New Jersey Court of Errors and Appeals

CONSTANTINE GRYBOWSKI, Administrator of Joseph Grybowski decease, *Respondent,* *vs.* ERIE RAILROAD COMPANY. *Appellant.*	On Appeal from Supreme Court.

BRIEF OF COLLINS & CORBIN IN FAVOR OF ERIE RAILROAD COMPANY, APPELLANT.

(1)

Statement of the Case.

The appeal herein is taken from a judgment of the Supreme Court affirming a judgment entered in the Hudson County Circuit Court in favor of the respondent (hereinafter called the plaintiff) and against the appellant (hereinafter called the defendant) for the sum of $1200 and costs (p. 15). The action was based upon the Federal Statute of April 22, 1908, entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases", commonly called the Federal Employers' Liability Act.

The plaintiff's intestate, while in the employ of the defendant as a laborer at its ash pit in the Jersey City Terminal, was run over and killed by a locomotive; and the action of the plaintiff was based upon the alleged negligence of the defendant and its servants in failing to maintain a proper system of signals and warnings, and in

failing to warn the intestate of the probable dangers of his employment, and in failing to give him reasonable notice of such probable dangers before they became actual dangers (p. 11). The gist of the plaintiff's evidence on this point was the alleged failure of certain servants of the defendant, who were in charge of the locomotive, to give warning to the intestate while he was in the act of climbing out of the ash pit, before moving the locomotive.

The question involved is whether the Supreme Court should have reversed the judgment of the Circuit Court for one or more of the grounds stated in the Supreme Court, namely:

I. That defendant's motion for direction of verdict in its favor should have been granted on the ground that at the time of the accident it was not engaging in interstate commerce, nor did the plaintiff's intestate suffer injury while he was employed by the defendant in such commerce.

II. That there was material error in the charge with respect to the application of the Federal statute to the facts of the case.

III. That even if the Federal Statute applied there was no evidence of negligence on the part of the defendant or any of its officers, agents or employes.

IV. That the risk of injury from the movement of the engine was assumed by the plaintiff's intestate.

V. That there was material error in the charge with respect to the law of assumption of risk.

VI. That there was error in the charge with respect to the question of contributory negligence.

VII. That the amount of damages should have been limited to the expenses of last sickness and burial, not exceeding Two Hundred Dollars, as provided by Paragraph Twelve of Chapter 95, Laws of 1911 of the State of New Jersey.

(2)

Specification of the Grounds of Appeal.

Following is a specification of the grounds of appeal relied upon and intended to be urged:

The Supreme Court affirmed the judgment entered in the Hudson County Circuit Court in favor of the plaintiff and against the defendant whereas said Supreme Court should have reversed said judgment for one or more of the following grounds:

I. The trial court denied the defendant's motion to non-suit the plaintiff and its motion to direct a verdict in its favor, and submitted to the jury to determine (*inter alia*) the questions of whether the defendant was engaged in interstate commerce at the time of the accident upon which the suit was based, and whether the plaintiff's intestate suffered injury while he was employed by the defendant in such commerce; whereas said motions should have been granted because it appeared that the defendant was not engaged in interstate commerce at the time of the accident within the meaning of the Federal Statute set forth in the complaint, nor did it appear that the plaintiff's intestate suffered injury while he was employed by the defendant in such commerce (Grounds, Nos. 2 (a) (b); 3 (a), (b); 4 and 5).

II. There was material error in the charge of the trial court with respect to the application of the Federal Statute. This part of the charge reads as follows:

> "One engaged in the work of maintaining tracks, bridges, engines or cars in proper condition after they have become and during their use as instrumentalities of interstate commerce, is engaged in interstate commerce, and this even if those instrumentalities are

used in both inter and intrastate commerce" (Ground No. 6).

III. The trial court denied the defendant's motion to non-suit the plaintiff and its motion to direct a verdict in its favor, whereas said motions should have been granted because there was no proof of negligence on the part of the defendant or any of its officers, agents or employes (Grounds 2 (c); 3 (c).)

The trial court erroneously refused to charge defendant's request numbered "3" reading as follows:

> "3. Plaintiff's intestate had no right to rely upon any signals being given by bell or whistle when the engine by which he was struck was about to be moved" (Ground 10).

IV. The trial court denied the defendant's motion to non-suit the plaintiff and its motion to direct a verdict in its favor, whereas said motions should have been granted because the risk of injury was assumed by the plaintiff's intestate (Grounds 2 (d) and 3 (d).)

V. There was material error in the charge with respect to the law of assumption of risk, and in refusing to charge the second request submitted by the defendant and in modifying the same. This part of the charge reads as follows:

> "If you find that the plaintiff has by a clear, fair and satisfying preponderance of the evidence shown you that these three items of which I have just spoken exists, then you may turn your attention to the consideration of contributory negligence and assumption of risk on the part of the plaintiff's intestate, that is, Joseph Grybowski.
>
> "Contributory negligence is the doing or not doing of those acts and things which a reasonably prudent person, under the existing circumstances and conditions, would or would not have done to have avoided injury to himself and either the doing or not doing

of which was the proximate cause or causes of the injury.

"Upon the assumption of risk, the Federal court has said:

" 'That an employee may have assumed a risk from one of two contributory causes of an injury will not defeat his right to recover where the other cause is one for which the master is liable.' "

* * * * *

"The second request is: 'If the jury find that the plaintiff's intestate either in fact knew or by the exercise of reasonable care on his part should have known that the engine by which he was struck was approaching, then he assumed the risk and there must be a verdict for the defendant.' I decline to charge in that language, but in place of it I charge as follows: 'That if you find from the evidence that the deceased party knew or reasonably should have known the risks surrounding his employment and work and that it was in disregard of that knowledge on his part which he had or should have had that the accident happened, you may find that he assumed the risk that brought about his death, and in that event you may find for the defendant.' " (Grounds 7 and 9.)

VI. There was error in the charge with respect to the question of contributory negligence and in refusing to charge defendant's Request No. 7. The charge on this subject reads as follows:

"On the question of contributory negligence, to which I have before alluded, I have to say to you that in an action upon this statute or under this statute contributory negligence may not defeat the right of the plaintiff to recover. Section 3 of the act provides, among other things, this:

" 'The fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'

"If you find that plaintiff's intestate was guilty of contributory negligence, then, if you have to find the amount of damages to which decedent's father is entitled, you are to abate or deduct from that sum the amount you shall find represented decedent's proportionate contributory negligence, and your verdict will be for the difference."

Said Request No. 7 reads as follows:

"7. If the jury find that the accident was due to contributory negligence on the part of the plaintiff's intestate, the damages, if any, that may be found against the defendant, must be diminished in proportion to the amount of the negligence of plaintiff's intestate as compared with the combined negligence of plaintiff's intestate and that of the defendant." (Ground 13.)

VII. The trial court erroneously struck out paragraph 2 of the answer of the defendant; the trial court erroneously decided that it had jurisdiction to entertain the cause of action notwithstanding the provisions of Chapter 95, New Jersey Laws of 1911; and erroneously refused to charge defendant's Request No. 4. Said request reads as follows:

"4. The amount of damages recoverable by the plaintiff's intestate, if a verdict is found in his favor, must be limited to the expenses of last sickness and burial, not exceeding the sum of two hundred dollars, as provided by Chapter 95, New Jersey Laws of 1911" (Grounds 1; 2 (f); 3 (f); and 11).

(3)

Brief of the Argument.

I.

Defendant's motion for direction of verdict in its favor should have been granted on the ground that at the time of the accident it was not engaging in interstate commerce nor did the plaintiff's intestate suffer injury while he was employed by the defendant in such commerce.

The allegation of the plaintiff is that the defendant was a common carrier by railroad engaged in the business of interstate commerce and that his intestate was employed in such commerce by it as a laborer; and that while so employed in such commerce in moving ashes taken from an engine so engaged from a certain ash pit where they had been dumped he, the plaintiff's intestate, received injuries by reason whereof he died. (See paragraph 3 of complaint, p. 10, ll. 10-30.) The right of the plaintiff to recover therefore necessarily depends in the first instance upon the question of whether the facts bring the case within the Federal Statute of April 22nd, 1908. Motions for non-suit and for direction of verdict were made on the grounds, *inter alia*, that this statute had no application to the case (p. 35, ll. 15-35; p. 59, ll. 1-30). These motions were denied and the trial judge left this question to the determination of the jury (pp. 61, 62).

On this point the defendant urges that as a matter of law the Federal statute does not apply to the facts, and that therefore its motion for a non-suit or for a direction of verdict should have been granted.

The statute in question so far as relates to the present point, reads as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe; and if none, then of such employe's parents * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carriers * * *"

It has been held by the United States Supreme Court that the question of the application of the statute to any particular case depends upon the nature of the work being done by the employe *at the time of the injury.* A recent decision of that Court which lays down this rule is *Illinois Central R. Co. v. Behrens,* 233 U. S., 473, 58 L. Ed. 105; Ann. Car. 1914 C, 163. (See also 217 Fed., 967. We quote from the opinion in that case as follows (italics ours):

"Giving to the words 'suffering injury *while* he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the *particular* service in which the employee is engaged is a part of *interstate commerce.* The act was so construed in *Pederson v. Delaware. L. & W. R. R. Co.,* 229 U. S., 146, 57 L. ed., 1125, 33 Sup. Ct. Rep., 648, 3 N. C. C. A. 779. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce.' Again (p. 152): 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases. Second Em-

ployers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A., 875: *Seaboard Air Line R. Co. v. Moore,* 228 U. S. 433, 57 L. ed. 907, 33 Sup. Ct. Rep. 580; *St. Louis, S. F. & R. Co. v. Seale,* 229 U. S. 156, 158, 57 L. ed. 1129, 1133, 33 Sup. Ct. Rep., 651; *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 256, ante, 305, 34 Sup. Ct. Rep. 305; *Grand Trunk Western R. Co. v. Lindsay,* 233 U. S. 42, ante, 581, 34 Sup. Ct. Rep. 581.

"Here *at the time of* the fatal injury the intestate was engaged in moving several cars, all loaded with interstate, freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, *upon the completion of that task,* to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done *at the time of the injury.*"

The test thus laid down has been applied in a variety of cases. We call attention to several recent decisions as follows:

In *Illinois Central R. Co. v. Rodgers,* 221 Fed., 52 (Circuit Court of Appeals, Fifth Circuit), it was pointed out that under the decisions of the U. S. Supreme Court in the *Behrens* and *Pedersen* cases, both the injured party and the carrier must be engaged in interstate commerce at the time of the injury. The Court said:

"Applying the principle to the present controversy, in order to bring the case within the purview of the act, it was necessary that both the defendant-in-error and the engine which injured him should be engaged, at the time of the injury, in such commerce."

In that case the injured employe was in the act of cleaning certain stencils used by the defendant

to mark the cars owned and used by it in interstate business; and while standing near the railroad track was run over and knocked down by an engine. There was no proof that the engine was engaged in interstate commerce at the time of the accident. Judgment in favor of the plaintiff was reversed on the ground that the facts did not bring the case within the Federal act.

The same question was considered in *Boyle v. Pennsylvania R. Co.,* 221 Fed., 453, where it was said:

> "If the act of Congress is confined to the fact of 'transportation,' it is admitted that it does not apply to the instant case. Counsel contend, however, that the act carries a broader meaning, and is to be applied to all cases in which the defendant is engaged in interstate commerce as a business, whether at the immediate moment 'transporting' interstate passengers or not. The distinction here sought to be made is claimed to find support in the *Pedersen* case, 229 U. S., 146, 33 Sup. Ct., 648, 57 L. Ed., 1125, Ann. Cas. 1914C, 153. It is further claimed that this case is in conflict with and overrules a number of cases decided in the District Courts. This argument, based upon the divergence of view between the District Courts and the Supreme Court, seems to overlook the point at which the divergence takes place. The application of the Act of Congress is made to turn upon two facts. The death or injury to the employee must have been caused while the defendant company was a common carrier 'engaged' in interstate commerce and while the employe was 'employed' in such commerce. The thought embodied in the *Pedersen* case as finally ruled is that an employee who is at work on or about any instrument then in use as an instrument of interstate commerce is employed in such commerce, and being so employed is entitled to the protection given by the act of Congress from injuries caused by the carrier employer, whether the thing by which he is injured is also in use as an

instrument of interstate commerce or not. We do not understand that the necessity for the presence of the two things required by the act of Congress has been denied by any ruling of the Supreme Court. On the contrary, we understand that, although this duality of conditions is not necessary to the exercise of the power of Congress, yet this very case recognizes both conditions to have been incorporated in the act of Congress."

In *Shanley v. Philadelphia, etc., R. Co.*, 221 Fed., 1012, it was held that the employee was not employed in interstate commerce at the time of the accident, and that therefore the Federal act did not apply when it appeared that the employee was a member of a shifting crew in the freight yard of a railroad company, who at times assisted in handling cars used in interstate, intrastate, and purely local commerce, but who at the time he met his death was aiding in the work of shunting empty cars upon a siding of a manufacturing company, and who had been sent out as flagman to protect the switch by stopping any oncoming train on the track with which the switch was connected; the ultimate destination, when freighted, of the empty cars, or the character of the oncoming train not being shown.

The following cases, all holding that there could be no recovery under the Federal Act, may also be examined:

Shanks v. Del. & Hudson R. Co., 214 N. Y., 413; 108 N. E., 664.

Parsons v. Del. & Hudson R. R., 153 N. Y. Supp., 179;

Norton v. Erie R. R. Co., 148 N. Y. Supp., 769;

McAuliffe v. N. Y. Central, &c., R. Co., 150 N. Y. Supp., 512;

Missouri, &c., R. Co. v. Fesmire, 150 S. W., 201;

Missouri, &c., R. Co. v. Hawley, 123 S. W., 726;

Affirmed by Sup. Ct. Jan

Erie R.R. v. Welsh 105 N.E. 189

Louisville, &c., R. Co. v. Strange, 161 S. W., 239;

Louisville, &c., R. Co. v. Parker, 177 S. W., 465;

Pecos, &c., R. Co. v. Rosenbloom, 177 S. W., 952;

Barker v. Kansas City, &c., R. Co., 146 Pac., 358; 94 Kansas, 176 (See also 88 Kansas, 767, 43 L. R. A. (N. S.), 1121);

La Casse v. New Orleans, &c., R. Co., 64 So., 1012;

Gray v. Chicago, &c., R. Co., 142 N. W., 505;

Ruck v. Chicago, &c., R. Co., 140 N. W., 1074;

Atchison, &c., R. Co. v. Pitts, 145 Pac., 1148;

Louisville, &c., R. Co. v. Moore, 161 S. W., 1129;

Cantin v. Glen Junction R. Co., 96 Atl., 303;

Penn. R. Co. v. Knox, 218 Fed., 748;

Erie R. R. Co. v. Van Buskirk—opinion of Circuit Court of Appeals for Third Circuit, filed Dec. 27, 1915, and not yet reported.

As it is necessary for a plaintiff to prove all the facts essential to entitle him to recover, it logically follows that the burden of proof is upon the plaintiff in a suit based upon this statute to show that at the time of the accident the common carrier was engaged and the employee was employed in interstate commerce. It was so held by the Supreme Court of Pennsylvania in *Hench v. Pennsylvania R. Co.,* 91 Atl., 1056, where it is said:

"As we view this case, the burden is on plaintiff to prove facts to show that her husband was engaged in interstate commerce,

> or had to do with the instrumentalities of such commerce, at the time he received his injuries."

To the same effect see

> *Gray v. Chicago, &c., R. Co.,* 142 N. W., 505;
> *Cantin v. Glen Junction R. Co.,* 96 Atl., 303.

The question on this phase of the case therefore is whether the plaintiff has proven that the defendant was engaged in interstate commerce and that his intestate was employed in such commerce at the time of the accident. It was admitted by the defendant's answers to interrogatories that the plaintiff's intestate on the date of the accident was employed by it as a laborer in the ash pit in its Jersey City Terminal; that the engines of the defendant were moved over this pit and that the slides of the ash pans were opened and the ashes were allowed to fall into the pit, and were then removed therefrom by means of a "worm" and bucket passing through the pit on an endless chain operated by a gas engine (p. 17, ll. 1-30); that the engine by which the plaintiff's intestate was run over was a passenger locomotive number 974, which on the day of the accident had come from Suffern in the State of New York; that after this engine had dumped its ashes it was going to the coal pockets to receive coal and thence to the roundhouse to be prepared for another trip (p. 18, ll. 1-30). There was no proof as to where this engine was expected to go nor where it did in fact go after it had received coal and had been prepared in the roundhouse for another trip; nor was there any proof to show how long after the accident (if at all) it was used on any other trip.

The only other engine which was on or near the ash pit shortly before the accident was engine number 612. This was a switch engine used for the purpose of switching cars in and about the

terminal (p. 43, ll. 1-20). This engine was on the same track on which 974 approached the pit. It had dumped its ashes before the accident and was moved off the hopper in order to allow 974 to take its place (p. 43, ll. 20-30).

The ashes of engine 974 had not yet been dumped into the pit when the accident happened (p. 23, ll. 10-25; p. 56, l. 40). Immediately before the accident plaintiff's intestate had been working in the pit and while there he had received a signal from the operator of the gas engine to come to the surface (p. 28, ll. 1-20). No one saw him struck, but apparently at the time of the accident he was walking on or near one of the rails of the track on which 974 was, or else he was in the act of climbing up from the ash pit in response to this signal.

Plaintiff proved that the defendant operated railroad trains *into* and through the States of New Jersey, Pennsylvania and New York. The passenger trains, so operated, used the terminal yard at the foot of Pavonia Avenue (p. 19, ll. 20-30). The passenger shed or station where the passenger trains ran is about two blocks from the ash pit (p. 20, ll. 20-40). On arriving at this passenger station they stopped and discharged passengers, and in the majority of cases the train was then pulled away by a switch engine and the engine by which the passenger train had been moved was sent to the ash pit "light," that is, without any cars attached; in some cases the passenger engine would "kick" its train up into the yard and then go to the ash pit light (p. 21, ll. 1-30). In the latter event the trains were backed to, and left at, the Monmouth Street yard, so-called (located about five blocks from the ash pit), and the engines were then run light to the pit, so that in every case the engines when they were moved towards and upon the pit had no cars attached, whether they moved from the passenger shed after having

their train pulled away by a switch engine, or whether they moved from the Monmouth Street yard after the passenger engine had backed its train to that point (p. 21, l. 30, to p. 22, l. 20).

In the case of engine 974 on the night of the accident, it had pulled a train into the passenger shed and after the train had been taken out, the engine backed up light to the turntable, turned around and moved on towards the pit, coming to a stop and waiting a few minutes until another engine (no doubt 612) had moved ahead out of the way (p. 48, l. 25, to p. 49, l. 30; p. 54, l. 30, to p. 55, l. 10). When 974 stopped the engineer (Sheddlar) got down to examine it; while he was doing this engine 612 moved away and the engineer told his fireman (McCarthy) to move the engine on to the pit (p. 50, ll. 10-40; p. 55, ll. 20-40). The fireman did so; it happened that the pilot or cowcatcher when the engine stopped was over some hot cinders and ashes; and the engineer thereupon directed the fireman to back up three or four feet, and he did so (p. 50, ll. 30-40; p. 53, l. 15; p. 55, ll. 30-40). The accident happened while the engine was thus backing (p. 56, l. 15).

