boat was the man who directed what was to be done.

THE COURT—But the men of the Pennsylvania Railroad Company were the men who did it.

MR. HARTPENCE—Yes; but I cannot see where there is any evidence of negligence on the part of defendant company even assuming that the railroad company was the owner and operator of the boat.

From this it appears that the defendant's attorney admitted that the defendant's employers were doing the work.

On motion to direct a verdict, the following appears:

MR. HARTPENCE—We move for a direction of a verdict in favor of the defendant on the ground that no negligence has been shown which would charge the defendant with liability. Further, on the ground that the real proximate cause of this injury to Wilczynski, if due to anybody's negligence at all, was due to the negligence of the operatives and servants of the lighterage company, who had full charge of the stowing of the cargo, and who, in your Honor's absence, it was testified to by the witnesses had no relation whatever to the Pennsylvania Railroad Company.

THE COURT—Yes, their relation was with Post and McCord.

Mr. HARTPENCE—Yes, and that the Pennsylvania Railroad Company's duty with regard to transportation of freight ended when they placed the cars on the dock at a point where the boat's apparatus could reach it, and from that time on the captain of the barge took charge of the whole operation, and sometimes he used his own men exclusively, and other occasions if he needed labor to aid him he employed hired men of the Pennsylvania Railroad Company, and instead of paying them their rate he paid the Pennsylvania Railroad Company the same rate which the company paid them, and in return the Pennsylvania Railroad Company paid them for their time. It was a mere matter of bookkeeping and convenience.

THE COURT—(After argument): I think, Mr. Hartpence, with respect to the motion which you have made, that the rules which will be applicable are these:

First of all, the claim of the defendant company is that this plaintiff's intestate was *pro hac vice* an employee of the Hudson River Lighterage Company. That in legal effect is the argument which you have made. Now the answer to that is this: that he cannot be made without his assent, either express or implied, *pro hac vice* the servant of anybody; either legally or constitutionally he cannot be made that. The authority for that is found in *Hardy v. D. L. & W.*

R. R. Co., which is reported twice in 30 Vr., first at page 35, and then affirmed in the Court of Errors later on in the same book.

Mr. HARTPENCE—I do not recall that I urged specifically that there was no such situation as that of employer and employee between the Pennsylvania Railroad Company and the injured party as the basis of my motion, but that comes in—

THE COURT—You have said—if language means what I think it does—you have said that the lighterage company paid his wages to the Pennsylvania Railroad Company for the time that he was employed about the business of the lighterage company, and that that made him the servant during that while of the lighterage company, and that the payment to the company instead of to him was a mere matter of bookkeeping. I think I am giving your language exactly.

Mr. HARTPENCE—But the idea that I had in mind in doing that was more incidental than decisive of this question. My motion was based primarily upon the ground that whatever negligence would be shown to have existed in the case was the negligence of the Hudson River Lighterage Company.

THE COURT—I am coming to that. I simply want to brush these things away, if I can brush them away, as I approach the main question, which is the one you suggest.

Mr. HARTPENCE—I only wanted my motion

on that point thoroughly understood by your Honor.

The COURT—I understand thoroughly. I simply want to take up each proposition you make and answer it. I say without the assent, either express or implied, of the plaintiff's intestate, he could not be made the servant of the lighterage company, and therefore, there being no evidence of either an express or implied assent on his part to such substitution of masters, he must be considered to remain the servant of the railroad company; or to put the best possible phase upon that branch of the case it is a question for the jury to say whether or not his services were transferred with his implied assent. So that to that point I want to direct this argument.

“The liability of a master to a servant does not cease—the servant not having been informed of any change—although, as between the master and a third person, a change is made by which thereafter the work is to be done for such third person; nor is the relation ended by reason of the fact that one joint employer, in accordance with an arrangement between himself and the other joint employer takes upon himself the functions of a workman.”

26 Cyc., 1086, 1087, 1088.

The Court in *D. L. & W. R. R. Co. vs. Hardy*, 59 N. J. L., 37, held:

“A general servant of one person may, for a particular work or a particular occasion, become, *pro hac vice*, the servant of another person. What will suffice to prove the assumption of the dual service gives rise to question. I think the applicable

rule is admirably expressed by Lord Watson thus: "I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become, *pro hac vice*, B's servant in such sense as not only to disable him from recovering from B for injuries sustained through the fault of B's own workmen. In order to produce that result the circumstances must be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purpose of the common employment." (Johnson vs. Lindsay, 1391 App. Cas., 371).