We submit that on these undisputed facts there was nothing to show that at the time of the accident plaintiff's intestate was employed or that the defendant was engaged in interstate commerce. Probably the ash pit and the machinery connected therewith might fairly be called an "instrumentality" of commerce (either interstate or intrastate), but, admitting that to be so, it proves nothing as to the nature of the employment of the decedent *when the accident happened.* So far as engine 612 is concerned, while it is true that that engine had dumped its ashes into the pit shortly before the accident, apparently the decedent had finished whatever was necessary to do with its ashes, as he had received word to leave the pit. Moreover, there is no proof that engine 612 was engaged in interstate

commerce; the proof indicates the contrary, as it was a switch engine *used only in the terminal at Jersey City.* While such an engine might be said to be working in interstate commerce when it is actually moving cars in a terminal, one or more of which may contain interstate commodities, the admitted fact in this case is that it was not moving any cars at the time of the accident; and there is no proof as to what cars it had been moving shortly before or what cars it moved (if any) shortly after the accident, or whether these cars or any of them contained interstate commodities. Hence so far as this engine is concerned the plaintiff has not brought himself within the statute upon which his action is based.

So far as engine 974 is concerned, it is quite true that the last trip made by that engine prior to the accident was an interstate trip. *But that trip had been finished.* The engine had drawn its train into the passenger shed, the passengers had been discharged, and the cars had been moved to the passenger yard by a switch engine. There was nothing more for engine 974 to do with respect to the train it had brought from Suffern. See *Heimbach v. Lehigh Valley R. R.,* 197 Fed., 579. Moreover, if it should be said that the dumping of the ashes of 974 was *preparatory* for another trip, there is still no proof to show that the engine was then being prepared for an *interstate* trip. The passenger trains of the defendant go *into* as well as through New Jersey; there is no proof that all of the passenger trains of the defendant are of an interstate character (p. 19, ll. 20-30). Hence there can be no presumption that this engine was being prepared for an interstate trip simply because it was moving to the ash pit.

Finally, there is nothing in the record to show that the plaintiff's intestate had anything whatever to do with engine 974, even if it was still engaged in, or was being prepared for, interstate commerce.

That engine had not yet begun to dump its ashes when the accident happened and the plaintiff's intestate was not even in the ash pit at the time of the accident, but had come out of it or was on his way out of it, in response to a signal for some purpose not proven. The decedent had nothing to do with the actual dumping of the ashes. His work did not begin until *after* the ashes had been dumped. His duty was to clean the pit, to watch the buckets in the pit and to see that the machinery therein was kept in working order (pp. 38, 39); after the pit was cleaned he was supposed to come up and clean on the surface around the pit (p. 42, ll. 20-30). The work of cleaning out the fires in the engine was done by another man (p. 22, l. 35, p. 23, ll. 1-3, p. 27, ll. 10-15). Apparently the decedent had finished cleaning the pit when the engineer in charge of the gas engine told him to come up. This engineer (Savage) testified;

> "Q. Did you see him (referring to decedent) at work this night of the 11th of January? A. I saw him, he was my partner.
> "Q. You were both working together in the pit and around the pit? A. Yes, sir.
> "Q. What was he doing when you last saw him? A. When he stopped cleaning the pit I gave him a signal to come up on the surface and I went to stop my machine." (p. 28, ll. 10-20)."

It is clear that the decedent had nothhing to do at any time with the dumping of the ashes of engine 974; and, up to the time of the accident he had done no work of any kind in connection with engine 974 or any of its ashes.

The case of *Tonsellito v. New York Central R. R.*, 94 Atl. 804, may be cited by the plaintiff, but that case is different from the present. The locomotive upon which the employe was working

was about to be attached to a train running from a point in New Jersey to a point in New York. The plaintiff was injured while assisting in preparing the locomotive for this interstate trip. Such a condition is not like that in the present case, where the engine by which the decedent was run over had finished an interstate trip and there was no evidence as to the trip for which it was being prepared, nor as to what trip it did in fact make after it had been prepared—nor was there any evidence as to the interstate use of the engine that had been in the ashpit immediately prior to the engine by which the accident was caused. *At the time of the accident* the decedent was not performing any service in connection with either of these two engines. One of them had finished dumping its ashes and had moved off the pit and the other had not yet dumped its ashes. Neither was the decedent actually cleaning the pit when the accident happened. According to the testmony of the operator of the gas engine (and there is no evidence to the contrary) the decedent had finished cleaning the pit and was about to come to the surface in response to a signal given to him shortly prior by this witness—but for what purpose does not appear. If the accident had happened while the plaintiff was engaged in cleaning a pit into whch the ashes of engines used both for interstate and intrastate commerce were dumped, then the reasoning of the New Jersey Supreme Court (based upon the the decision of the U. S. Supreme Court in the *Pedersen* case, 229 U. S. 146) might be sound—although perhaps even that is doubtful in view of the fact that there was no evidence that either of the two engines were in fact used in interstate commerce at the time of the accident or were being prepared for such use.

Applying the test specified by the U. S. Supreme

Court in the *Behrens* case, supra, to wit; "The nature of the work being done at the time of the injury," we submit that the plaintiff failed to prove the necessary facts to bring the case within the statute upon which the action was based. The trial judge submitted to the jury the question of whether the defendant company was engaged in interstate commerce and whether the plaintiff's intestate was an employe so engaged (p. 61, l. 35 to p. 62, l. 10; p. 63, l. 32). It was error to leave that question to the jury; and, inasmuch as the evidence on this point was undisputed, the trial judge should have ruled as a matter of law that the Federal statute did not apply, and the defendant's motion for a direction of verdict in its favor should therefore have prevailed.

II.

There was material error in the charge with respect to the application of the Federal statute to the facts of the case.

In discussing the Federal statute the trial judge said:

> "One engaged in the work of maintaining tracks bridges, engines or cars in proper condition, after they had become and during their use as instrumentalities of interstate commerce is engaged in interstate commerce, and this even if those instrumentalities are used both in inter and intrastate commerce."

This part of the charge was no doubt quoted from one of the headnotes in *Pederson v. D. L. & W. R. R. Co.*, 229 U. S. 146; 57 L. ed. 1125. Considered in the abstract, the quotation must of course be conceded to be correct. But we submit it has no bearing upon facts of the present case. It was not shown that the plaintiff's intestate was engaged in the work of maintaining engines

at the time of the accident, nor was it shown that the engines, or any of them that dumped their ashes in the pit where he was employed, were used in interstate commerce at the time of the accident. The evidence on this point has been summarized under Point I and need not be repeated. The jury, however, would naturally infer from the charge that there was some proof to show that plaintiff's intestate was engaged in maintaining engines during their use as instrumentalities in interstate commerce, and the charge in this respect was therefore misleading and erroneous.

III.

Even if the Federal statute applies, there was no evidence of negligence on the part of the defendant, or any of its officers, agents or employes.

Under the Federal statute a plaintiff is entitled to recover damages if (and only if) he proves that the injury or death resulted in whole or in part from the negligence of any of the officers, agents or employes of the carrier, or by reason of any defect of insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, bolts, wharves or other equipment. It will be observed that with respect to the negligence of the employer the statute is merely declaratory of the common law; but there is a further liability imposed upon the employer in the event of negligence on the part of any of its officers, agents or employes, thus abolishing the common law defense of negligence of a fellow servant. In the present case there was no proof of any defect or insufficiency due to negligence in the defendant's cars, engines, etc. The plaintiff's case was put upon the point that there was negligence on the part of the defendant's servants in failing to use reasonable care in the giving of a warning of the

movement of the engine by which the plaintiff's intestate was struck. The trial judge properly charged that there was no law of this state which required "an audible warning or otherwise, by ringing a bell or blowing a whistle or other means of warning where the engine or locomotive is in the railroad company's yard" (p. 63, ll. 10-15). The question on this phase of the case therefore is whether there was any evidence for the jury as to the exercise of reasonable care by the defendant's servants. The plaintiff's case was put entirely upon the claim that when the engine moved backward it failed to give a signal by bell or whistle. Plaintiff's witness Gott, said that when the engine was nearing the pit the bell rang but that it didn't ring when it backed from the pit (p. 23, l. 40). The operator on the gas engine, one Savage, said he did not hear any bell or whistles (p. 30, ll. 10-20) but his testimony is of small importance in view of his statement that his gas engine was running and that it made "quite a noise" and that the buckets that pulled the ashes also made some noise (p. 31, ll. 20-30). The engineer said that the bell was rung (p. 54, ll. 1-10) and the fireman corroborated him (p. 56, ll. 1-20). It is possible that under this evidence there might be a question of facts as to whether or not the bell was ringing at the time the engine was moved backward, but granting that the jury might be justified in finding that the bell was not ringing at that time, such fact does not prove negligence.

In this connection defendant's third request should have been charged. This reads as follows: "Plaintiffs' intestate had no right to rely upon any "signals being given by bell or whistle when the "engine by which he was struck was about to be "moved" (p. 69, l. 30). If, as the Trial Judge charged, there was no statute or decision which required the ringing of a bell or the blowing of a whistle, and if there was no proof of any custom

of giving any such warning before moving the engine, it follows that plaintiff had no right to rely upon any such signals. This request was therefore proper.

The jury had no right to find under the charge that there was any legal duty on the part of the defendant to ring a bell when moving a locomotive in a railroad yard and that the alleged fact that the bell was not rung (if relevant at all in the absence of evidence that it was the *custom* so to do under such circumstances) is important only with respect to the question of whether the employes exercised reasonable care. In this respect the case is distinguishable from *Firth v. Pennsylvania R. Co.*, 83 Atl. 896, 83 N. J. Law 467, (cited by counsel for plaintiff), in which a judgment for plaintiff was affirmed because (and only because) there was a custom of giving warning, and it was disputed whether such warning was given as an incident of the work of the master, or as the duty of the master to warn the servant.

The case of *Koneski v. D. L. & W. R. R. Co.*, 77 N. J. Law, 645, also is cited by counsel for plaintiff. This case is not in point because there the non-liability of the master was based upon the ground that the failure of the engineer to blow his whistle or ring his bell when about to move his engine from an ash pit, was negligence on the part of a fellow servant; and such negligence would of course not be a defense under the Federal statute. Moreover this case indicates that the mere failure of the engineer to give such signal is not negligence unless it appears that it was the *custom* to give such a signal to warn the men working in the ash pit of the approach of an engine to the pit, or of its movements on the pit. Under the logic of both of these decisions, negligence by reason of the failure to give such a signal must be predicated upon a *custom* so to do;

and in the absence of proof of the existence of such custom it cannot be negligence to fail to give such signals.

We may, therefore, leave out of consideration the question of possible negligence by reason merely of the fact of an alleged failure to ring the bell when the engine was moved backward. The question still remains whether the defendant's servants used reasonable care in thus moving the engine. There is nothing to suggest that the engineer and the fireman who were in charge of this engine had any actual knowledge that the decedent was on the track or in the act of climbing out of the manhole on to the tract at the time the engine was moved. There is no proof that the decedent gave any notice of his intention to climb out of the pit. The engineer said that when he approached the ash pit the engine was headed west (p. 51, l. 15). He stopped before reaching the pit because there was another engine ahead of him (p. 49, l. 25; p. 51, l. 15). He got down to examine the engine and in the meantime the engine that was ahead, moved on and he called to his fireman to keep going up to the pit and he followed behind the engine "walking as fast as she moved—moving very slowly" (p. 50, ll. 18-20). He was then on the right-hand side of the engine looking in an easterly direction alongside of the track on which the engine stood. He looked back and saw nobody around the manhole leading up from the ash pit. This manhole was on the same side of the engine that he was on (p. 51, ll. 10-40). There was a big electric light a few feet from the manhole. He called to the fireman to back and at that time there was nobody in sight. The fireman was then on the engineer's side of the engine and was looking back (p. 52, ll. 1-20).

The fireman said that after the engineer got

off from the engine the engine that was on the pit ahead of him moved out and the engineer on the ground said "move up" and he started the bell ringing and moved up "very slowly." The engineer then told him to back up a little bit, and he did so (p. 55, ll. 20-30). When the engineer told him to back up he turned around and looked toward the rear of the engine to see if there was anything back of him; he saw nobody anywhere around the manhole. Before starting to back up there were two men around the engine getting ready to clean out the fire and the engineer called, "Look out, we are going to back," and they got out of the way (p. 57, ll. 20-30).

The first that either the engineer or the fireman knew that there was an accident was when they heard someone holler (p. 52, l. 35; p. 56, l. 15).

None of this evidence was disputed. What is there to show a failure on the part of the defendant's servants to exercise reasonable care? There is no proof of any custom to give warning by bell or whistle or otherwise when an engine is moved as this one was; the only men who had anything to do with operating the engine say they both looked in the direction in which the engine was about to move before it was started, and they saw no one; one of them shouted a warning before the engine moved. There is no claim that there was not sufficient light; on the contrary the proof is that there was an electric light near the ash pit; and also a light in the gas engine house (p. 31, ll. 10-20). It is quite obvious that the decedent must have been coming out of the top of the manhole at practically the same moment as the engine started to back. There is nothing to suggest that either the engineer or fireman had any reason to suppose that the decedent would be climbing out of the ash pit at that particular

moment; and even if they should have guarded against such a possibility, the evidence is undisputed that they looked to see if there was anyone on the track, and the engineer called a warning before the engine was moved.

In the opinion of the Supreme Court affirming the judgment for the plaintiff there are three theories upon which it is suggested that the jury were justified in concluding that there was negligence on the part of the defendant's servants. The first referred to the alleged failure to give warning of the intended movement of the engine by the ringing of the engine bell. The court said:

> "If the bell was not rung, as the jury might have found, then it cannot be said as a matter of law that in backing the engine over the manhole without first using reasonable care to ascertain whether anyone was in it and likely to be endangered thereby, and without giving warning of such movement, the engineer and fireman were, each of them, free from negligence" (page 76, ll. 10-22).

We submit that this overlooks the fact that there was no proof of any custom to give warning by the ringing of the bell when the engine was about to be started under circumstances like those in the present case. The trial judge charged that there was no law that required such a warning in a railroad yard (page 63, ll. 10-15). The verdict, therefore, cannot be sustained on the theory that it was negligence to move the engine without giving warning by ringing the bell, as the case was not submitted to the jury on that theory. A verdict can be sustained only on the theory upon which it is submitted to the jury under the charge of the trial judge.

Cook Admr. v. American Gunpowder Co., 70 N. J. L. 65;
Bowlby v. Philipsbury, 83 N. J. L. 377.

The second theory also appears in the above

quotation from the Supreme Court opinion. It suggests that there may have been negligence on the part of the defendant's servants in backing the engine "without first using reasonable care to ascertain" whether anyone was in the manhole. In discussing what was done by the engineer, the court says:

> "The engineer testified that before directing the engine to be moved he looked towards the rear to see if everything was clear, and saw no one in the way, but that he made no special observation of the manhole" (page 76, ll. 1-10).

We submit that the conclusion that the engineer may have been negligent in the respect indicated by this quotation cannot be sustained under the undisputed evidence. We again invite attention to the testimony of the engineer, by reference to which will be seen that before the engineer directed the fireman (who was in charge of the engine for the time being) to move the engine, he, the engineer, looked towards the rear and saw nobody anywhere around the manhole. The manhole was on the said side of the engine where the engineer was standing. He swears positively that when he called to the fireman there was nobody in sight around the manhole (page 51, l. 30 to page 52 l. 15). Possibly the conclusion of the Supreme Court that the engineer made "no special observation" may have been based upon the testimony of the engineer where he said:

> "Q. Could you see the manhole? A. No, well you could see it if you made it your business to look right at it—it is just back of the tanks" (page 52 l. 10).

We submit that it makes little or no difference whether the engineer could or did actually see the manhole itself; the opening thereof was on a level with the ground and it is quite possible that

one could not see the hole unless very close to it or while looking directly at it, but the important question is not whether the engineer saw the manhole, but rather whether he should have seen it in the exercise of reasonable care. The engineer says that at the time the engine moved there was nobody in sight. What more could he be expected to do in the exercise of reasonable care than exactly what he did do in the present case? Was he under obligation to stand directly over the manhole and look into it to make sure that nobody was crawling out before the engine was moved? There is no evidence that the engineer or the fireman knew or had any reason to expect that a man would be coming out of the hole just at the moment when the engine was about to be moved. A few seconds before the accident the engine had passed over the manhole and no one was then in sight; it moved a little too far; that was the occasion of its backing (page 55, ll. 20-40); and at that time there was still no one in sight.

The third theory of the Supreme Court is expressed in the following quotation from the opinion:

> "Moreover, there was evidence to show that the decedent came out of the manhole of the ashpit in response to a signal given to him by a fellow employee who operated the gas engine which furnished the motive power to hoist the loaded buckets out of the ashpit; and it was for the jury to decide whether it was negligence to give such a signal without first ascertaining whether or not the engine was about to be moved."

There are several answers to this view. In the first place, the suggestion that there may have been negligence on the part of the operator of the gas engine in giving a signal to the plaintiff's intestate to come out of the pit appears for the

first time in the opinion of the Supreme Court. No such claim was made in the complaint; the charge therein is that the defendant did not maintain and operate a proper system of signals and warnings and did not warn the plaintiff's intestate of the probable dangers of his employment and did not give him reasonable warning before the probable dangers became actual dangers. The "signals and warnings" referred to in the complaint obviously refer to the movements of the locomotive; the case was tried upon that theory and the testimony of both sides was directed to that point. It is true that the charge of the trial judge was somewhat general in form; he did not point out the specific acts of negligence upon which the jury might find their verdict, but simply said that the verdict might be based upon the failure to use "reasonable care" (page 63 l. 20). But there is no suggestion in the charge that there was any failure on the part of the operator of the gas engine to use reasonable care in giving the signal to the plaintiff's intestate.

The further answer to this new theory is that the operator of the gas engine had no information when he gave the signal to the intestate to come out of the pit that the engine was about to be moved just at the moment when the intestate was about to come out of the pit. It does not even appear that when this signal was given the gas operator knew that the locomotive was on the ashpit track. After giving the signal to the intestate he walked to the shanty where the gas engine was located, a distance of about sixty feet (page 28, ll. 20-30), and was in the shanty for about ten minutes before he knew of the accident (page 29, l. 20; page 31, l. 25). The witness did not even know whether the decedent started to come out of the pit immediately on receiving the signal. He says "I did not see him because I went to the shanty and left him there" (page 31, ll. 1-10).

Even if the operator of the gas engine had seen

the locomotive on the ashpit there was nothing in that fact which would suggest to him that the locomotive was about to be backed up three or four feet due to the fact that it had gone a little too far. If he had seen the locomotive at all he would naturally have supposed that it would stay where it was, and there was therefore nothing to show any negligence on his part in signalling the decedent to come out of the manhole at that particular time. When the engine was backed this man was in the shanty some distance from the manhole; there is nothing to suggest that he knew that it would be necessary to back the engine, and even if there was it was no part of his duty to inform the decedent of the fact that the engine was about to be backed. He had warned the decedent about the danger of the work and had a right to assume that the warning would be heeded (page 46, ll. 10-35).

The further answer to all of the several theories upon which the judgment was sustained by the Supreme Court is that the fellow employes of the decedent had the right to suppose that other employes who worked in the yard would themselves exercise reasonable care against the dangers due to the constant movement of cars and engines. See *Aerkfetz v. Humphreys, Receiver,* 145 U. S. 418, 36 L. Ed. 758. This case is cited with approval in the decision of the Supreme Court in *Willever v. Delaware etc. R. Co.,* 94 Atl. 595, wherein it was held in an action under the Federal statute that there was no proof of negligence sufficient to go to the jury when it appeared that the accident happened in a railroad yard where cars and engines were constantly moving back and forth and the train by which the employe was struck was moving very slowly; that it was part of the duty of the employe to protect himself and also the men under him from danger arising out of such movements, and that he was so instructed.

IV.

The risk of injury from the movement of the engine was assumed by the plaintiff's interstate.

Under the Federal statute the defense of assumption of risk remains as at common law. This has been so held by the U. S. Supreme Court in *Seaboard Air Line Company v. Horton,* 233 U. S. 492, and *Southern Railroad Co. v. Crockett,* 234 U. S. 725.

The following are a few of many cases that might be cited arising under the Federal Act wherein the question of assumption of risk was considered.

Glenn v. Cincinnati etc. R. Co., 163 S. W. 461;
Helm v. Cincinnati etc. R. Co., 160 S. W. 945;
Truesdell v. Chesapeake etc. R. Co., 169 S. W. 471;
Fort Worth etc. R. Co., v. Copeland, 164 S. W. 857 (Tex.);
Central Vermont R. Co. v. Bethune, 206 Fed. 868;
Farley v. N. Y. etc. R. Co., 91 Atl. 650;
Kansas City R. Co. v. Livesay, 177 S. W. 875;
Kirbo v. Southern R. Co., 84 S. E. 491;
Schweig v. Chicago etc. R. Co., 216 Fed. 750.

The Copeland case, supra, is much like the one now under consideration. In that case it was held that a switchman assumed the risk of injuries resulting from the customary method of moving cars although no warning of the movement was given; it appearing without dispute that it was not the custom to give such warning.

The evidence is undisputed that the decedent was familiar with the conditions at the ash pit. He was hired to work at that point in January, 1911, and worked there until July of that year. During all of that time he worked at night on the same pit as a fire cleaner (page 47 ll. 20-40). He did not at that time do work *in* the pit, but of course he had ample opportunity to become familiar with the movements of the engines in and around the pit. He had again been hired on January 6, next before the accident and worked at night up to the time he was killed. He was warned by the foreman to look out when he came up (page 48, ll. 1-20). The operator of the gas engine at the time the decedent went to work warned him to "watch yourself" (p. 46, ll. 10-30).

An examination of the blue print shows that the ash pit where this accident happened was so constructed that it extended under two railroad tracks. The manhole near which the body of the decedent was found was located on the north side of the southerly of these two tracks. The ladder leading up the manhole was on the westerly side of the manhole. Hence a person climbing up the ladder would naturally face in a westerly direction. This was the same direction from which the engine was coming when it backed at the time of the accident. There were two electric lights on the southerly side of the ash pit—the manhole being about equi-distant from each of them. There were also lights in the gas house. This engine, as it moved toward the manhole, was only a few feet distant from these lights, and must have been in plain sight of decedent.

Plaintiff's intestate had every opportunity to know that engines were frequently moving back and forth on the tracks over the pit; he had been expressly warned to look out when coming up

out of the manhole. His experience, even without the warning, was such that he must have known and appreciated the danger of being struck by a moving engine while in the act of climbing out of the manhole.

The general rule as to assumption of risk has been stated in many cases in this State. A succinct statement of the principle is found in *Durand v. New York, etc., R. Co.*, 65 N. J. Law, 656, where Judge Vredenburgh, speaking for the Court of Errors and Appeals, said (italics by the court):

> "It must be conceded to be the law in this state that either knowledge by an employe of dangers attending the prosecution of his work, or his failure to exercise ordinary or reasonable care to obtain knowledge, will prevent recovery in his behalf of damages resulting to him therefrom. * * * An employe assumes *all* the risks of his employment against which he may protect himself by *ordinary observation and care.*"

Applying this rule to the facts of the present case, we submit that plaintiff's intestate assumed the risk of being struck by an engine moving in plain sight over the manhole from which he was emerging at the time of the accident.

V.

There was material error in the charge with respect to the law of assumption of risk.

Under the last preceding point we have urged that the trial judge should have ruled as a matter of law that the plaintiff's intestate assumed the risk of an injury which was either in fact known or with the exercise of ordinary care on his part should have been known. If, however, that question was one of fact for the jury, we

nevertheless submit that there was error in the charge where the trial judge laid down the principle of law applicable to such defence. On this subject there was a general charge to the effect that an employe may have assumed a risk from one of two contributing causes, etc. (p. 64, l. 10). Later the trial judge, referring to a request submitted on behalf of the defendant, charged as follows:

> "The second request is: 'If the jury find that the plaintiff's intestate either in fact knew or by the exercise of reasonable care on his part should have known that the engine by which he was struck was approaching, then he assumed the risk and there must be a verdict for the defendant. I decline to charge in that language, but in place of it I charge as follows: that if you find from the evidence that the deceased party knew or reasonably should have known the risks surrounding his employment and work and that it was in disregard of that knowledge on his part which he had or should have had that the accident happened, you may find that he assumed the risk that brought about his death, and in that event you may find for the defendant" (p. 67, ll. 1-18).

The error in this charge, we submit, is that it failed to tell the jury that *it was their duty to* give a verdict for the defendant in the event that the facts were found as stated in the charge. The trial judge said that in a certain event "you *may* find for the defendant;" the request was that in a certain event there *must* be a verdict for the defendant. We submit that the request was clearly correct and that the trial judge was in error in leaving it to the option of the jury as to whether or not there should be a verdict for the defendant in the event that certain facts were found, as stated; if the facts were found as stated then it follows under well-settled principles of law relating to assumption of risk that

there *must* be a verdict for defendant. This error was material, as it gave to the jury the option of finding a verdict *against* the defendant notwithstanding that they might have found the facts stated in the charge, to wit, that the decedent knew or reasonably should have known the risks surrounding his employment and work and that it was in disregard of that knowledge on his part which he had or should have had, that the accident happened.

VI.

There was error in the charge with respect to the question of contributory negligence.

Section 3 of the Federal statute provides that "in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe 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 employe."

The trial judge in charging the jury quoted the statute and then said:

> "If you find that plaintiff's intestate was guilty of contributory negligence, then, if you have to find the amount of damages to which decedent's father is entitled, you are to abate or deduct from that sum the amount you shall find represented decedent's proportionate contributory negligence, and your verdict will be for the difference" (p. 66, ll. 15-25).

Exception was taken to this part of the charge (p. 69, ll. 1-10).

Defendant submitted to the trial court the following request to charge on this point:

> "7. If the jury find that the accident was due to contributory negligence on the part of the plaintiff's intestate, the damages, if any, that may be found against the defendant, must be diminished in proportion to the amount of the negligence of plaintiff's intestate as compared with the combined negligence of plaintiff's intestate and that of the defendant" (p. 70, ll. 15-20).

This request was refused except as already charged (p. 67, l. 30) and objection was made to such ruling (p. 68, l. 20).

The request was based upon the decision of the U. S. Supreme Court in *Norfolk and Western R. Co. v. Earnest,* 229 U. S., 114; 572 L. Ed., 1096, where the court said:

> "The statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employe' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportionable amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employe."

In *Grand Trunk Co. v. Lindsey,* 233 U. S. 42 at p. 49, the Court said (italics ours):

> "Coming to consider the proposition that although the case be governed by the Employers' Liability Act error was nevertheless committed in sustaining the action of the trial court in refusing to give the requested

instruction, we think that even if for the sake of the argument it be assumed that the proof brought the case within the principle of comparative negligence established by the Employers' Liability Act, the correctness of the ruling of the Court below is clearly made manifest by the reasoning given by the court for its conclusion. But having regard to the state of the proof as to the defect in the coupling mechanism, its failure to automatically work by impact after several efforts to bring about that result, all of which preceded the act of the switchman in going between the cars, in the view most favorable to the railroad, the case was one of concurring negligence, that it, was one where the injury complained of was caused both by the failure of the railway company to comply with the Safety Appliance Act and by the contributing negligence of the switchman in going between the cars. Under this condition of things it is manifest that the charge of the court was greatly more favorable to the defendant company than was authorized by the statute for the following reasons: Although by the third section of the Employers' Liability Act a recovery is not prevented in a case of contributory negligence since *the statute substitutes for it a system of comparative negligence whereby the damages are to be diminished in the proportion which his negligence bears to the combined negligence of himself and the carrier, in other words, the carrier is to be exonerated from a proportional part of the damages corresponding to the amount of negligence attributable to the employee* (*Norfolk & Western Railway Co. v. Earnest,* 229 U. S. 114, 122), nevertheless under the terms of a proviso to the section contributory negligence on the part of the employee does not operate even to diminish the recovery where the injury has been occasioned in part by the failure of the carrier to comply with the exactions of an act of Congress enacted to promote the safety of employees."

This provision of the statute was further con-

sidered in the recent case of *Seaboard Air Line R. Co. v. Tilghmann,* 237 U. S. 499, where the court said (italics ours):

> "The Federal question which brings the case here is, whether proper effect was given to that part of the statute which deals with the measure of recovery where the employee contributed to his injuries by his own negligence.
>
> "At common law there could be no recovery in such a case, the contributory negligence being a complete bar or defense. But this statute rejects the common law rule and adopts another, deemed more reasonable, by declaring (§3), '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.' This is followed by a proviso to the effect that contributory negligence on the part of the employee shall not be considered for any purpose where the carrier's fault consisted in the violation of a statute—a Federal statute—enacted for the safety of employees (See *Seaboard Air Line Ry. Co. v. Horton,* 233 U. S. 492, 503); but this is not such a case, and so the principal provision is the one to be applied. It means, and can only mean, as this court has held, that *where the causal negligence is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employees' contribution to the total negligence. Norfolk & Western Ry. Co. v. Earnest,* 229 U. S. 114, 122; *Grand Trunk Western Ry. Co. v. Lindsay,* 233 U. S. 42, 49.
>
> "At the trial the court instructed the jury that, if they found the plaintiff was injured through the concurring negligence of the rail-

way company and himself, they should determine the full amount of damages sustained by him, 'and then deduct from that whatever amount you think would be proper for his contributory negligence.' This was reiterated in different ways and somewhat elaborated, but the fair meaning of all that was said *was that a reasonable allowance or deduction should be made for the plaintiff's negligence and that it rested with the jury to determine what was reasonable.* No reference was made to the rule of proportion specified in the statute or to the occasion *for contrasting the negligence of the employee with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery.* On the contrary, the matter of diminishing the damages was committed to the jury *without naming any standard to which their action should conform other than their own conception of what was reasonable.* In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made and the jury should have been advised of that rule and its controlling force."

The following cases illustrate the same point:

Penn. R. Co. v. Sheeley, 221 Fed. 901;
Nashville etc. R. Co. v. Banks, 161 S. W. 554;
Nashville etc. R. Co. v. Henry, 164 S. W. 310;
Cross v. Chicago etc. R. Co., 177 S. W., 1127.

Under the foregoing decisions it will be seen that is was the duty of the trial court to advise the jury of the rule prescribed by the statute for determining the amount of the diminution. In the present case the trial court not only charged the jury inaccurately on this question but refused

to charge an accurate request which was duly submitted.

We concede, as stated in the opinion of the Supreme Court, that the trial court need charge only the substance of a request which embodies correct legal principles (p. 78, ll. 30-40), but this assumes that the charge was itself correct and that therefore it was not error to refuse a request which embodied the same principle in a somewhat different form. The difficulty with this conclusion of the Supreme Court, we submit, is that the premise, namely, that the charge itself on this point was correct, is erroneous. Let us leave out of consideration the request to charge, and examine for the moment that part of the charge itself which dealt with the subject of contributory negligence. What the trial judge said was that if the jury found that the plaintiff's intestate was guilty of contributory negligence, then if they should have to find the amount of damages to which the decedent's father was entitled, they should abate or deduct from that sum the "amount" which "represented" the decedent's "proportionate" contributory negligence, and that the verdict would be for the difference. This is the same error, we submit, as was pointed out in the *Tilghman* case, *supra,* in that it left to the jury to determine what deduction should be made for the negligence of the decedent, without naming any *standard* to which their action should conform, and without referring to the contrast between the negligence of the employe as compared with the "total causal negligence" as a means of ascertaining what proportion of the full damages should be excluded from the recovery.

VII.

The amount of damages should have been limited to the expenses of last sickness and burial not exceeding two hundred dollars as provided by Paragraph twelve of Chapter 95, Laws of 1911.

Under Section II. of Chapter 95, Laws of 1911, it is provided in paragraph 9 that every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of Section II. of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of Section II. of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of Section II. of this act and have agreed to be bound thereby.

Paragraph 12 provides that in case of death compensation shall be computed on the following basis:

(1) Actual dependents. Then follows allowances made to children, widow, etc.

(2) "No dependents. Expenses of last sickness and burial not exceeding $200." * * * "Compensation under this schedule will not apply to alien dependents, not residents of the United States."

This accident happened at Jersey City, New Jersey, on January 11, 1912. Under the statute it is, therefore, presumed that the parties have accepted the provisions of Section II. and have agreed to be bound thereby.

In the present case the only dependent was the

father of the decedent. He was a resident of Russian Poland (p. 34, ll. 20-30; p. 35, ll. 20-30).

In such case *compensation* would not be paid to the father as a dependent, but sub-division (2) would apply. It follows that if it were not for the provisions of the Federal statute of 1908 there would be no doubt about the conclusion that the amount to be paid by the defendant would be the expenses of last sickness and burial not exceeding $200. The point that the New Jersey statute of 1911 applied to the case and limited the amount of the recovery was raised by paragraph two of the answer (p. 13, ll. 10-30); again as part of the motion to direct a verdict for the defendant (p. 60, l. 18), and again by a request to charge (p. 69, ll. 30-40)—which was refused (p. 67, l. 18; p. 68, l. 15).

Of course, if we are right in the argument made under Point I. that the Federal statute does not apply at all, that is the end of the present case and whatever rights the next of kin or dependents of the decedent may have must be determined by the New Jersey compensation statute; but our present point is that even if the Federal statute does apply, nevertheless the amount of recovery must be limited in accordance with the agreement of the parties, which they are presumed to have made by virtue of the provisions of the New Jersey statute.

There is nothing in the Federal statute which prevents such conclusion. Section 5 provides, "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." When a State statute comes in conflict with a Federal statute the former must give way—but this rule applies if, and only if, the two statutes are in conflict, and only in so far as they are in conflict. The New Jersey statute does

not *exempt* an employer from liability, but on the contrary it imposes liability in cases coming within it; so far as the amount of recovery is concerned, it merely *limits* the liability. The case is, therefore, analogous to that of a contract limiting the liability of common carrers. It is well settled that such contracts are valid and will be enforced. See:

Hart v. Pennsylvania R. R., 112 U. S., 331;
Elliott on Railroads, Sec. 1510, et seq.

The contract between the plaintiff's intestate and the defendant whereby, under the provisions of the New Jersey statute of 1911, the damages were fixed at a certain amount according as there might or might not be "dependents," is not in conflict with the Federal statute, but on the contrary merely liquidates or fixes the amount of damages to be paid. Such contract is not in violation of Section 5 of the Federal statute. The amount of the verdict in this case, therefore (even if the Federal statute applies), should have been limited, as requested by the defendant, to the expenses of last sickness and burial not exceeding the sum of $200.

The Supreme Court in dealing with this point said:

"It has been held by the United States Supreme Court that the Federal Employers' Liability Act of 1908 supersedes all State laws upon the subject of the liability of carriers by railroad engaged in interstate transportation, to their workmen injured while employed in such commerce. Second Employers' Liability Cases, 223 U. S., 1, 32 Sup. Ct., 169, 56 L. Ed., 327, 38 L. R. A. (N. S.), 44; *Seaboard Air Line Ry. v. Horton,* 233 U. S., 492, 34 Sup. Ct., 635, 58 L. Ed., 1062, L. R. A., 1915C, 1, Ann. Cas. 1915B, 475. The necessary corollary of this judicial declaration is that no State, by subsequent legislation, can

impair or curtail in any degree the rights conferred upon the employe, or his personal representative, or the liabilities imposed upon the carrier, by that statute."

So far as the foregoing conclusion is based on the theory that the Federal statute has superseded all State laws, we submit that it is modified, if indeed it is not in effect overruled by the decision of this court in the case of *Winfield v. Erie Railroad Company* (opinion filed January 6, 1916, and not yet reported), wherein it was held that the Federal statute did not prevent the representatives of a deceased employe from recovering compensation under the State law when there was no proof that the accident causing his death was the result of negligence. A similar ruling was made by the New York Court of Appeals in the case of *Winfield v. New York Central R. R.,* 110 N. E., 614. It is true that both of these cases were in the form of proceedings instituted by the representatives of the employes to recover compensation under a State compensation act; but if the principle upon which these cases were decided is correct, namely, that the Federal Act is exclusive of proceedings under the State law so far and only so far as the respective statutes are necessarily inconsistent with each other, then we submit it follows that Section 5 of the Federal statute does not operate to prevent an employer and an employe from making the contract of hiring specified in paragraph 9 of the New Jersey Act, by virtue of which a carrier is not *exempted* from liability but merely has its liability limited to a certain amount as fixed by the schedules in the statute; especially is this so, we submit, in view of the provisions of paragraph 8 of the New Jersey statute that such agreement (that is, the agreement implied by Section II.) "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as

provided in Section II." In the present case there is no doubt that the agreement specified by Section II. of the New Jersey statute was made. That being so, why should the courts not give effect to the express provisions of paragraph 8? We submit that the only ground on which that paragraph can be regarded as inapplicable is that the agreement limiting the compensation according to the schedules of the statute is necessarily in conflict with Section 5 of the Federal statute.

The opinion of the Supreme Court suggests as another reason for overruling the present point that no State can impair or curtail the rights conferred upon the employe or the liabilities imposed upon the carrier by the Federal statute. Whether this can be done, we submit, depends in the first place upon whether the legislation of the State is necessarily inconsistent with the Federal statute, and in the second place, upon whether the parties themselves (both being of full age and sound mind) can make a contract whereby their respective rights and liabilities are altered.

We submit that both the employer and the employe have the right to enter into the contract implied by the New Jersey statute (even in interstate service), and as a part of such contract have the power to agree to surrender their rights to any other method, form or amount of compensation other than as provided by the New Jersey statute, *unless* Section 5 of the Federal Act operates as a bar to such an agreement. But under the reasoning of this court in the *Winfield* case, *supra,* such an agreement does not operate as a violation of Section 5 of the Federal statute.

We therefore submit that if the decision of this court in the *Winfield* case is correct, then the decision of the Supreme Court in the present case is erroneous.

VIII.

For one or all of the foregoing reasons the judgment should be reversed and a new trial ordered.

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NEW JERSEY

Court of Errors and Appeals.

CONSTANTINE GRYBOWSKI, ADMINISTRATOR OF JOSEPH GRYBOWSKI, DECEASED, *Plaintiff-Respondent,* *vs.* ERIE RAILROAD COMPANY, *Defendant-Appellant.*	*On Appeal from New Jersey Supreme Court.*

Brief on Behalf of Respondent.

The Supreme Court, 95 Atlantic, 764, affirmed the judgment of the Hudson Circuit Court and this appeal is from such judgment of affirmance.

The appeal presents to the Court the question as to whether the defendant was engaged in interstate commerce, at the time of the accident to the plaintiff's intestate, and also the question as to whether the plaintiff's intestate was engaged in such commerce at that time.

STATEMENT OF FACTS.

I.

It appears by defendant's answers to plaintiff's interrogatories that the defendant maintained at its Pavonia avenue yard in Jersey City, an ash-pit, constructed between and underneath certain of its railroad tracks, and that incoming locomotives were moved upon the tracks to a point immediately

over the ash-pit, and that the ashes which had accumulated in the engines during their trips were dumped into this ash-pit, and thereafter removed for the purpose of making the pit available for the dumping of ashes from other engines coming into the yard (p. 17, record).

II.