"To establish the fact that the servant of one has thus transferred his services to another *pro hac vice*, it must appear that he has assented, expressly or impliedly, to such transfer. No one could transfer the services of his servant to another master without the servant's consent. It must further appear that the servant has, in fact, entered upon the service and submitted himself to the direction and control of the new master."

POINT II.

The accident was caused by negligence of the defendant.

It was the duty of the defendant to use reasonable care for the safety of its employees in the matter of the loading of the barge or boat with the iron girders. Upon this point the Court charged the jury:

"If the intestate of the plaintiff was the servant of the defendant company at the time he was doing the work there, *their duty to him was to use reasonable care for*

his safety in the matter of the loading of the barge or boat with the iron girders."

It appears from the testimony that the girders were piled upon the boat in such a position that the boat listed to one side, and as described by the witnesses, "was lopsided, toward the side of the boat on which the heaviest pile of girders had been placed; and while in this position, two of the heavy girders slipped from the pile on which they had been placed, across an intervening space of a foot or more, and on to another pile of girders." The plaintiff's intestate, at this moment was standing between two piles of girders, and was crushed so that he died a few hours afterwards.

The plaintiff's intestate was an employee of the defendant (see Point 1) and the accident to him was due to the negligence and careless placing of the girders upon the boat. *The duty of the defendant was to use reasonable care for his safety, and it was a question of fact for the jury, as to whether the defendant used such reasonable care, in ordering plaintiff's intestate to a place known to be dangerous.*

DANIEL MCALLISTER, a witness on behalf of the defendant, testified, fol. 30, p. 80, case, and fol. 10 to 20, p. 81, case:

Q. Now, as the boom swung across the deck from one side to the other, did it have any effect on the position of the boat? A. Why, yes, sir.

Q. What would it do? A. Whatever way the boom would go, the boat would list a little bit from it.

Q. It would tip over? A. Yes, sir.

Q. As the boom went toward the shore, the boat would tip toward the shore? A. Yes, sir.

Q. And as it came out it would tip the other way? A. Yes, sir.

Q. *If the girders were piled properly it would not have any effect of upsetting the girders; is that right?*

A. *Yes, sir.*

Q. *Have you ever seen it misplace the girders before this one occasion you have spoken of in that way?*

A. *I have seen them slide; yes, sir.*

Q. *When the boom would bring the pressure on the girders?* A. *Yes, sir.*

This checker or foreman of the defendant was the man who ordered the plaintiff's intestate into the place of danger where he was subsequently killed, as he testified, fol. 20, p. 86, case:

Q. When did you bring them down to the dock?

A. Seven o'clock.

Q. The night before? A. The night before, yes, sir.

Q. Then what did you do with them after you got them to the dock? A. *Well, I showed them the boat and told them to go to work.*

This employee of the defendant in charge of the men, knew that whichever way the boom would go, the boat would list, and tip over, and *if the girders were properly piled, it would not have the effect of upsetting the girders*, fol. 80, p. 86, case.

McAllister, on behalf of the defendant, testified that *he had previously seen the girders slide when the boom would bring the pressure on them*, and that they would slip, owing to an improper piling of them, as he testified, "if the girders were piled properly, the swinging of the boom would not have the effect of upsetting them," fol. 10, p. 81, case. By reason of the improper piling of the girders, the accident happened. This want of care for the safety of the men presented a case upon which the jury was justified, under the instructions of the Court, in finding a verdict against the defendant, due to its negligence.

On the motion for a non-suit the Court said:

THE COURT—But the men of the Pa. R. R. Co. were the men who did it.

Mr. HARTPENCE—Yes; but I cannot see where there is any evidence of negligence on the part of the defendant company even assuming that the railroad company was the owner and operator of the boat; it simply shows an ordinary operation of shifting girders from a car to a boat; of a man standing in a position which would indicate no possible chance of danger, and the movement of the boat which tipped the girder. Now there is nothing to show what might have caused the movement of the boat.

THE COURT—There is the statement of one witness as to what caused it. One witness said that they piled too many girders on the side toward the land, that the boat tipped that way, and that is what caused the girder on the other pile to slip and strike the man.