It also appears by the defendant's answers to plaintiff's interrogatories, that engine No. 974 had just come into the Pavonia avenue yard from Suffern, in the State of New York, and after dumping its ashes, the engine was going to the coal pockets, and then to the round house to be prepared for *another trip* (p. 18, record).

III.

It further appears by the evidence of Frank Gott, an employee of the defendant, that the bell of the engine was rung at the time *when it was nearing the pit, but when it backed down, it did not ring* (fol. 40, p. 23, case). And it appears from the evidence of Frank Savage, another employee of the defendant, that after the engine had reached a place immediately over the pit, that he gave a signal to plaintiff's intestate to come out of the pit and that he heard no bell rung or whistle blown after that time (fol. 10, p. 30, case). It further appears from the evidence of George Sheddlar, engineer in charge of the engine which caused the injury to plaintiff's intestate that he was on the ground alongside of the engine, and that a fireman (Jeremiah McCarthy) was in charge of the engine (fol. 10, p. 50, case), and that the fireman moved the engine down *too far* so as to bring it immediately over the ash-pit and that the engineer Sheddlar hollered up to the fireman to move the engine back a little, two or

three feet (fol. 1, p. 51, case), and that at the time Scheddlar directed the fireman to move the engine back he saw no one coming out of the manhole, and that he could not help but see anybody if there was anybody near it (fol. 30, p. 51, case). It further appears (fol. 10, p. 52, case), just at the time the engine moved back three or four feet, the plaintiff's intestate was injured (fol. 30, p. 52, case), and at the time the engineer directed the fireman to move the engine back three or four feet the plaintiff's intestate had not been hurt (fol. 20, p. 53, case); and when the engine was moved back this three or four feet, no signal was given (fol. 30, p. 52, case), and although Sheddlar, the engineer, attempted thereafter to qualify his statement that no signal was given, he wholly failed to do so (fol. 10, p. 55, case). His testimony that no signal was given corroborates that Frank Gott (fol. 40, p. 23, case) heretofore referred to in which Gott says, that the bell was rung when the engine was nearing the pit, but when it backed from the pit, it did not ring, and while it is true that McCarthy, the fireman, testifies that when he backed up the engine, he did not ring the bell, this did no more than create a conflict in the testimony upon the question of negligence of the defendant and upon which issue the jury were justified in finding the railroad company was negligent, and furthermore, the testimony of McCarthy (fol. 20, p. 57, case) supports the presumption that the bell was not ringing as he says it was for that reason, before backing up the engine, he shouted to some men on the track that he was going to back up, which would have been absolutely unnecessary for him to do, if the bell was ringing (fol. 20, p. 57).

IV.

It further appears that plaintiff's intestate before coming out of the ash-pit was given a signal to

come out by a co-employee upon the outside (p. 30 & 31, record), an the authority of this co-employee to signal the plaintiff's intestate to come out of the pit is not questioned by the defendant.

V.

The defendant's engine was engaged in interstate commerce at the time of the accident, and that the plaintiff's intestate was also engaged in such commerce.

In Darr v. Baltimore, etc., R. Co., 197 Fed., 665, an engine used in hauling interstate trains had reached the end of its lines and was on a fire track to await the train for starting on the return trip. Plaintiff was a repair man and was sent to replace a bolt which had been lost from the brake-shoe. Held, the statute applied. In this case the Court put its decision on the ground that the engine at the time of the accident was "habitually used in interstate commerce."

Another recent decision of the U. S. Supreme Court is St. Louis, etc., R. Co. vs. Seale, 229 U. S., 156; 57 L. Ed., 1129, in which the Federal Statute was held to apply to the case of an accident to a yard clerk who was killed while proceeding through the yard to meet an interstate incoming freight train for the purpose of taking down the numbers of the cars, inspecting the seals and checking them with the conductor's list, although it appeared that the yard was the terminal for the particular train and none of the cars were going to any point beyond that point.

Also the case of *Eng. v. Southern Pacific Co.*, 210 Fed., 92, throws important light on the act construed by the Federal Courts. Here an employee sought to recover a damage for injuries received by

him while engaged in framing up a new office in a freight shed belonging to the defendant, and in sawing boards and nailing them in place on the walls The Court said (p. 93):

> "The principle seems to be that one employed at the time of his injury in the use of or maintaining in proper condition any instrumentality or appliance used by the carrier in interstate commerce comes within the statute, although such instrumentality or appliance may also be used for intrastate business. Now, freight sheds, depots and warehouses or other facilities provided and used by a carrier for receiving, handling and discharging interstate freight are, I take it, instrumentalities used in interstate commerce under the doctrine of the cases, and are so closely connected therewith as to be a part thereof for the purposes of the Federal Employers' Liability Act."

In Zikos vs. Oregon Nav. Co., 179 Fed., 893 (Circuit Court, Washington,) the Court held:

"A section hand working on repairs of a track over which both interstate and intrastate traffic was carried was injured by a defective implement. The Court said: "Since the track in the nature of things must be maintained for commerce between the States the work bestowed upon it inures to the benefit of such commerce. It is, therefore, subject to Federal control even though it may contribute to carriage wholly within the State."

In Johnson vs. Great Northern Ry., 178 Fed., 643 Circuit Ct. of Appeals, 8th Circuit).

Plaintiff, when injured, was engaged in connecting up the air hose upon a train of empty cars standing on a switch and destined for a point without the State. Plaintiff was not employed in the movement of trains but only as a yard man. The Court held that the defendant was engaged in interstate commerce in moving one of the cars which caused the injury, and that, therefore, the plaintiff was likewise engaged in such commerce.

In Colasurdo vs. Cent. R. R. of N. J., 180 Fed., 832; affirmed 192 Fed., 901 (C. C. of Appeals and Circuit).

Plaintiff was a trackwalker and engaged in repairing a switch in the railroad yard. The switch connected tracks used both in local and interstate traffic. An intrastate train injured the plaintiff while so at work. Held, that the repair of the switch involved the proposition that both the railroad and its employee were engaged in interstate commerce.

In Lampbere vs. Oregon Ry., 196 Fed., 363 (C. C. A., 9th Circuit), the Court held:

A locomotive fireman was ordered to report for duty on an interstate train. While passing through the defendant's yard, on the way to his destination, he was struck and killed by cars of the defendant other than those to which he was assigned. The Court reversed the judgment below, and held that that case fell within the statute. In support of its decision the Court cited the Zikos case and the Colasurdo case, supra, and criticised the decision in the case at bar as counter to those cases, and to the decision of this Court in the Second Employers' Liability cases, 223 U. S., 1.

"Where an employee of an Interstate Railroad Company when working in a repair shop engaged

in repairing a car used by the defendant, indiscriminately in both interstate and intrastate commerce as occasion required was employed by the defendant in interstate commerce within the meaning of the Employees' Liability Act, and the defendant was at that time engaged in interstate commerce.

"It appeared from the evidence that the place where the repairing was done was on the main line of the defendant company, between Tacoma, Wash., and Portland, Or., and was connected with it by switches over which the cars needing repairs were run, and over which, after repairing, they were again put into the service of the company for use interstate and intrastate commerce as occasion required; and the parties are agreed that this particular car upon which the deceased was at work when injured had been for a long time indiscriminately used in interstate and intrastate commerce, and was to be again so used when repaired. That a car so used is one of the instruments of interstate commerce does not admit of doubt. Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S., 452, 474, 30 Sup. Ct., 155; L. Ed., 280. And in S. R. Co. v. U. S., 222, U. S. 20, 26, 27, 32; Sup. Ct. 2, 56 L. Ed., 72, in holding that the Safety Appliance Act of March 2, 1893 (27 Stat., 531, c. 196, U. S. Comp. St. 1901, p. 3174, as amended Mar. 2, 1903 (32 Stat., 943, c. 976, U. S. Comp. St. Supp. 1911, p. 1314), embraces all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce."

N. P. Ry. Co. vs. Maerkl, U. S. Circuit Court of Appeals, 9th Circuit, Aug. 5th, 1912, 198 Fed. Rep.

"Employees of a railroad company engaged in hauling freight from some intermediate point on its line to another point where it is taken up by regular trains for interstate shipment are 'employed in interstate commerce.'"

U. S. vs. C. M. & P. S. Ry. Co., 197 Fed. Rep., 4.

"Another ground on which the decision of the Circuit Court of Appeals was rested remains to be noticed. That Court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it come along that evening."

"The presumption is that it was stocked for the return; and as it was not a new car, or a car just from the repair shop, on its way to its field of labor, it was not an 'empty,' as that term is sometimes used. Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras, in Voelker v. Chicago, N. & St. P. R. Co., 116 Fed., 867, that 'it cannot be true that on the eastern trip the provisions of the Act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'"

196 U. S., 1-21, p. 371.

"It frequently happens that the railway companies load cars with live stock or farm produce in the Western States, and carry the same to the eastern markets, and then return these cars without a load; but it cannot be true that on the eastern trip the provisions of the Act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip because the cars are empty."

Voelker v. C. N. & St. Ry. Co., 116 Fed. Rep., 874.

"A foreign freight car, moved by one railroad company from one State to another, loaded, and there delivered to defendant company, and by defendant to the consignee, and after being unloaded placed by defendant on a switch track, from which it was afterwards redelivered to the original company, again loaded by it, and returned into the State whence it came, was, when on defendant's switch track awaiting redelivery, a car in use in instate commerce." * * * * * *

"An employee of a railroad company, charged with the duty of seeing to the coupling of the cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company, some of which cars were being used in interstate commerce, was being employed in interstate commerce, and was within the provisions of the employer's liability act. * * * The tracks upon which this work was done were not repair tracks, but were switching tracks, track 23 being a track upon which the cars were switched which were to be delivered to the Soo Railroad Company. The first work that plaintiff did on the day of the accident was to couple up the air in a string of about 40 cars standing upon said track 23. * * * The

cars came together by reason of other cars being kicked in on that track which he was endeavoring to work the pin out. In his petition he based his right to recover upon the grounds, first, that the car in question was used in interstate commerce, and was moved by defendant as an interstate commerce car." * * * * * * * * *

J. C. Ry. Co. v. King, 169 Fed., 372; 94 C. C. A., 652.

"The car had been unloaded and placed upon track 23 for the purpose of being redelivered to the Soo Railroad. It was delivered to that railroad, and afterwards loaded with shingles into Minnesota, and taken by the Soo road thus loaded in Wisconsin on its return home. That it was at the time a car in use in interstate commerce is clearly sustained by the decisions of the Supreme Court in Johnson v. Southern Pacific Co., 196 U. S., 1, 25; Sup. Ct. 158, 49 L. Ed., 363, in which case it said:

"Whether cars are empty or loaded, the danger to employee is practically the same, and we agree with the observation of District Judge Shiras, in Voelker v. Ry. Co. (C. C.), 116 Fed., 867, that 'it cannot be true that on the eastern trip the provisions of the Act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty.'"

"The case of the car in question, at the time of the injury, was a use in interstate commerce within the rule thus announced. It had been brought loaded from the State of Wisconsin to the State of Minnesota, and though empty at the time of the injury, was being moved by the defendant on its return from whence it came. That the switching movement made at the time of the

injury was a movement within the purview of the the Act of Congress is clearly established by the case of Voelker v. Chicago, M. & St. P. Ry. Co. (C. C.), 116 Fed., 867, and same." * * *

"The facts of this case are quite similar, also, to those of the case of Chicago Junction R. Co. v. King, supra. In that case King was in the employ of defendant as a switchman in its yards, and, while repairing a coupler, was injured by the cars coming together. It was contended that the movement of the car was not such as was covered by the act; also that plaintiff, in doing the work of repairing a coupler, was not within the protection of the act, the coupler provisions being designed only for those who are engaged in the work of coupling and uncoupling cars."

"Again, we think the facts bring the case within the provisions of Act. Cong., April 22, 1908, c. 159, 35 Stat. 65 (U. S. Comp. St. Supp., p. 1172), known as the 'Employers' Liability Act,' as the defendant, in moving the car in question, was engaged in interstate commerce; plaintiff was employed by such carrier in said commerce." * * *

"It is argued that the 'Employers' Liability Act' can have no application to the case, as plaintiff was not an employee engaged in interstate commerce. A part of his employment was to see to the coupling of the cars and the air hose upon the cars which were placed upon the transfer tracks. Some of those cars, among them the one in question, were engaged in interstate commerce. It is difficult to see why he was not an employee engaged in the movement of interstate commerce to as full an extent as a switchman engaged in the making up of trains in the railroad yards, as in the case of Chicago Junction R. Co. v. King, supra." * * * * * *

San Pedro, L. A. & S. L. R. Co. v. Davide.

Circuit Court of Appeals, Ninth Circuit. Feby. 2, 1914. 210 Fed. Rep., 870, the Court held:

"In an action by a railroad section hand for injuries sustained while he and other employees were returning to their camp on a number of hand cars, where there was evidence tending to show that the employees upon the car immediately preceding plaintiff's car negligently slackened their speed without warning, thus causing a collision between such car, plaintiff's car, and the car following plaintiff's car, defendant's negligence was properly submitted to the jury."

"A railroad section hand engaged in ballasting the main track of a railroad which carried freight and passengers between different States, was engaged in interstate commerce within the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat., 65, as amended April 5, 1910, c. 143, p. 1, 36 Stat."

"A railroad section hand who had been engaged in interstate commerce during the day, was still so engaged while riding on a hand car furnished by the railroad company at the conclusion of his day's labor, by direction of his foreman, for the purpose, not only of returning from his place of work to the camp maintained by the company, but also for the purpose of taking the hand car to a point where it was to be removed from the track, so as to leave the road open for the passage of trains."

"Railroad employees while being carried as part of their daily service to and from their place or work, are fellow servants, even if there is no agreement that they shall be so carried, if such be the implied agreement or regular custom of the rialroad company, assented to by the employees."

"If, as held in the Pedersen case, a railroad employee is engaged in interstate commerce when he is merely carrying material for repair to a place where a bridge used in interstate commerce is being repaired, or, as held in Lamphere v. Oregon R. & Nav. Co., 196 Fed., 336; 116 C. C. A., 156, an engineer is engaged in interstate commerce while proceeding on the right of way under orders to take charge of a train engaged in interstate commerce, no reason is perceived why a section hand, engaged in propelling a hand car furnished him by the railroad company to convey him to his camp, as the concluding part of his daily service of ballasting a track used in traffic between states is not, while so doing, engaged in interstate commerce."

We find no error. The judgment is affirmed.

Johnson vs. Southern Pacific Co., 196 U. S.; 1-21.

"Another ground on which the decision of the Circuit Court of Appeals was rested remains to be noticed. That Court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train, according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening."

The presumption is that it was stocked for the return; and as it was not a new car, or a car just from the repair shop, on its way to its field of labor

it was not "an empty," as that term is sometimes used. *Besides, whether cars are empty or loaded, the danger to employees is practically the same, and we agree with the observation of District Judge Shiras, in Voelker v. Chicago M. and St. P. R. Co., 116 Fed., 867, that "it cannot be true that on the eastern trip the provisions of the act of Congress would be binding upon the company, because the cars were loaded, but would not be binding upon the return trip, because the cars are empty."*

Counsel urges that the character of the dining car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such use, and Coe v. Errol, 116 U. S., 517; 29 L. Ed., 715, 6 Sup. Ct. Rep., 475, is cited as supporting that contention. In Coe v. Errol it was held that certain logs cut in New Hampshire, and hauled to a river in order that they might be transported to Maine, were subject to taxation in the former state before transportation had begun.

The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce which was stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable.

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law.

In Southern Railway Co., v. United States, 222 U. S., 20, the Court held:

1. Cars used in moving interstate traffic on a railway which is a highway of interstate commerce are comprehended by the provisions of the safety-appliance act of March 2, 1893 (27 at L. 531, Chap. 196, U. S. Comp. Stat., 1901, p. 3, 174), as amended by the act of March 2, 1903 (32 Stat, at L. 943, Chap. 976, U. S. Comp. Stat. Supp., 1909, p. 1 143), declaring, inter alia that its provisions and requirements shall "apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith."

2. Congress had the power, under the commerce clause of the Federal Constitution, to require, as it did in the safety appliance act of March 2, 1893, as amended by the act of March 2, 1903, that all locomotives, cars and similar vehicles used on any railway engaged in interstate commerce, shall be equipped with certain designated safety appliances, regardless of whether such vehicles are used in moving intrastate or interstate traffic.

Mr. Justice Devanter delivered the opinion of the Court.

This was a civil action to recover penalties for the violation in specified instance of the safety appliance acts of Congress, 27 Stat., at L. 532, Chap. 196, U. S. Comp. Stat., 1901, p. 3174, 32 Stat., at L. 943, Chap. 976, U. S. Comp. Stat., Supp., 1909, p. 1143. The government prevailed in the District Court and the defendant sued out this direct writ of error.

Briefly stated, the case is this: The defendant while operating a railroad which traffic was "a part of a through highway" over which traffic was continually being moved from one state to another,

hauled over a part of its railroad during the month of February, 1907, five cars, the couplers upon which were defective and inoperative. Two of the cars were used at the time in moving interstate traffic, and the other three in moving intrastate traffic; but it does not appear that the use of the three was in connection with any car or cars used in interstate commerce. The defendant particularly objected to the assessment of any penalty for the hauling of the three cars, and insisted, first, that such a hauling in intrastate commerce, although upon a railroad over which traffic was continually being moved from one state to another, was not within the prohibition of the safety appliance acts of Congress; and, second, that, if it was, those acts should be pronounced invalid, as being in excess of the power of Congress under the commerce clause of the Constitution. But the objection was overruled (164 Fed., 347), and error is assigned upon that ruling.

The original act of March 2, 1893 (27 Stat., at L. 531, Chap. 196, U. S. Comp. Stat., 1901, p. 3174), imposed upon every common carrier "engaged in interstate commerce by railroad" the duty of equipping all trains, locomotives and cars used on its line of railroad in moving the interstate traffic, with designated appliances calculated to promote the safety of that traffic and of the employees engaged in its movement; and the 2d section of that act made it unlawful for "any such common carrier" to haul or permit to be hauled or used on its line of railroad any car "used in moving interstate traffic," not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars. The Act of March 2, 1903 (32 Stat. at l. 943, Chap. 976, U. S. Comp. Stat., Supp., 1909, p. 1143), amended the earlier one and enlarged its scope by declaring,

inter alia, that its provisions and requirements should apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, "and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." Both acts contained some minor exceptions, but they gave no bearing here.

The real controversy is over the true significance of the words "on any railroad engaged" in the first clause of the amendatory provision. But for them the true test of the application of that clause to a locomotive, car, or similar vehicle would be, as it was under the original act, the use of the vehicle in moving interstate traffic. On the other hand, when they are given their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic. And so certain is this that we think there would be no more contention to the contrary provision of the third clause,—"and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith." In this there is a suggestion that what precedes does not cover the entire field; but at most it is only a suggestion and gives no warrant for disregarding the plain words, "on any railroad engaged" in the first clause. True, if they were rejected, the two clauses, in the instance of a train composed of many cars, some moving interstate traffic and others moving intrastate traffic, would, by their concurrent operation, bring the entire train within the statute. But it is not necessary to reject them to accomplish this result, for the first clause, with those words in it, does even more, that is to say, it embraces every train on a railroad

which is a highway of interstate commerce, without regard to the class of traffic which the cars are moving. The two clauses are in no wise antagonistic, but, at most, only redundant; and we perceive no reason for believing that Congress intended that less than full effect should be given to the more comprehensive one, but on the contrary, good reason for believing otherwise. As between the two opposing views, one rejecting the words "on any railroad engaged" in the first clause, and the other treating the third clause as redundant, the latter is to be preferred, first, because it is in accord with the manifest purpose, shown throughout the amendatory act, to enlarge the scope of the earlier one and to make it more effective, and, second, because the words which it would be necessary to reject to give effect to the other view were not originally in the amendatory act, but were inserted in it by way of amendment while it was in process of adoption (Cong. Rec., 57th Cong., 1st Sess., Vol. 35, Pt. 7, p. 7300; Id., 2d Sess., Vol. 36, Pt. 3, p. 2268), thus making it certain that without them the act would not express the will of Congress.

For these reasons, it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.

We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used

in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation of connection between the two same railroads, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate interstate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportion, no matter what may be the source of dangers which threaten it. That is to say, itis no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.

Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car, and when this is not the case, the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen,

and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement, and safety, but are interdependent; for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only of the train, but to others.

These practical considerations make it plain, as we think, that the questions before stated mast be answered in the affirmative.

Affirmed.

In North Carolina R. R. Co. vs. Zachary, 232 U. S., 248, the Court held:

The hauling of empty cars from one state to another is intestate commerce within the meaning of the Employers' Liability Act of April 22, 1908, giving a right of recovery against an interstate railway carrier for the death of an employe while engaged in interstate commerce.

Evidence that a fireman in the employ of an interstate railway carrier after inspecting, oiling, firing and preparing his engine for the intrastate haul of a train containing some cars that had come from another state was killed by a switching engine while he was attempting to cross the tracks intervening between the engine and his boarding house is at least sufficient to require the submission to the jury of the question of the carrier's liability under the Employers' Liability Act of April 22, 1908, giving a right of recovery against an interstate railway carrier for the death of an employe while engaged in interstate commerce.

Mr. Justice Pitney delivered the opinion of the Court:

"This action was brought in the Superior Court of Guilford County, North Carolina, to recover damages for the negligent killing of Burgess, a locomotive fireman in the employ of the Southern Railway Company, lessee of the defendant, which occurred at Selma, North Carolina, on April 29, 1909. Under the local law, as laid down in Logan v. North Carolina R. Co., 116 N. C., 940; 21 S. E., 959, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, in the absence of a statute expressly exempting it. The responsibility is held to extend to employes of the lessee, injured through the negligence of the latter.

The complaint set forth in substance that plaintiff's intestate, being in the employ of defendant's lessee, and engaged at the Selma switchyards in the discharge of his duties as fireman upon engine No. 862, about 8 o'clock, P. M., on the date mentioned, after inspecting, oiling, firing and preparing the engine for starting on a trip from Selma to Spencer, North Carolina, attempted to cross certain tracks that intervened between the engine and his boarding house, which was located a short distance away; that another engine, No. 716, was standing upon a side track in such position as to shut off intestate's view of the main track; that No. 716 had its blower on, and was making a noise so loud that intestate could not hear a third engine, No. 1551, the shifting engine used in the yards, which at this time was running backward at a reckless and dangerous rate of speed, and without headlight

and without an adequate and competent crew; and that as intestate stepped from the track in the rear of engine No. 716, and was about to step upon the main line in the attempt to cross it, he was struck and killed by the shifting engine. Defendant's answer, besides denying the allegations of negligence, set up as a special defense that at the time plaintiff's intestate was killed, he was engaged in interstate commerce as an employee upon a train of defendant's lessee which was moving from Selma, North Carolina, to Spencer, in the same State, and carrying cars loaded with freight from the State of Virginia to the State of North Carolina and other states; that the liability of the defendant to him or to the plaintiff as his representative was fixed and regulated by the Federal Employer's Liability Act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and that under that act the plaintiff was not entitled to recover.

Upon the trial, at the close of the plaintiff's evidence, which tended generally to support the averments of the complaint, defendant moved for a non-suit, and among other grounds assigned the following: that from the uncontradicted evidence it appeared that at the time of the occurrence in question, defendant, through its lessee, was a common carrier by railroad, engaged in interstate commerce, and plaintiff's intestate was at that time a person employed by such carrier in such commerce; that the Act of Congress, already referred to, exclusively regulated the liability of defendant to plaintiff's intestate, and that upon all the evidence plaintiff had failed to make out a case of liability under that act. The Court, in denying the motion, held that the action was brought under the statute of North Carolina, that the Federal Act had no application, and that the cause was triable under the

statutes of the State. To this ruling, defendant excepted. At the close of the case, defendant again undertook to invoke the protection of the Federal act by requested instructions to the jury, which was refused and exceptions allowed.

There was a verdict for plaintiff and judgment thereon, followed by an appeal to the Supreme Court of the State. That Court overruled the contention of the defendant that the Federal Employer's Liability Act of April 22, 1908, applied, and held that the action was properly tried under the State law. The result was an affirmance (156 N. C., 496, 72 S. E., 858), and the case comes here under section 709, Rev. Stat., U. S. Comp. Stat., 1901, p. 575, Judicial Code, Section 237, 36 Stat. at L. 1156, Chap. 231, U. S. Comp. Stat. Supp., 1911, p. 227.

In order to bring the case within the terms of the Federal Act (35 Stat., at L. 65, Chap. 149, U. S. Comp. Stat. Supp., 1911, p. 1322, printed in full in 223 U. S., p. 6, 56 L. ed., 329; 38 L. R. A., (M. S.) 44; 32 Sup. Ct Rep., 169, 1/ N. C. C. A., 875), defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's intestate must have been employed by said carrier in such commerce. If these facts appeared, the Federal Act governed, to the exclusion of the statutes of the State Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.), 223 U. S., 155, 56; L. ed., 327) 348; 38 L. R. A. (N. S.), 44, 32; Sup. Ct. Rep., 192; Gulf C. & S. F. R. Co. v. McGinnis, 228 U. S., 173; 57 L. ed., 785; 33 Sup. Ct. Rep., 426. The State Law (Revised 1908, Section 2646) seems not to recognize this limitation upon the measure of recovery; certainly the damages in the present case were assessed without regard to it.

In support of the judgment, it is earnestly argued

that the question whether deceased was employed in interstate commerce was not properly raised in the Trial Court, in accordance with the pertinent provisions of the local Code of Civil Procedure. But this is a question of State practice; and since it appears that defendant expressly claimed immunity by reason of the act of Congress, and the highest Court of the State either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right, the decisions of this Court render it clear that it is our duty to pass upon the merits of the Federal question. Home for Incurables v. New York, 187 U. S., 155, 157; 47 L. ed., 117, 118; 63 L. R. A., 329; 23 Sup. Ct. Rep., 84; San Jose Land & Water Co. v. San Jose Ranch Co., 189 U. S., 117, 179; 47 ed., 765; 23 Sup. Ct. Rep., 487; Montana ex rel. Haire v. Rice, 204 U. S., 291, 299; 51 L. ed., 490, 494; 27 Sup. Ct. Rep., 281; Chambers v. Baltimore & O. R Co., 207 U. S., 142, 148; 52 L. ed., 143, 146; 28 Sup. Ct. Rep., 34; Miedreich v. Lauenstein, No. 20, 232; U. S. pos., 309; 34 Sup. Ct. Rep., 309.

The Court based its decision that the Federal Act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad,—its tracks and property lying wholly within the State,—and that the corporation, itself, is not, although its lessee is, engaged in interstate commerce, the lessor's activities being confined to receiving annual rents and distributing them among its stockholders. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business of the lessor's road, as established by the same court in Logan v. North Carolina R. Co., 116 N. C., 941; 21 S. E., 959, was recognized, indeed, reasserted. "But," it was said,

"that is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either." (156 N. C., 500; 72 S. E., 858).

It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease certainly, so far as concerns the rights of third parties, including employees as well as patrons, constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must, and does, result in the case before us, that the lessor is a "common carrier by railroad, engaging in commerce between the States," and that the deceased was "employed by such carrier in such commerce," within the meaning of the Federal Act; provided, of course, he was employed by the lessee in such commerce at the time he was killed.

It was, however, further held by the Supreme Court of North Carolina that deceased, at the time he was killed, was not infact employed by the Southern Railway, the lessee, in interstate commerce. There are several grounds upon which this decision was based, or upon which it is said to be supportable; and these will be separately noticed. Of course, if, upon the evidence, any essential matter of fact was in doubt it should have been submit-

ted to the jury under proper instructions. The rulings of the Trial Court deprived plaintiff in error of the opportunity to go to the jury upon the question. But it is now insisted that there was no evidence tending to show that deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent neces sary to give to plaintiff in error the benefit of its asserted Federal right. Southern P. Co. v. Schuyler, 227 U. S , 601; 57 L. ed., 662, 669; 43 L. R. A. (N. S.), 901; 33 Sup. Ct. Rep., 277, and cases cited.

The evidence tended to show that train No. 72 of the Southern Railway had come into Selma, North Carolina, from Pinners Point, Virginia, and and other places, and that a shifting crew was "working" this train so as to take two cars from it and put them into a train that was to include these and other cars to be hauled from Selma to Spencer, North Carolina, by engine No. 861, and that deceased was employed on this engine as fireman for the trip that was about to begin, and had already prepared his engine for the purpose. It is contended that the evidence failed to show that the two cars thus taken from train No. 72 had come in from Virginia, rather than from the "other places," which it is said might be intermediate North Carolina points. We find, however, evidence that the train which was to be hauled from Selma to Spencer by engine No. 862 was being made up in part from cars that had come in from Pinners Point; and it was at least a reasonable inference that the two cars referred to were being put into the Spencer train in order to be carried forward as a part of a through movement of interstate commerce.

There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the ab-

sence of evidence, it is reasonable to infer that they were empty as that they were loaded; and that it was incumbent upon defendant to show tha they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer. But were it so, the hauling of empty cars from one state to another is, in our opinion, interstate commerce within the meaning of the act. Such is the view that has obtained with respect to empty cars in actions based upon the safety appliance act of March 2, 1893, (27 Stat., at L. 531, Chap. 196; U. S. Comp. Stat., 1901, p. 3174). Johnson v. Southern P. Co., 196; U. S. 1, 21, 49; L. ed., 363, 371; 25 Sup. Ct. Rep., 158; 17 Am. Neg. Rep., 412; Voelker v. Chicago, M. & St. P. R. Co., 116 Fed., 867, 873. And the like reason applies, as we think, to actions founded upon the employer's liability act, which, indeed, is in pari materia with the other.

It is argued that because, so far, as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still in future. It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstances that the interstate freight cars had not yet been coupled up is legally insignificant. See Pedersen v. Delaware, L. & W. R. Co., 229 U. S., 146, 151; 57 L. ed., 1125; 33 Sup. Ct. Rep., 648; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S., 156, 161; 57 L. ed., 1129, 1134, 33 Sup. Ct. Rep., 651.

Again, it is said that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon

carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still "on duty," and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri, K. & T. R. Co., v. United States, 231 U. S., 112, 119, ante, 26; 34 Sup. Ct. Rep., 26.

We conclude that, with respect to the facts necessary to bring the case within the Federal Act, there was evidence that, at least, was sufficient to go to the jury. It is doubtful whether there was substantial contradiction respecting any of these facts; but these we need not consider.

From what has been said, it follows that the State Courts erred in holding that the Federal Act had no application. As the case stands, we are not called upon to determine the validity of the several contentions that were raised by defendant at the trial on the strength of that act, nor to pass upon the mode in which they were raised. Upon these matters, therefore, we express no opinion.

Judgment reversed, and the case remanded for further proceedings not inconsistent with this opinion."

VI.

The first ground of appeal is to no value. If the plaintiff's intestate and defendant were engaged in interstate commerce at the time of the accident then

the Federal Act under which this action is brought is exclusive of all other remedies.

See also: Whitecraft vs. Penn. R. R. Co., 36 N. J. Journal, 182.

Vickery vs. N. L. Ry. Co., 89 Atlantic, 277.

St. Louis S. & T. Ry. Co. v. Seael, 229 U. S., 156-158.

C. I. & L. Ry. Co. vs. Hackett, 228 U. S., 559.

Deatley vs. C. & C. Ry. Co., 201 Fed. Rep., 591.

N. C. R. R. Co. vs. Zachary, 232 U. S., 248.

Seaboard Air Line v. Horton, 233 U. S., 492-501:

See also opinion Chief Justice Gummere, p. 74 case, and if the plaintiff should fail on the trial, to establish that the defendant and the plaintiff's intestate were engage in interstate commerce at the time of the accident, then the plaintiff would fail to make a case and would be non-suited, and further more, the plaintiff's intestate could not maintain an action under the "Employer's Liability Act," as it appears, that the sole beneficiary under the "Employer's Liability Act" was a non-resident alien (p. 35, record) and being a non-resident alien, the act expressly precludes all compensation. (See 12 (2) Ch. 95, Laws 1911.)

VII.

Sub-division C. of the second ground of appeal constitutes no ground for reversal. The plaintiff established a clear case of negligence in the moving of the engine at a time and place when the defendant knew as appears by the testimony of defend-

ant's witnesses, Rose (fol. 30, p. 43, case) and Roden, (fol. 10, p. 41, case), that the plaintiff's intestate was in the ash-pit immediately under the engine where his duty called him, and for the defendant to move the engine without some signal notice or warning being given, of its intention to move the engine, presented a question of fact to the jury as to whether the defendant was guilty of negligence, and the statement in this ground of appeal that there is no proof that any of the employees knew that the plaintiff's intestate was coming from the manhole at the time the engine was moved, is a statement directly contrary to what is shown by the evidence as it appears (fol. 10, p. 28, fol. 10, p. 30, case); that before coming out of the ash-pit one of the employees of the defendant upon the ground, signalled to the plaintiff's intestate to come out of the ash-pit, and that while he was in the act of doing so, the engine was negligently moved backward two or three feet. Neither can it be said as claimed by the defendant, in sub-division D. of the second ground of the appeal, that the risk was assumed by the plaintiff's intestate, as he had a right to infer that he was assuming no risk when he came out of the ash-pit in response to a signal given him to do so; and he had a right to infer when he attempted to come out of the ash-pit on the signal being given him to do so, that it was perfectly safe for him to do so, as the engine was not moving at the time when the signal was given him.

The case of Koneski vs. D. L. & W. R. Co., 77 N. J. L., 645, was one almost identical with the facts in this case. The plaintiff in that case was killed while in an ash-pit by reason of an engine being moved without signal or warning being given to him. The Court in that case reversed a judgment in favor of the plaintiff on the sole ground

that the failure to give notice to the injured employee was the negligence of a fellow servant.

The Court holding, that while the plaintiff was injured through negligence, yet as the negligence was that of a fellow servant he could not recover. The Federal Act, Sec. 1, under which this action is brought, gives to an injured plaintiff a cause of action for injury 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."

As was said in the Koneski case, "*the verdict of the jury has determined that the accident occurred through the failure of the engineer to give the customary signal of approach of his engine to the pit, and the neglect of the hostler to give warning of its movement in the pit* (77 N. J. L., 647). Hence, the law is settled that in an accident such as happened to the plaintiff's intestate, the plaintiff is entitled to recover under the Federal Statute in which the negligence of a fellow servant does not constitute a defense. The Federal Statute gives a cause of action for injury where it is occasioned by any negligence in the operation of its cars, engines, appliance, machinery, track, roadbed, works, boats, wharves, or other equipment, and under the language of the statute, it certainly cannot be claimed that the ash-pit is not an appliance or an equipment connected with the operation upon the railroad. And the Supreme Court of the U. S. has decided in the case of Eng. vs. Southern Pacific Ry. Co., 210 Fed. Rep., 92, "that the Act applies to any and all instrumentalities maintained or used by the railroad in the prosecution of its work."

VIII.

Sub division E. of paragraph 2 of appellant's grounds of appeal should be disregarded for the reason that the Supreme Court of the United States in the case of McGovern vs. Phil., Reading Railroad Co. 235 (U. S., 389), decided that the provisions of the Federal Act under which this suit is brought, inured to the benefit of a non-resident alien.

IX.

The 6th ground of appeal should be disregarded as the charge to the jury follows the language of the Supreme Court of the United States in the case of

X.

The 7th ground of appeal should be disregarded as the charge to the jury on the question of contributory negligence, follows specifically, the language of the Federal Statute, and on the question of assumption of risk, the Court followed the language of the U. S. Court in the case of Northern Pacific Ry. Co. vs. Maerkl, 198 Fed. Rep., 1.

XI.

The 9th ground of appeal does not constitute the ground for reversal for the reason that the charge requested as modified by the Court is substantially all that the appellant requested the Court to charge, and in fact, is more favorable to the defendant than the request to charge submitted to the Court.

XII.

The 10th ground of appeal should be disregarded. The Court of Errors and Appeals in Ferth vs. Pa. R. R. Co., 83 Atlantic, 896, held :

"The place of work of a servant was a pit under

a locomotive tender which was a reasonably safe place unless the tender was moved without warning. There was a custom of giving such a warning, but whether it was given as an incident of the work of the master or as the duty of the master to warn the servant was a disputed question. Held that, where the testimony was conflicting and variant inferences could be drawn from it, this question was for the jury."

"The principal seems to be that one employed at the time of his injury in the use of or maintaining in proper condition any instrumentality or appliance used by the carrier in interstate commerce comes within the statute, although such instrumentality or appliance may also be used for intrastate business. Now, freight sheds, depots and warehouses or other facilities provided and used by a carrier for receiving, handling and discharging interstate freight are, I take it, instrumentalities used in interstate commerce under the doctrine of the cases, and are so closely connected therewith as to be a part thereof for the purpose of the Federal Employers' Liability Act."

XIII.

The 11th ground of appeal (p. 7 case) should be disregarded, as the plaintiff's cause of action was not confined to or limited in anyway to the provisions of the "Employers' Liability Act," Ch. 95, Laws of N. J., 1911. See also: Whitecraft vs. Penn. R. R. Co., 36 N. J. Journal, 182; Vickery vs. N. L. Ry. Co., 89 Atlantic, 277; St. Louis S. & T. Ry. Co. vs Seale, 229 U. S., 156-158; C. I. & L. Ry. Co. vs. Hackett, 258 U. S., 559; DeAtley vs. C. & C. Ry. Co., 201 Fed. Rep., 591; Seaboard Air Line vs. Horton, 233 U. S., 492-501; N. C. R. R. Co., vs. Zachary, 232 U. S., 248.

XIV.

The 13th ground of appeal (p. 7 case) should be disregarded, as the charge given by the Court correctly and fully states the law upon the question of contributory negligence, the Court being careful to read into this charge the section of the Federal Statute applicable thereto.

XV.

No question is presented to this Court as to the judgment being excessive, and consequently we submit nothing to the Court upon that question. The only question of damages appearing in the record is contained in the defendant's 4th request to find, paragraph 11 of appellant's grounds of appeal, (p. 7 case), and regarding which we have heretofore stated in the Employers' Liability Act, Ch. 95, Laws 1911, does not apply.

XVI.

The judgment of the Supreme Court which affirmed the judgment of the Hudson Circuit Court, should be affirmed with costs.

FRANK M. HARDENBROOK,

Attorney for Respondent.

Dated February 21st, 1915.

New Jersey Court of Errors and Appeals

CONSTANTINE GRYBOWSKI, Administrator of Joseph Grybowski, deceased, *Respondent,* *vs.* ERIE RAILROAD COMPANY, *Appellant.*	On Appeal from Supreme Court.

SUPPLEMENT TO BRIEF IN FAVOR OF ERIE RAILROAD COMPANY, APPELLANT.