Mr. HARTPENCE—But there is no evidence that there was any girder being piled at the time that the boat tipped. As a matter of fact it was at rest at that moment.

THE COURT—But the fact is the witness swore the boat was tipped that way. If it was tipped that way then the normal action of the water on the boat plus the tip might very well be taken by the jury to have been the cause of the accident.

Mr. HARTPENCE—Even at that I do not think there is any evidence in the case to connect the defendant company with it.

THE COURT—Then again, we have to look at it this way: Let us assume that the girders were piled as it is said they were, and that the normal action of the water on the boat caused the girder to

slip, mightn't the jury conclude that the piling must have been improperly done or there would not have been any slipping? Because manifestly if they had been properly piled allowance for the normal action of the boat would have been made in the ordinary course of events, and if a girder did slip that was piled there it might be concluded by the jury that the reason for the slip was that it was not piled properly or the normal action of the boat would not have caused it to slip.

Mr. HARTPENCE—Well, that is the ground of the motion.

THE COURT—Yes. I think I must deny the motion and you may have an objection entered on the record.

On the motion to direct a verdict, the Court said: That brings us then to this situation, which I understand to be the main point urged by you in your argument: that is as to whether or not, assuming that the intestate of the plaintiff was the servant of the Pennsylvania Railroad Company at the time the accident happened, there was any evidence of negligence on the part of the servants of the defendant company or of the company itself which could be considered proximately to be the cause of the disaster which subsequently resulted in his death. Now, on that branch of the case, this seems to me to be the series of rules which would govern:

First of all, assuming this man to be the employee of the Pennsylvania Railroad Company, the company undoubtedly, because of the relationship of master and servant owed him a duty. The duty which they owed him if they set him to work in any particular place was the duty to use reasonable care to see that that place was reasonably safe for the performance of the work which they

had set him to do. That I understand without any doubt to be the rule of law that governs in a case of this kind. Now, assuming for the sake of argument that the place they set him to work in was a place that the Hudson River Lighterage Company was doing the work in, under those circumstances, still if the Pennsylvania Railroad Company set him to work there to participate in any other work, they could not delegate their duty to use reasonable care to the Hudson River Lighterage Company, and if such care were not used excuse themselves from liability, the reason being that such duty is not delegatable. The duty is the duty of the master, and the master cannot hand it over to somebody else and if somebody else is negligent say, "Why, we were not doing the work;" because the place that they put him to work in was a place that so far as reasonable care can render it safe must be made safe, and if it were unsafe and the unsafety resulted from the negligence of somebody else who was doing that work it was certainly a breach, or might be considered to be a breach, by the company of its duty to use reasonable care to see that it was safe. They could not turn the man loose in any sort of a place and discharge themselves of liability for resulting accidents. If the place was dangerous in itself or was likely to become dangerous or was such as a reasonably prudent and cautious person might anticipate that danger would result from, then the duty rested upon the Pennsylvania Railroad Company to use care proportioned to the danger to prevent injury to that person from that danger. I understand that is the rule settled everywhere, and if that is the rule, why manifestly it is the rule that must be applied in this case, if the plaintiff's intestate at the time of the happening of the accident bore to the defendant in

this case the relation of servant. Now, that doctrine will be found laid down in very many cases, but you will find that it is quite well settled that "the liability of a master to a servant does not cease, the servant not having been informed of any change, although as between the master and a third person a change is made by which thereafter the work is to be done for such third person." That you will find laid down in *Missouri, etc. R. R. Co. v. Fuch*, in 18 Texas Civil Appeals, 46, 44 S. W. 317; and also *Goodwin v. Smith*, 66 S. W. 179; 23 Ky. Law Reports, 1810. And the same doctrine will be found expatiated on and cases cited with respect to it Cyc., Vol. 26, 1087. It is also quite well settled that a master's duty to direct his servant continues so long as the latter may be said to be actually or constructively in his employment or under his control. That will be found laid down in Cyc. with a citation of cases to support it, in Vol. 26, at page 1086.

So that it seems to me for these reasons it becomes my duty to submit to the jury—outside of course of the proposition as to whether the company was actually engaged in interstate commerce, which I believe is admitted in the case—whether or not the plaintiff's intestate was engaged in interstate commerce at the same time and whether or not he was still the servant of the defendant company, and whether or not the company performed the duty which rested upon it if he were such servant to use reasonable care for his safety in the place in which they had set him to work.