Since the preparation of the original brief for the appellant in this Court, there has been filed (March 6, 1916), an opinion in the case of *Moran v. Central Railroad Company of New Jersey* which counsel for appellant submit sustains the contention made in the original brief to the effect that at the time of the accident the railroad company was not engaging in interstate commerce nor did the plaintiff's intestate suffer injury while he was employed by it in such commerce. The attention of the Court is particularly invited to that part of the decision in the *Moran* case wherein the Court approves the remarks of the Trial Judge to the effect that when the function that the car in question in that case was performing in interstate commerce was ended, its character as an interstate car ceased and it did not acquire a new character as an interstate commerce car until the intention on the part of the railroad company to use that car had been in some way manifested,

either by act or by word. We submit that this ruling is applicable to the facts of the present case, wherein it appears without dispute that the engine by which the plaintiff's intestate had been run over, although it had made an interstate trip from Suffern to New York, had finished its trip, and there was no proof as to where it was expected to go nor where it did in fact go after the completion of this interstate trip. A copy of the opinion in the *Moran* case is hereto attached.

COLLINS & CORBIN,
Attorneys of Erie Railroad Company,
Appellant.

GEO. S. HOBART,
Of Counsel.

Opinion in Moran Case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

EUGENE W. MORAN,
Appellant,
vs.
CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Respondent.

No. 22. November Term 1915.

PER CURIAM.

On appeal from the Supreme Court.

For the Appellant, Charles M. Egan.

For the Respondent, George Holmes and Edwards & Smith.

PER CURIAM:

The plaintiff, who was injured by a car of the defendant company, sued for damages in the New Jersey Supreme Court alleging that the defendant at the time of the accident was a com-

mon carrier of passengers and freight to and from the State of New Jersey from and to the States of New York and Pennsylvania, and claimed a right to recover under the act of Congress of April 22, 1908, commonly called the "Federal Employers' Liability Act." The case was referred to the Hudson Circuit and the trial judge directed a verdict for the defendant on the ground that at the time the accident happened the car which caused the plaintiff's injury was not engaged in interstate commerce. The learned trial judge, in directing the verdict, observed, among other things:

> "When the defendant's case was put in—and no part of this evidence seems to have been shaken by cross-examination, and no attempt was made by way of rebuttal—that this car when it had discharged its cargo at East Ferry Street had then been taken back to Brill's Junction to be left there awaiting an order for cars, and that order was given to Mr. Hastings, who was the general yardmaster; then the nature of the order was manifested; the order was that he was to give a certain amount of tonnage in cars and it was his function to select what cars should comply with that order, and that order was not given until half past five or six o'clock on the day of the accident, and the accident happened at three on that day—my function, then, it seems to me, became perfectly clear, and that was when all the evidence was in and it was manifest that there was nothing upon which the jury could infer, in the light of the explanatory proof produced by the defendant, which amplified and clarified the rather vague evidence produced on the part of the plaintiff—it then seemed to me it became my duty to say that there was not anything in the case which would authorize me to say that the jury might conclude that the car at that time was engaged in interstate commerce."

* * * * *

"I think the interstate character of that car ceased and I so decide, when the function that the car was performing in the interstate commerce was ended; that is, it was engaged in the purpose of carting coal from Mauch Chunk to Newark from a consignor to a consignee. When it had taken the last vestige of coal off of the car and had delivered it to the consignee, I think at that point its character as an interstate commerce car ceased, and that it did not acquire a new character as an interstate commerce car until the intention on the part of the railroad company to use that car had been in some way manifested, either by act or by word."

We are of opinion that the facts of this case required the course which was taken by the learned trial judge. The law of the case will be found to be correctly stated in the opinion of McPherson, J., in *Pennsylvania R. R. Co. v. Knox,* U. S. Circuit Court of Appeals, Third Circuit, 218 Fed. Rep., 748, 751.

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Notice of Appeal.

(Filed March 30, 1914.)

To Frank M. Hardenbrook, Esquire, Attorney of Plaintiff:

Sir:

The defendant, Erie Railroad Company, appeals to the New Jersey Supreme Court from the whole of the judgment entered in this case.

COLLINS & CORBIN,
Attorneys of Defendant.

Dated March 25, 1914.

Grounds of Appeal

(Filed April 27, 1914.)

The appellant states the following grounds of appeal:

1. The Hudson County Circuit Court erroneously struck out paragraph "2" of the answer of the appellant, reading as follows:

> "2. At the time of the death of plaintiff's intestate, Joseph Grybowski, the said Joseph Grybowski was in the employ of the defendant, pursuant to a contract of hiring made subject to the provisions of Section II of the Statute 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' (being Chapter 95 of New

Jersey Laws of 1911); and whatever rights, if any, the plaintiff and the next of kin of said Joseph Grybowski have to recover compensation from this defendant by reason of the death of said Joseph Grybowski, are governed and limited by the provisions of said Section II of the said Statute of the State of New Jersey."

2. The trial court denied the motion of the appellant to non-suit the respondent at the trial of the case, whereas said motion should have been granted for one or more of the following reasons urged in behalf thereof.

(a) Defendant was not engaged in interstate commerce at the time of this accident, within the meaning of the Federal statute; the engine that struck the decedent had completed its trip, passengers were discharged, engine had backed; the accident happened while engine was at the ash pit for the purpose of having the ashes removed.

(b) Plaintiff's intestate was not engaged in interstate commerce at the time of the accident; the work he was doing being merely to keep the ash pit in proper working order, and so far as the particular engine was concerned the ashes had not been dumped into the pit at the time of the accident, and there is no proof that any of the ashes that the intestate had to do with came from the engine engaged in inter-state commerce. So far as any proof on the subject is concerned—as far as can be gathered from the proofs as testified to—all of the engines that dump these ashes, even if engaged in inter-state commerce, had completed their trips and were no longer so engaged at the time of the dumping.

(c) No negligence has been proved on the part of the defendant, or any of its officers, agents or employees. When the engine was moved there is no proof of any failure to give any customary signals.

There is no proof that any of the employees knew that plaintiff's intestate was coming from the manhole at the time the engine was moved.

(d) The risk of injury was assumed by plaintiff's intestate in coming out of the manhole at a time when he knew or with reasonable care on his part should have known that the engine was moving and was in plain sight.

(e) Under the Federal statute, on which this suit is based, even if there was any proof of pecuniary loss, the plaintiff cannot recover, as the benefit of the Federal statute does not accrue to non-resident aliens.

(f) The rights of the parties hereto are governed and limited by the provisions of Chapter 95, New Jersey laws of 1911, and this court therefore has no jurisdiction to entertain this cause of action.

3. The trial court denied the motion of appellant to direct a verdict in its favor, whereas said motion should have been granted for one or more of the following reasons urged in behalf thereof:

(a) The defendant was not engaged in inter-state commerce at the time of the accident within the meaning of the Federal statute; engine 974 had completed its trip, passengers had been discharged, engine had backed to the turntable and thence to the ash pit for the purpose of having the ashes removed; and there was no proof to show where it was going after the ashes had been removed, nor whether or not it was regularly engaged in inter-state commerce.

(b) Plaintiff's intestate was not engaged in inter-state commerce at the time of the accident; the work he was doing was merely to keep the buckets and ash pit in proper working order; so far as engine 974 was concerned, the ashes from that engine had not yet been dumped into the pit at the time of the accident, and there is no proof that any of the ashes that the

plaintiff's intestate had to do with came from engines engaged in interstate commerce; so far as there is any proof on this subject all of the engines that dump such ashes, even if engaged in inter-state commerce, had completed their trip and were no longer so engaged.

(c) No negligence has been proved on the part of the defendant or any of its officers, agents, or employees, even if the Federal statute applies. When engine 974 was moved there is no proof that there was any failure to give any customary signal. Further, there is no proof that any of the employees knew that the plaintiff's intestate was coming from the manhole at the time the engine was moved. He had given no notice that he was about to do so, and the employees who have charge of the engine looked to see if there was any one on the track at the time the engine was moved, and their evidence is undisputed that they saw no one.

(d) The risk of injury was assumed by plaintiff's intestate, in coming out of the manhole at a time when he knew, or with reasonable care on his part should have known that the engine was moving or about to move; it was in plain sight of him as he climed up the west side of the manhole, and only a few feet distant.

(e) Plaintiff cannot recover, as the benefit of the Federal statute does not accrue to a non-resident alien.

(f) The rights of the parties hereto are governed and limited by the provisions of Chapter 95, New Jersey laws of 1911.

4. The trial court erroneously submitted to the jury the question of whether the appellant was engaged in inter-state commerce at the time of the accident upon which the suit was based.

5. The trial court erroneously submitted to the jury the question of whether the respondent's intestate was employed in inter-state commerce at the time of the accident upon which the suit was based.

6. The trial court erroneously charged the jury as follows:

> "One engaged in the work of maintaining tracks, bridges, engines or cars in proper condition after they have become and during their use as instrumentalities of inter-state commerce, is engaged in inter-state commerce, and this even if those instrumentalities are used in both inter- and intra-state commerce."

7. The trial court erroneously charged the jury as follows:

> "If you find that the plaintiff has by a clear, fair and satisfying preponderance of the evidence shown you that these three items of which I have just spoken exist, then you may turn your attention to the consideration of contributory negligence and assumption of risk on the part of the plaintiff's intestate, that is, Joseph Grybowski.
>
> Contributory negligence is the doing or not doing of those acts and things which a reasonably prudent person, under the existing circumstances and conditions, would or would not have done to have avoided injury to himself and either the doing or not doing of which was the proximate cause or causes of the injury.
>
> Upon the assumption of risk, the Federal court has said:
>
> 'That an employee may have assumed a risk from one of two contributory causes of an injury will not defeat his right to recover where the other cause is one for which the master is liable.' "

8. The trial court erroneously refused to charge appellant's request numbered "1":

> "1. Before the jury can bring in a verdict in favor of the plaintiff and against the defendant, they must find first that the defendant at the time of the accident was engaged in inter-state commerce, and second, that at said time plaintiff's intestate was employed by the defendant in such commerce; if the jury conclude that the plaintiff has failed to prove either one of these two facts there must be a verdict for the defendant."

9. The trial court erroneously refused to charge appellant's request numbered "2," and modified said request; and said request and the modification thereof reads as follows:

> "The second request is: 'If the jury find that the plaintiff's intestate either in fact knew or by the exercise of reasonable care on his part should have known that the engine by which he was struck was approaching, then he assumed the risk and there must be a verdict for the defendant.' I decline to charge in that language, but in place of it I charge as follows: 'That if you find from the evidence that the deceased party knew or reasonably should have known the risks surrounding his employment and work and that it was in disregard of that knowledge on his part which he had or should have had that the accident happened, you may find that he assumed the risk that brought about his death, and in that event you may find for the defendant."

10. The trial court erroneously refused to charge appellant's request numbered "3":

> "3. Plaintiff's intestate had no right to rely upon any signals being given by bell or whistle when the engine by which he was struck was about to be moved."

11. The trial court erroneously refused to charge appellant's request numbered "4":

> "4. The amount of damages recoverable by the plaintiff's intestate, if a verdict is found in his favor, must be limited to the expenses of last sickness and burial, not exceeding the sum of two hundred dollars, as provided by Chapter 95, New Jersey Laws of 1911."

12. The trial court erroneously refused to charge appellant's request numbered "6":

> "6. The evidence in the case shows that the father of the decedent, for whose benefit this action is brought under the Federal statute on April 22, 1908, is a non-resident alien and therefore has no right under said statute to recover damages thereunder; and on this ground the jury must bring in a verdict in favor of the defendant."

13. The trial court erroneously refused to charge appellant's request numbered "7" and in connection therewith erroneously charged the jury on the subject of contributory negligence of the respondent's intestate. Said request numbered "7" reads as follows:

> "7. If the jury find that the accident was due to contributory negligence on the part of the plaintiff's intestate, the damages, if any, that may be found against the defendant, must be diminished in proportion to the amount of the negligence of plaintiff's intestate as compared with the combined negligence of plaintiff's intestate and that of the defendant."

The charge on this subject reads as follows:

> "On the question of contributory negligence, to which I have before alluded, I have to say to you that in an action upon this statute or under this statute contributory negligence may not de-

feat the right of the plaintiff to recover. Section 3 of the act provides, among other things, this:

> 'The fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'

If you find that plaintiff's intestate was guilty of contributory negligence, then, if you have to find the amount of damages to which decedent's father is entitled, you are to abate or deduct from that sum the amount you shall find represented decedent's proportionate contributory negligence, and your verdict will be for the difference."

COLLINS & CORBIN,
Attorneys for Appellant.

Return.

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court holden in and for the County of Hudson and within named, the record and proceedings of the plaint whereof mentioned is within made with all things touching the same I send to the Justices of our Supreme Court of Judicature at Trenton, N. J., the day and year within contained, in a certain appeal to this writ annexed as within I am commanded.

LUTHER A. CAMPBELL,
Judge.

Judgment Record.

COMPLAINT.

Filed September 30, 1912.

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

CIRCUIT COURT HOLDEN IN AND FOR SAID COUNTY.

CONSTANTINE GRYBOWSKI as administrator of the goods, etc., of Joseph Grybowski, deceased,
Plaintiff,
vs.
THE ERIE RAILROAD COMPANY, a corporation organized and existing under the laws of the State of New York,
Defendant.

Complaint.
Action at Law.

The defendant was summoned to answer unto said plaintiff therein in an action at law upon the following complaint.

1. The plaintiff resides in the City of Jersey City, Hudson County, New Jersey.

2. That before and at the time of the committing of the grievances hereinafter mentioned, to wit, on January 11th and 12th, 1912, at Jersey City, in the County of Hudson and State of New Jersey, the said defendant was, and still is, engaged in the business of common carrier by railroad and was, and still is

engaged in commerce between the States of New York, New Jersey and Pennsylvania and other States of the United States of America, and the said defendant then and there owned, possessed and had the management and control of a certain railroad with its appurtenances which was then and there operated and used by it in such business of common carrier, and in commerce as aforesaid.

3. That the said defendant then and there employed divers large numbers of servants and agents to manage, operate and run its said railroad in its business of common carrier as aforesaid and in commerce as aforesaid and that the plaintiff's intestate was on the said January 11th and 12th, 1912, a resident of the State of New Jersey and was then and there employed in such commerce by the defendant in the capacity of a laborer and at the yards of terminal at or about Pavonia avenue and 9th street, in said city under the orders and directions of the said defendant and being so employed the plaintiff's intestate was engaged in such commerce in removing ashes taken from engine so engaged in such commerce from a certain ash pit where they have been dumped, for the purpose of removal and that the said ash pit was immediately under the tracks of the defendant upon which its said engines or locomotives passed and that the injuries hereinafter mentioned were received and suffered by the plaintiff's intestate while employed in such commerce and were inflicted by the said defendant through its officers, agents and employees while the said plaintiff's intestate was so employed in such commerce by the said defendant as such common carrier in such commerce between the aforesaid States.

4. That the said employment of plaintiff's intestate was exceedingly dangerous and hazardous if he was not carefully and properly protected, guarded, notified and warned of the probable dangers of said

employment before they became actual dangers and it then and there became and was the duty of the said defendant to provide and maintain and operate a proper system of signals and warnings in the operation and management of its said railroad and to carefully and properly protect, guard, notify and warn the plaintiff's intestate of the probable dangers of his said employment and to give him warning and notice thereof before the said probable dangers became actual dangers, so that plaintiff's intestate might not be subjected and exposed to extreme and unnecessary dangers of life and bodily peril not required nor contemplated by his said employment.

5. Yet the said defendant, then and there disregarded its duty in this behalf in that it did not provide, maintain and operate a proper system of signals and warnings in the operation and management of its said railroad and in that it did not carefully and properly protect, guard, notify and warn the plaintiff's intestate of the probable dangers of his said employment and in that it did not give the plaintiff's intestate reasonable warning and notice thereof before the said probable dangers became actual dangers and thereby the plaintiff's intestate was subjected and exposed to extreme and unnecessary danger of life and bodily peril not required, nor contemplated, by his said employment and thereby, while the said plaintiff's intestate was so employed in such commerce as aforesaid, at the place aforesaid, and while the said defendant was such common carrier and engaged in commerce between the aforesaid States, and while the plaintiff's intestate was engaged in his said work in said ash pit under said tracks and road beds under the orders and direction of the said defendant, the said plaintiff's intestate was struck and run over by an engine and train of the said defendant and thereby suffered injuries at about midnight on June 11th, 1912, by and through the negligence of the offi-

cers, agents and employees of the said defendant and was thereby so wounded, cut and mangled that he died, to wit, on January 12th, 1912, at Jersey City, in the county aforesaid leaving him surviving Andrzey Grybowski who was before and at the time of his death, his father as his next of kin to the damage of the plaintiff $25,000.00.

6. That this action was commenced within two years from the time the said cause of action accrued; wherefore and by virtue of an act of Congress of the United States of America, entitled "An Act relating to the liability of common carriers by railroads to their employees in certain cases" being a public act and approved April 22, 1908, and the supplements thereto and amendments thereof, an action has accrued to the said plaintiff to demand and have of and from the said defendant the sum of money herein demanded in manner and form as is demanded.

7. That the said plaintiff brings here into court the letters of administration of the goods and chattels, rights and credits, moneys and effects of the said Joseph Grybowski granted to him from the Surrogate of the County of Hudson, in the State of New Jersey, on September 5, 1912.

8. The plaintiff demands the sum of two hundred dollars as and for the burial and funeral expenses incurred by him for the burial of the said Joseph Grybowski, the said plaintiff's intestate.

9. The plaintiff demands as damages $25,000.00.

FRANK M. HARDENBROOK,
Attorney for Plaintiff.

Filed Clerk's Office, September 30,
1912, Hudson County.
JOHN F. CROSBY, *Clerk.*

ANSWER.

Filed October 15, 1912.

The defendant corporation answers as follows:

The defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey, at the City of Jersey City, says that:

1. It denies the truth of the matters contained in the complaint.

2. At the time of the death of plaintiff's intestate, Joseph Grybowski, the said Joseph Grybowski was in the employ of the defendant, pursuant to a contract of hiring made subject to the provisions of Section II of the Statute 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" (being Chapter 95 of New Jersey Laws of 1911); and whatever rights, if any, the plaintiff and the next of kin of said Joseph Grybowski have to recover compensation from this defendant by reason of the death of said Joseph Grybowski, are governed and limited by the provisions of said Section II of said Statute of the State of New Jersey.

3. The death of plaintiff's intestate, Joseph Grybowski, was due directly to contributory negligence on the part of said Joseph Grybowski.

4. The risk of injury from the dangers of the employment of plaintiff's intestate, Joseph Grybowski, as specified in the complaint, was assumed by the said Joseph Grybowski as incidental to his employment.

COLLINS & CORBIN,
Attorneys of defendant.

Filed, Clerk's Office October 15, 1912, Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

ORDER.

Filed November 1, 1912.

HUDSON COUNTY CIRCUIT COURT.

CONSTANTINE GRYBOWSKI, as admx.,
Plaintiff,

vs.

ERIE RAILROAD COMPANY,
Defendant.

It appearing to the court that the above named plaintiff has given due written notice to the defendant of a motion to strike from the defendant's answer, paragraph number two thereof, pleading that this action is governed and controlled by Section 11 of Chapter 95 of the Laws of 1911 of this state.

It is therefore on this 1st day of November, 1912, ordered by the court that the said defense in said answer of said defendant be stricken out as constituting no defense to this action with costs. All rights of the defendant to review this order, on appeal are hereby preserved.

FRANK M. HARDENBROOK,
Attorney for Plaintiff.

Let the above order be entered upon the minutes.

WM. H. SPEER,
Judge of the Hudson County Circuit Court.

Filed, Clerk's Office November 1, 1912, Hudson County, N. J.
JOHN F. CROSBY, *Clerk.*

Judgment.

JUDGMENT.

This action was tried before Judge Luther A. Campbell, with a jury at the Hudson Circuit on March 17th, 1914.

The cause having been heard and submitted to the jury, they returned their verdict as follows: They say that they find for the plaintiff and against the defendant and they assess the damages of the plaintiff on occasion of the premises at the sum of twelve hundred dollars ($1,200).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of twelve hundred dollars ($1,200) and his costs which are taxed at the sum of fifty-five dollars and eighty-three cents ($55.83) making in the whole the sum of one thousand two hundred and fifty-five dollars and eighty-three cents ($1,255.83).

Judgment entered this March 17th, 1914.

LUTHER A. CAMPBELL,
Judge.

Attest:

JOHN F. CROSBY,
(L. S.) *Clerk.*

Mr. Hardenbrook. I offer in evidence letters of administration granted to Constantine Grybowski, on the goods, chattels and credits of Joseph Grybowski, granted by the Surrogate on the 5th of September, 1912.

(Paper marked Exhibit P. 1.)

Mr. Hardenbrook. I will read in evidence the stipulation entered into between respective counsel in the case:

"It is hereby consented that the annexed copy of the record of St. Francis Hospital, that is, of

the injury and cause of death of Joseph Grybowski, may be received in evidence at the trial of the above stated case, without other or further proof as to the said injuries and cause of death."

The Court. I assume, Mr. Hobart, you do not contest that offer?

Mr. Hobart. No; I have signed the stipulation.

Mr. Hardenbrook. The record of St. Francis Hospital is: "St. Francis Hospital, Jersey City, New Jersey. Hospital Record. Patient, Joseph Grybowski, residence 129 Pavonia avenue, Jersey City; occupation laborer, Erie Railroad; admitted January 11, 1912; died January 12, 1912; diagnosis crushing injuries of both legs; compound comminuted fracture of tibia and fibula, both legs, just below the knee."

I will also read another stipulation which has been entered into in the same case:

"It is stipulated and agreed that on the trial of this action the following facts are admitted to be true and such admission shall stand in lieu of proof of the same in each of them upon said trial:

"First, that on the 12th of January, 1912, the plaintiff in said case, Joseph Grybowski, was being paid by the defendant, twelve dollars and fifty cents weekly wages; second, that the annexed is a copy of the American Experience Mortality Tables, showing the expectancy of life." We will offer that table in evidence.

(Paper marked Exhibit P. 2.)

Mr. Hardenbrook. I will now read to you certain answers which have been made under oath by the defendant to certain questions asked under the practice in this state as to facts and circumstances relative to the matter.

"Interrogatory 1. State the place where the plaintiff's intestate was employed by the defendant on Jan-

uary 11, 1912?" To which the Railroad Company answered:

"The ash pit on the south side of the defendant's terminal at Jersey City."

"2. State the character of his employment?"
"Answer. Employed as laborer on said ash pit."

"3. State the name of the foreman, or superintendent under whose immediate orders he was working?"
"Answer. Joseph Roden."
The 4th was not answered.

"5th. State the exact location of the ash pit where he received injuries on said date."

"Answer. Ash pit was located on the south side of engine yard at the north side of the coal pockets, between the rails of two tracks leading up to and over it."

"8th. State the manner in which the ashes were emptied or received into the ash pit."

"Answer. As engines come over the pit the slides or the ash pans are opened and the ashes allowed to fall into the pit."

"9th. State the manner in which the ashes were removed from said pit."

"Answer. The answer is, the ashes were removed from the said ash pit by means of a mechanical worm and buckets which passed through the pit on an endless chain operated by gas engine."

"10th. State what engines utilized said ash pit for their respective ashes?"

"Answer. All the defendant's engines that ran into Jersey City terminal used said ash pit at said time."

"11th. State whether any of said engines were engaged in hauling trains to and from points outside of the State of New Jersey."

"Answer. They were not so engaged at the time of dumping the ashes."

"12th. State the manner in which plaintiff's intestate was injured on said day."

"Answer. He was run over by a locomotive or some part thereof."

"13th. State the amount of wages which he was being paid at that time?"

"Answer. Twelve and one-half cents per hour or an average of one dollar and fifty cents a day when he worked for twelve hours."

"14th. State the number of the engine which injured him at that time?"

"Answer. No. 974."

"15th. State whether said engine was a passenger or freight engine?"

"Answer. Passenger."

"16th. State the point furthest north or west from which said engine had come on said day?"

"Answer. The point farthest north or west from which said engine had come at the time mentioned was Suffern, New York."

"17th. State to where the said engine was going after dumping its ashes."

"Answer. After dumping these ashes said engine was going to the coal pockets to receive coal, and then to the roundhouse to be prepared for another trip."

DAVID D. COLEMAN, sworn.

Direct examination by Mr. Hardenbrook.

Q You are employed by the Erie Railroad Company?

A Yes.

Q In what capacity?

A General foreman.

Q Where is your place of work?

A At the south side of engine yard, Pavonia avenue.

Q Pavonia avenue?

A Yes.

Q Jersey City, Hudson County, New Jersey?

A Yes.

Q How long have you been employed there as foreman?

A Been foreman about twelve years.

Q You were foreman on the 12th of January, 1912, were you not?

A Yes.

Q Working for the Erie Railroad Company at that locality?

A Yes.

Q Into and through what States did the Erie Railroad Company run at that time?

A New Jersey, Pennsylvania, New York.

Q And the trains operated by the Erie Railroad Company into Pennsylvania and New York utilized the terminal yard at the foot of Pavonia avenue, where you were employed, did they not?

A Yes.

Q At that time?

A Yes.

Q Those trains which came into that yard were both freight and passenger trains, were they not?

A We handle passenger part only.

Q At that yard?

A Our terminal.

Q Only passenger trains?

A Passenger engines we handle.

Cross examination by Mr. Hobart.

Q Were you in general charge of the yard or only a part of the yard?

A Had charge of the engines only.

Q The passenger engines that come into Jersey City?

A The passenger engines.

Q Where is the terminal of the Erie Railroad at Jersey City?

A The foot of Pavonia avenue.

Q Is that where the passenger trains ran at that time?

A Yes.

Q How far is the passenger shed or passenger station from the ash pit?

Mr. Hardenbrook. I object. There has been nothing brought out on direct examination other than the testimony showing this railroad is engaged in interstate commerce, nothing whatever.

The Court. How do I know but what this question may go to that point?

Mr. Hardenbrook. This is as to the location and situation of ash pits in the yard.

The Court. What is the purpose of the question?

Mr. Hobart. You honor has suggested the purpose.

The Court. If it is to the point of determining that question, the question you have brought out on direct examination, I will permit the question for that purpose only.

A I should judge about two blocks.

Q When these engines or trains that run through New York and Pensylvania, and through New Jersey,

come into the passenger shed at Jersey City, do they stop and discharge passengers at that shed and station?

A Yes.

Q And that was the custom at this time in January, 1912?

A Yes.

Q And after the passengers have been discharged at the passenger shed what was done with the engine, that is, where do the engines go?

A Well, the majority of cases the switch engine pulls the train away from the engine, and then the engine goes light to the ash pit—comes up on the turntable, and is turned and goes to the ash pit light.

Q Without any cars attached?

A Yes.

Q You said a majority of the cases; what about the other cases?

A Well, in some cases the engine might kick its train up in the yard herself, and then go down and come up on the ash pit light.

Q In other cases?

A Yes.

Q Eh?

A No, sir; that is about—

Q How about the Monmouth street yard; do any of the engines bring in trains and take them up to the Monmouth street yard?

(Objected to as immaterial, irrelevant and not cross examination.)

(Question allowed.)

A Yes, sir; they back them out to the Monmouth street yard and then the engines come light to the ash pit.

Q So that in those cases where the engine took their trains to Monmouth street they would leave the trains at that point?

A Yes.

Q And then run light right to the ash pit?

A Yes.

Q So in every case where they are run to the ash pit they are light engines?

A Yes, every case.

Q That is the way it was handled?

A Yes.

By the Court.

Q You mean by "light" they are without any cars?

A Yes.

By Mr. Hobart.

Q How far is the Monmouth street yard from the ash pit?

A About five blocks.

FRANK GOTT, sworn and examined through Polish Interpreter.

Direct examination by Mr. Hardenbrook.

Q Where do you live?

A Pavonia avenue. 129 Pavonia avenue, Jersey City.

Q What is your business?

A I work at the Erie Railroad, by the engines.

Q Was he working for the Erie Railroad Company on the 11th and 12th of January, 1912?

A Yes, sir, I was.

Q What work was he doing for the Erie Railroad Company at that time?

A I worked firing at the engines.

Q Fireman on an engine?

A Yes.

Mr. Hobart. I do not think he means that.

The Interpreter. He means he worked by fire at the engine. He cleans out the ash pan and dumps the ashes, and cleans out the fire.

Q He cleans out the fire in the engine, is that what you mean?

A Yes, sir, from the engine.

Q Did he know Joseph Grybowski in his life time?

A I did.

Q Did you see the accident to him on the night of January 11th, 1912?

A I saw him when he was under the engine.

Q Was that the engine on which he was employed?

A Yes, sir, same engine.

Q Was that immediately over the ash pit, or—ask him if he knows where the ash pit is?

A Yes, sir.

Q Had this engine which he was on, which this man was on—had that backed down on to the ash pit or had it come down head on? A No, sir; she stood over the pit.

Q How did it get on the pit; did it back down over the pit or did it go head on over the pit?

A She came there to clean out the fire—fire to be cleaned out of the machine.

Q Dumping the ashes into the pit?

A It should be emptied, but it was not emptied yet.

Q It came down over the pit for the purpose of having the ashes emptied—ask him?

A Yes.

Q Did the engine back down over the pit or not?

A Yes.

Q Was there any light on the rear end of the engine?

A There was a light on the front, but none in the rear.

Q Was there any bell rung or whistle blown before this engine moved down over the pit?

A When the machine was in motion the bell rung—only at the time when it was nearing the pit, but when it backed from the pit it did not ring.

Q He said he saw this man's body. I call your attention to the fact that he saw this man's body lying under the engine. What portion of the body did he see under the engine?

A I saw the whole body—head to foot.

RECESS.

By Mr. Hardenbrook (continuing).

Q Were any of the wheels resting on any part of his body?

A It was between the wheels; part of the wheels had already passed.

Q How did they get the man's body out from under the engine?

A They used two jacks.

Q For what purpose?

A Because they could not pull it out, pull the body out.

Q Well, if the wheels were not resting on any part of the man's body what was to prevent taking the man's body out from under the engine?

A Some spring in connection with the engine forced the leg—fastened the leg down—the four wheels under a truck—one wheel passed—between the wheels is a spring that fastened the leg fast—that had the leg fastened, and they could not get it.

Q About how long did it take them to get the man's body from under the engine?

A About an hour.

Q What was the condition of the man when they got him out from under the engine; was he living or dead?

A Yes, he was living.

Q About what time of night was this that this happened?

A Fifteen minutes to one—fifteen minutes to one when this happened.

Q What was the kind and character of the night; was it bright and light or dark?

A It was as usual; there was light came from the front, but not from the rear.

Q As to the sky, was it moonlight, bright or clear night, or dark night?

A Yes.

Q Yes, what?

A I did not closely observe the sky as to the nature of the light.

Q Couldn't he say whether it was bright and clear or whether it was dark?

A It was not dark. I cannot say as to the exact—I did not look up in the sky to see.

Q What portion of the engine was he working on at the time of the accident?

A I was on the tank, near the fire box.

Q Well, was there any portion of the engine beyond that point, between him and the rear end of the engine? He was working in the fire box.

The Interpreter. He was near the fire box.

Q Was there a tender back of that?

A I don't know what the tender is.

Q The receptacle where they keep coal?

A Yes, the tank was behind me and I was standing near the fire box.

Q Then the tender was between him and the rear end of the tender?

A I got on the tank as soon as I heard this accident—between the tank and the engine.

Q Which wheel was it that passed over this man's body? Was it the wheels under the tender or the wheels under the engine?

A The wheel from under the tank.

Q Under the tank?

A Yes.

Q What does he mean when he says "tank"?

The Court. He means tender. What you call tender he calls tank, because he didn't understand what tender meant.

Cross examination by Mr. Hobart.

Q Did you know Joe?

A I knew him, but his name was given there as Joe Cole.

Q Did you see Joe before he was killed?

A I saw him in the old country and I saw him here.

Q What country do you mean? What country did he come from?

A Russian Poland.

Q How long had he been in this country?

A Two years and a half.

Q How long had he worked at the ash pit?

A Three days and the fourth day he met with the accident.

Q Did you see Joe on the night of the accident before he was killed?

A Yes, sir; I saw him.

Q Where was he when you saw him?

A He was at the work.

Q Did you see Joe on the night of the accident before he was killed?

A Yes, I saw him.

Q Where was he when you saw him?

A He was at the work.

Q Was he down in the pit or was he on the ground?

A Immediately before the accident, I did not see him.

Q Did you see any electric lights near the place where the accident happened?

A It was burning in front.

The Court. He does not understand that, apparently.

Q I am not talking about the light on the engine, but an electric light on a pole.

A Yes, sir, before the injuries there was an electric light.

Q Did you see the engine come up on the ash pit?

A Sure. I was there when the machine approached the pit.

Q Had you done any work on the engine before the accident?

A As soon as the engine stopped, I got on the engine.

Q What did you do on the engine?

A I was cleaning out the fire.

Q How long were you on the engine before the accident happened?

A Two minutes and a half.

FRANK SAVAGE, sworn and examined through Italian interpreter.

Direct examination by Mr. Hardenbrook.

Q Where do you live?

A 498 Sixth street.

Q What is your business? What do you work at? What do you do now?

A Formerly I worked with a gas engine.

Q Were you working for the Erie Railroad at midnight on the 11th of January, 1912?

A I was. I worked there.

Q What was he doing there?

A I run a gas engine.

Q Didn't he work in the ash pit on the night of the 11th of January?

A No, sir; I didn't work in the pit; I worked on the surface.

Q The gas engine to which you refer was the gas engine used in connection with the ash pit?

A The machine would lower the buckets to the ash pits.

Q The ash buckets—does he mean the buckets of ashes?

A Ash buckets.

Q Did you notice Joseph Grybowski?

A Only since—when I started to work there.

Q Did you see him at work this night of the 11th of January?

A I saw him, he was my partner.

Q You were both working together in the pit and around the pit?

A Yes, sir.

Q What was he doing when you last saw him?

A When he stopped cleaning the pit I gave him a signal he should come up on the surface, and I went to stop my machine.

Q How far distant from the pit was this machine which he went to stop?

A About fifty feet, about.

Q What signal was it he gave Grybowski to come out of the pit?

A I knocked with the hook on a piece of tin.

Q Is this engine which he had charge of in a shanty?

A Yes, sir, in a shanty.

Q How long did it take you to go from the point where you gave Grybowski the signal to come out of the pit to this shanty, this sixty feet?

A About a minute or two.

Q Sixty feet? Ask him if it took him two minutes to walk sixty feet?

A I did not so closely observe as to the exact time.

Q Did he walk direct from the point where he had given Grybowski the signal to the shanty ?

A Sure, because we clean the—not far from the shanty we clean, so we walk.

Q He walked direct there without stopping?

A No; you have to go around to the rear, to the door.

Q When he got to the shanty what did he hear, if anything?

A I went to stop the machine. I turned around the gas—or the electric—

Q What did he hear, I asked him. Ask him if he heard anybody cry?

A No, sir; I didn't hear any noise.

Q When did he next see Grybowski?

A When I went down to the pit.

Q How did he come to go to the pit?

A Because I had to go down. He was working there.

Q Didn't hear any cry while he was in the shanty?

A I didn't hear any noise.

Q How long was he in the shanty?

A About ten minutes.

Q When he went down to the pit—where did he see Grybowski?

A About two feet from the hole—one wheel already passed over his leg.

Q Which wheel of the engine was it, or which wheel was it?

A The rear wheel.

Q Was it a wheel of the tender or a wheel of the engine itself?

A From the tank.

Q Was one of the wheels resting on him when he got there?

A No, sir; it already passed.

Q Did they get his body out?

A They had to use some jacks to get him out.

Q Why was that necessary, if no part of the engine was resting on his body?

A Because they couldn't pull him out.

Q Was his body between the wheels or was the wheel resting on it?

A There was a spring—what they call a truck between the wheels kept it there.

Q Was there any light on the rear end of this engine or tender?

A The rear it was quite dark; there was no light.

The Court. That does not answer the question. The question was, was there a light on the rear end of the tank.

A No, sir, there was no light in the rear. I did not see any light.

Q After he gave this signal to Grybowski to come out of the pit, and between that time and the time when you saw Grybowski's body under the wheels, did you hear any bells rung or any whistles blown?

A I didn't hear any bell rung as I went to the shanty.

Q Or whistles blown?

A Did not hear any whistles.

Q How long did he say he had known Grybowski?

A From the time he worked there, three or four days.

Q He knew him in Europe, did he not?

A No, sir.

Q What kind of a night was this, light or dark?

A It was a clear night.

Q Was it moonlight, or don't you remember?

A Yes, sir, it was bright light.

Q Was there moonlight? Was there a moon or don't you know, don't you remember?

A No, sir; I couldn't see, because it was behind a tank, I couldn't see.

Cross examination by Mr. Hobart.

Q What kind of a signal did you give to Grybowski to come up out of the pit?

A I knocked with the hook on the tin.

Q On the tin on top of the pit?

A Yes, sir.

Q After you knocked on the pit—knocked on the top of the pit—did you see Grybowski start to come up?

A No, sir, I didn't see him because I went to the shanty and left him there.

Q Was there an electric light near the shanty?

A Yes, sir; it was behind the engine, the other side of the engine.

Q How high about the ground?

A About eight or nine feet.

Q Were there lights in the shanty?

A No, sir, it was not—because the light is far from the shanty.

Q Were there any lights in the shanty?

A There was gas burning there.

Q Were there other windows in the shanty?

A Yes.

Q So the light would shine through the windows?

A No, I didn't see it when I stopped the machine.

Q After you went back to your shanty, did you shut your engine off right away or did you wait a few minutes?

A No, sir; I took about ten minutes after I closed —turned off the gas in the electric.

Q While the engine was running did it make any noise?

A Sure, quite a noise.

Q Quite a noise? Did the buckets that pull up the ashes make any noise?

A Sure.

Q When you gave the signal to Grybowski to come up from the pit where was the locomotive?

A The machine was in the shanty.

(Question repeated.)

A No, sir; I didn't see where the machine was.

CONSTANTINE GRYBOWSKI, sworn and examined through interpreter.

Direct examination by Mr. Hardenbrook.

Q You are the administrator appointed by the surrogate in this action?

A Yes.

Q You are a brother of Joseph Grybowski?

A Yes, sir.

Q What was his age on the 12th of January, 1912?

A Well, past twenty-two years.

Q What was his general condition of health?

A Sure, he was in healthy condition before the accident.

Q How big a man was he?

A Same height as I am myself.

Q Was he strong and vigorous?

A He was a strong man.

Q What were his general habits; stay home nights or roam around?

A When he was through with his work he would come home.

Q Did he drink, to excess or otherwise?

A No, he did not.

Q Was he bright and smart and intelligent?

A He was smart enough to do his work when it was necessary.

Q Is your father living?

A Yes, sir.

Q What is your father's age?

A Fifty.

Q What is the condition of his health?

Mr. Hobart. I object unless the witness shows he has some knowledge of it.

Q How long since you have seen or heard from your father?

A Going on four years.

Q What was his general condition of health at the time you last saw him?

A He was well then and he is alive now.

Q Has he heard from him since then? Did you hear from him frequently?

A I receive letters steady.

Q About what intervals? How often?

A Once a month—twice—two letters in one month.