Mr. HARTPENCE—Does your Honor think the plaintiff has sustained her burden of proof in this respect, in regard to the violation of the duty of the defendant company in failing to provide a reasonably safe place for the employee to work?

THE COURT—That of course I have nothing to do with. Whether they have sustained the burden or not must be determined by the jury. If they have offered evidence on it I must submit it to the jury and they will say whether they have sustained the burden.

Mr. HARTPENCE—It seems to me the great weight of the evidence in this case would go to show that there was no failure on the part of the defendant company to furnish a reasonably safe place for this man to work, and in fact this was a most unusual and extraordinary occurrence, as I recall the testimony of those people who were on board the lighter and who were familiar through long experience with such occurrences, and it was not such an occurrence as the defendant might reasonably anticipate would take place, and for that reason it does seem to me that a verdict to the contrary must be set aside on that ground.

POINT III.

Joint Wrongful Act.

Should the plaintiff's intestate have been the employee of both the defendant and the lighterage company at the time he was injured, still the defendant would be liable.

“Where the wrongful act of the contractor joins with that of the contractee in causing the injury, the contractee is liable. So where a part of the work is done by employees of the contractee, the failure to guard the work done by such employees renders the contractee liable, although other work in connection therewith was performed by an independent contractor.”

26 Cyc., p. 1566—7 and 8.

POINT IV.

The grounds upon which the defendant appeals do not specify error in the admission in evidence of the mortality tables or the evidence adduced to show its materiality.

The mortality tables (fol. 40, p. 22 case) were received in evidence under a stipulation admitting them. The only question raised by the defendant when the mortality tables were offered in evidence, was as to their relevancy "unless some evidence is produced in connection with the mortality tables to show its real materiality in the case." This suggestion of counsel was met by producing proof (fol. 20, p. 18 case) that "the deceased did not either drink or smoke, always remained at home at nights and that the condition of his health was very good." No motion was made at the close of the plaintiff's case to strike out the mortality tables.

It furthermore appears that whatever little benefit may have accrued to the plaintiff by the admission of the mortality tables was completely nullified by the charge of the Court to the jury (fol. 40, p. 110, case). Furthermore, on the grounds upon which the defendant appeals, *defendant does not claim that the verdict of the jury was excessive.*

POINT V.

The eighth ground of appeal should be disregarded. The judicial proceedings are controlled by law of place of trial.

The defendant claims that its motion to direct a verdict should have been decided in accordance with the rules of the United States Courts, relating thereto, and not in accordance with the rules of the New Jersey Courts. We cannot agree to this proposition.

"The form of remedies, and the order of judicial proceedings are to be" according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act." See *N. P. R. R. Co., v. Babcock*, 154 U. S., 961, approving *Herrick v. M. and St. L. R. R. Co.*, 31 Minn., 11, and cases there cited, and this has long been the settled doctrine of the courts of this state in actions upon contract. *Gulick v. Loder*, 1 Gr., 68; *Wood v. Malin*, 5 Halst., 208; *Garr v. Stokes*, 1 Harr., 403, 405; *Harker v. Brink*, 4 Zab., 344; *Armour v. McMichael*, 7 Vroom, 92, 94. *The same principal applies to actions of tort.*

Ferguson v. Central R. R. Co., 71 N. J. L., 651.

While the State Courts are controlled by the Federal Statute—the Trial Court could not have directed a verdict for the defendant—except where the Federal decisions held that the evidence produced on the trial was *not sufficient in law to create a liability under the Federal Statute*, and the case of *St. L. I. M. & S. R. R. Co., vs. McWhirter*, 229 N. S., 265, goes no further than this.

POINT VI.

The answer pleads contributory negligence, in connection with a general denial.

"A plea of contributory negligence, filed with a general denial, admits that there is an issue of negligence between the parties, and defendant cannot show that plaintiff was employed by a third person, who was the proper party to be sued.

26 Cyc., p. 1408, citing *Bomar v. Louisiana R. R. Co.*, 42 L. A. Ann, 984, 8 So., 478; 42 L. A. Ann, 1206, 9 So., 244.

POINT VII.

Judgment should be affirmed.

Respectfully submitted,
CHARLES M. EGAN,
Attorney for Plaintiff-Respondent.

March 20, 1916.