Q Has his father written to him at all, or stated to him in his letters that he is in bad health?

A Yes, sir—he was in good health.

Q Do you know of your own knowledge as to whether your brother, Joseph, sent any money to his father?

A Yes, sir, he sent.

Q Regularly or irregularly?

A One pay day he kept for himself; another pay day he used to send to his father, because father brought us up and we had to see that he was supported.

Q How many times was he paid a month?

A About thirty or thirty-two dollars one pay that he kept for himself and the other pay he sent for his father.

Q How much would the other pay be—the same amount?

A I cannot say exactly what he sent, but I do know that he kept one pay for himself and one he sent to his father.

Q How long had that been his custom previous to his death?

A It was necessary when he arrived to this country that he should go to work and also send some money to his father.

Q How long had he been doing that previous to his death?

A During the entire time while in America he would keep one pay for himself and the other to his father.

Q Did you ever go with your brother when he procured any drafts or money orders to send to his father?

A Yes, I used to go with him as I have some papers here (produces papers), which I found after his death.

Q At the time your brother sent money to his father would he obtain any receipt or memorandum as to the money he sent?

A Yes, sir, he received—

Q Have you any of those receipts?

A I have some.

Q Let me see them, please?

A Some I found and some I did not find. (Produces papers.)

Q What is your father's name, his Christian name?

A Andrew Grybowski.

Q Where does he live?

A In the old country.

Q Whereabouts in the old country?

A Wolinski, the state.

The Court. What country?

A Russian Poland.

Q Ask him what village his father lived in?

A Dudy.

Mr. Hardenbrook. I offer three receipts produced by the witness of remittances from Joseph Grybowski to Andrew Grybowski, in the village of Dudy, one for seventy rubles, one for thirty rubles, and another for seventy rubles.

(Papers marked Exhibits P. 3, 4 and 5.)

Q Did you go with your brother to procure remittances to send to your father more than three times in all?

A I went quite a number of times. Only the papers for these I found after his death, and some I did not find.

Q Did you have charge of the funeral of your brother?

A I buried him.

Q What was the undertaker's bill?

Mr. Hobart. I object.

Q And the expenses of the funeral?

Mr. Hobart. I object to it as not a part of the damage.

Mr. Hardenbrook. I will withdraw it.

The Court. Do you know the value of a ruble in United States currency?

The Interpreter. About fifty cents.

Cross examination by Mr. Hobart.

Q Has your father lived in Russian Poland all of his life?

A The whole of his life.

Q And he was in Russian Poland then at the time your brother was killed?

A Yes, he was. He was with his father until he arrived in this country.

Q Does he live there yet?

A He lives there in the same place.

Q Do you know how much your brother earned?

A Sometimes he would make thirty-three and thirty-four dollars a pay day.

Q How often were you paid?

A Twice a month.

Q Did your brother send money to his father through a banker in Jersey City?

A From a man named Snitzer, from New York, and a man named Gross, in Jersey City.

Q Is that Mr. Emanuel Gross?

A The place of business on Henderson street.

Q 325 Henderson?

A I don't know the number.

Q How much did your brother send through Mr. Gross?

A I have not found the papers. They got destroyed—but these I found.

Q Did he go to Mr. Gross about as often as he went to Mr. Snitzer?

A Sometimes he would send through Snitzer and other times through Gross, but those papers I found from Snitzer, and Gross' papers I did not find.

PLAINTIFF RESTS.

DEFENDANT'S MOTION TO NON-SUIT.

Mr. Hobart. If your honor please, I ask for a non-suit. For convenience I will hand your honor a statement of the grounds, and I will read those of them that may be applicable to the evidence as now produced.

First, defendant was not engaged in inter-state commerce at the time of this accident, within the meaning of the Federal statute; the engine that struck the decedent had completed its trip, passengers were discharged, engine had backed; the accident happened while engine was at the ash pit for the purpose of having the ashes removed.

Second. Plaintiff's intestate was not engaged in inter-state commerce at the time of the accident; the work he was doing being merely to keep the ash pit in proper working order, and so far as the particular engine was concerned the ashes had not been dumped into the pit at the time of the accident, and there is no proof that any of the ashes that the intestate had to do with came from the engine engaged in inter-state commerce. So far as any proof on the subject is concerned—as far as can be gathered from the proofs as testified to—all of the engines that dump these ashes,

even if engaged in interstate commerce, had completed their trips and were no longer so engaged at the time of the dumping.

Third. No negligence has been proved on the part of the defendant, or any of its officers, agents or employees. When the engine was moved there is no proof of any failure to give any customary signals. There is no proof that any of the employees knew that plaintiff's intestate was coming from the manhole at the time the engine was moved.

Fourth. The risk of injury was assumed by plaintiff's intestate in coming out of the manhole at a time when he knew or with reasonable care on his part should have known that the engine was moving and was in plain sight.

The fifth ground is out under the proof.

Sixth. Under the Federal statute, on which this suit is based, even if there was any proof of pecuniary loss, the plaintiff cannot recover, as the benefit of the Federal statute does not accrue to non-resident aliens. (See McGovern *vs.* Philadelphia & Reading Railroad Company, 209 Federal, 975.)

Seventh. The rights of the parties hereto are governed and limited by the provisions of Chapter 95, New Jersey laws of 1911, and this court therefore has no jurisdiction to entertain this cause of action.

(Discussion.)

(During the argument the stenographer was instructed to note on the record that the plaintiff's decedent was a single, unmarried man, with no children.)

The Court. The court will deny the motion for non-suit. You may have you objection entered.

Mr. Hobart. Note an objection.

DEFENDANT'S TESTIMONY.

ANTHONY J. RODEN, sworn.

Direct examination by Mr. Hobart.

Q On the 11th and 12th of January, 1912, where were you employed, Mr. Roden?

A Ash pit, acting foreman.

Q For the Erie Railroad Company?

A Yes.

Q Did you know Frank Savage who testified a few moments ago?

A Frank Savage, yes.

Q Did you know Joseph Grybowski?

A Yes.

Q What time did you go on duty on the night of January 11th?

A Six P. M.

Q What was your position at that time when you went on duty?

A I was put there as acting foreman on the ash pit—the regular—

Q Took the place of the regular man?

A The regular man reported sick.

Q Did you see Grybowski working there that night?

A Yes.

Q What was he doing?

A Why, he was laboring around there until it was time to start up and unload the bucket, or unload the pits, clean them out.

Q Did you see him working in the pit that night?

A Yes—I didn't just see him working in the pit, but I gave him orders to go down here and get ready to start cleaning out the pits.

Q Describe what his work was?

A Why, first start off, we start up the gas engine and get the endless chain buckets to going, and he came and got his torch and after he got his torch he

start down the ladder; after he got down there, why, Mr. Savage was put there by me to work on top, plugging down the ashes.

Q About what time was that in the evening?

A That was between eleven and twelve we started, some time around there.

Q What was the purpose of these buckets and what did they do?

A Them buckets, why, we had a hopper—the ashes fell in from the locomotives and after this pit was filled, we watered it down and pulled it off, and after that this man went down and worked as, what they call a hopper slide—after he opened his slide the ashes from this hopper fell into what they call a worm, and this worm revolved and had on it the buckets, and these ashes fell into the buckets and these buckets carried the ashes to the top.

Q The first process of the dumping of the ashes then was to let them fall into this hopper?

A Yes.

Q Then when the hopper got full the slide in the hopper would be released?

A Yes.

Q After that was released then the ashes would fall into this worm carried into the buckets?

A Yes.

Q Where were the buckets taken? A Up to a brick chute we had made up on top, way up on the other end of the pit.

Q Where did they go after that?

A Why, we used to have the yard gang come around there with cars and we had chutes on that we opened and dropped down into the cars and taken away.

Q How many ash pits were there?

A Well, one ash pit, but four hoppers.

Q I show you a blue print, which I think you have already seen, and ask you if you can state whether or not that represents the layout of the tracks and the

gas engine house and ash pits as they were in January, 1912?

A Well, as far as I can see to my ability on this blue print it is pretty near the same as the ash pit we had.

Q It was not changed since then?

A Oh, yes; we got a different one altogether now.

Q There was what is called a manhole?

A Yes.

Q About at the place indicated?

A Yes; supposed to be a rail in it.

Q Apparently this is indicated as near a rail.

A Yes.

Q Is that the way it was?

A Yes.

Q Near the south ash pit?

A Yes.

Q Does that represent the location of the gas engine house?

A Yes—two arc lights.

Q These places that are indicated here as conveyors, was that where the buckets run?

A Yes, right near the engine house.

Q How many engines could be placed over the ash pits at the same time?

A Four.

Q Two on each track?

A Yes—provided you want to dump the ashes into the hopper; is that what you want?

Q Yes.

A Yes, sir.

(Blue print offered in evidence and marked Exhibit D. 1.)

Mr. Hardenbrook. Is it substantially the same? There has been change made there, but is that substantially what it was?

The Witness. Yes—the engine house—channels—buckets. (Indicating.)

Q Where was Grybowski that night the last time you saw him? A The last time I saw him?

Q I mean before he was hurt?

A Before he was hurt? He was downstairs the time he was cleaning out the buckets.

Q You mean down in the pit?

A Down in the pit.

Q How did you get down that pit?

A Walked down that ladder facing the west end.

Q The ladder was located at the west end of the man-hole?

A Yes; when you went down the ladder you were facing toward the west.

Q Did you see him go down?

A Yes; I seen him go down before we started.

Q After he went down what did you do?

A Why, I gave orders then to Mr. Savage to start.

Q Meaning the gas engine?

A Yes.

Q He was the engineer in charge of that?

A Yes; I had him outside that night—I always put two men together, so they can talk to each other.

Q Did you see a locomotive come over the ash pit that evening, the locomotive that afterwards ran over Grybowski; did you see it coming?

A I didn't notice it, because we were inside. We were all down here working when this accident happened, for this accident happened right after we had done all our work cleaning out of the pit. I was standing in the engine house, waiting for the gas engine to stop, to make an examination of the engine, which we are supposed to do, so she will be ready for the next trip at four o'clock.

Q Do you know what the number of the locomotive was?

A Well, I do know, yes, after the accident I looked.

Q That is what I mean?

A Yes; 974.

Q Had you seen that locomotive at any time before the accident?

A No.

Q At the time the accident happened were you then in the gas engine house?

A Yes; when the accident happened I was in attending to the engine.

Q Didn't see anything of it yourself?

A No, sir.

Q Didn't know that the engine was moving at that time?

A No, sir.

Q Had you given any instructions to Grybowski that night as to what work he should do?

A No, sir; only just go down there and clean out the pits, that is all.

Q Well, had you given him any directions as to what he should do after the pits were cleaned out?

A No; he was supposed to know.

Q What was he supposed to do?

A He was supposed, after he got done cleaning out the pits, climb up and clean all around the pits on the surface.

Q He could do that without being specially instructed?

A Yes; that was his duty.

Q Do you recall whether he was working there before?

A Well, I kind of have a kind of a recollection he did work there before, but—

Q Well, if you are not sure about it—

A I ain't sure about it, no.

No Cross Examination.

EDWARD A. ROSE, sworn.

Direct examination by Mr. Hobart.

Q You work for the Erie Railroad Company, Mr. Rose?

A Yes.

Q On the night of this accident to Grybowski where were you employed?

A As a hostler in the ash pit.

Q What engine did you have charge of shortly before the accident?

A 612.

Q What kind of an engine was that?

A A switch engine, used to switch cars in and about the terminal.

Q What track was that engine on shortly before the accident?

A On the south ash pit track.

Q Was your engine dumped into the hopper?

A Yes, sir.

Q Did you see engine 974 coming towards you?

A Yes.

Q What did you do when 974 came along?

A I got up and moved 612 off the hopper to allow 974 to take its place.

Q Which way did you move your engine?

A West.

Q Did you clear the hopper?

A Yes, sir.

Q At that time did you see anything of Grybowski?

A No, sir.

Q Did you know where he was at the time?

A I supposed he was in the hole.

Q Well, had you seen him down there?

A I had not seen him, no.

Q Had you seen him go down?

A No, sir.

Q Did you see the accident?

A No, sir, I did not see the accident; I saw it shortly afterwards.

Q What did you see afterwards?

A I saw he was pinned under the tank of 974.

Q How close behind you did 974 come?

A Well, I saw him coming off the turntable about, I should judge, maybe two hundred and fifty feet away; by the time it took me to walk fifteen or twenty feet to get up in the engine and move her she was about forty feet away and followed me right on the ash pit.

No Cross Examination.

THOMAS SHANNON, sworn.

Direct examination by Mr. Hobart.

Q You are the day foreman of the ash pit, Mr. Shannon?

A Yes.

Q You were not on duty then at the time of the accident?

A No, sir.

Q Now, I want you to tell us a little more in detail the construction of the ladder leading into the man-hole?

A The construction of the ladder, first, there was five steps on it and then a platform, and there were six more steps, those extending from the platform to the bottom.

Q How far below the level of the ground was the first platform?

A Well, about, as near as I can judge, about five foot, maybe more.

Q Which part of the man-hole was the ladder built on, which side of it?

A On the south side.

Q Well, that would be towards the west?
A Well, it would be—
Q Take an engine headed west?
A In about the middle, yes.
Q How wide was the ladder?
A It was about, I should judge, about fifteen inches wide.

The Court. Can it be shown on the blue-print which you have the direction in which the ladder was down that man-hole?

Q Let's see if Mr. Shannon can show it. Have you seen this print (indicating Exhibit D. 1)? I may be permitted to explain it, so he may understand it.

Mr. Hardenbrook. No objection. Let Mr. Hobart explain it.

Q There is a man-hole shown on here?
A Yes. This is the gas engine house, here is the two tracks here, here is the man-hole.
Q Which way was the ladder?
A Right down here.
Q Can you put an X on it?
A Here is the man-hole and here is the ladder right here.
Q Just mark it with a pencil; mark it X.

(Witness complies, and marks plan with an X.)

By the Court.

Q If you were going to go down that ladder where would you go to do it? Just show with the pencil?
A Just go right down. Here is the ladder and you come to the platform.
Q Would you start to go down here or here or here?
A I don't know, you could get from here or you could step from here in.
Q Could you step from this track?

A It was not a bit handy. The railing is there.

By Mr. Hobart.

Q A man going down that ladder or coming up that ladder would face towards the west?

A When he is coming up he is coming up west, with his face towards the west.

No Cross Examination.

FRANK SAVAGE, re-called and examined through Interpreter.

Direct examination by Mr. Hobart.

Q At the time Joe went to work on the ash pit did you say anything to him about looking out for engines?

Mr. Hardenbrook. I object. I submit that this ought to have been gone over on cross examination.

Mr. Hobart. Counsel would have objected at that time.

The Court. I will permit it.

A I said, "Watch yourself"; I went and took him down the put and showed him.

Q Did you show him where the ladder was?

A I did, and the buckets where he stood.

Cross examination by Mr. Hardenbrook.

Q That was when this man Grybowski first went to work, when he gave him these instructions?

A Yes, sir.

Q That was some days before he was killed?

A Three or four or five days before.

JOHN CARLO, sworn.

Direct examination by Mr. Hobart.

Q You are employed by the company, Mr. Carlo?
A Yes.
Q In what position?
A Well, I am in the tool room now.
Q At the time of this accident to Grybowski, where were you employed?
A I was foreman of the pit, but I was sick, I was off, sick.
Q Did you know Grybowski before he was hurt?
A Yes, sir.
Q How long had you known him?
A Oh, known him about six—about six months, between six and seven months.
Q Had he ever worked in the ash pit before this time?
A Yes.
Q When?
A Well, he was hired in January, 1911.
Q How long did he work?
A From the 24th of January, 1911, until the 3rd of July, 1911.
Q Did he work at night all that time?
A Yes.
Q On this same pit?
A On the same pit.
Q And doing the same kind of work?
A No, sir; he was fire cleaning at the time before?
Q And the fire cleaners work on the ground, do they?
A No, they clean fires.
Q They are not supposed to go down in the pit?
A No, not fire cleaners.
Q Now coming back to the time he was hurt, how long before he was hurt had he been working in the pit?

A Why, when he was hired again on the 6th of January, 1912.

Q Worked every night up to the time of the accident?

Q Well, yes, as far as I know. He worked three nights for me, when I was working there, and I laid off, he worked the 6th, 7th and 8th, and I laid off on the 8th, and he was hurt on the 11th.

Q Did you say anything to him about looking out for engines?

A Yes, sir.

Q What did you say?

A I always notified him.

Q What?

A I always notified him when he went down the hole to clean those pits to look out coming up.

By Mr. Hardenbrook.

Q How many men have been killed in that ash pit the last two years?

Mr. Hobart. I object.

The Court. Is it material?

Mr. Hardenbrook. I will withdraw it.

GEORGE SHEDDLAR, sworn.

Direct examination by Mr. Hobart.

Q You are employed on the railroad as a locomotive engineer, I believe?

A Yes, sir.

Q Have been for how long?

A Twelve years engineer, twenty-four years all told.

Q Were you in charge of engine 974 on the night when this accident happened?

A Yes.

Q You had gone on the train, I understand, up into the passenger yard?

A Yes, sir.

Q Or passenger shed?

A Yes.

Q And did you leave the train there?

A Sir?

Q Did you leave the train there and then run your engine out, or what did you do?

A I don't remember now whether we kicked the train out or a switch engine came after the train; anyway we backed the engine from the shed up to the turntable.

Q When you got upon the turntable was there any train fastened to your engine?

A No, no.

Q What did you do with the turntable?

A Put the engine on the table.

Q Turn around?

A Turn around.

Q Where did you go then?

A Started off the table a little ways, and stopped. The reason I stopped was because I could not run right up on the pit on account of another engine ahead of me.

Q How long did you wait?

A Well, about five minutes or ten minutes, I don't remember just exactly.

Q Then this other train moved away?

A Moved up ahead and I followed right up.

Q Which end of the pit did you come on—on the east end or west end?

A Why, on the pit next to the gas house here.

Q That would be the south track, but which end of it?

A All right—

Q There are two pits there, aren't there?

A Yes.

Q Two pits on each track. When that engine moved away how far up over the pit did you go with your engine?

A Why, I run right along up to the second pit. There is two pits there. I run over the first pit and run up to the second pit and give another man a chance to follow me up.

Q Were you on your engine at that time?

A No, sir.

Q Who was?

A The fireman.

Q Where were you?

A I was on the ground.

Q What were you doing on the ground?

A When I got off the turntable I stopped, just as I told you, I could not run up on the pit, and got down on the left side to examine this engine. In the meantime, why, this engine ahead moved on, so I hollered up to the fireman to keep on going up the pit, and I followed the engine right up, walking as fast as she moved—moving very slowly. It was a cold winter's night, plenty of snow there on the ground, it was hard walking, it was slippery walking, so I went nice and easy and I followed the engine right along, up to the second pit and stopped there.

Q Then what did you do?

A The fireman stopped and I followed the engine up in front—I think that the pilot of the engine—I presume you know what the pilot is on a locomotive?

Q Please tell us, what was it?

A Well, some people call it the cowcatcher, but we ain't catching no cows with it—the proper name for it is the pilot—that is the front part of the engine, made out of wood.

Mr. Hardenbrook. For catching people with it at grade crossings.

Q Never mind, go on.

A I walked in front of it and I seen the pilot was over a lot of hot cinders and ashes—you know what the consequences is when you put a piece of wood

over hot fire, they burn up. Well, so I hollered up to the fireman to move back a little, about two or three feet.

Q When you hollered to the fireman were you still on the ground?

A I was still on the ground.

Q On which side of the engine were you?

A Well, I was on the right side.

Q On the right-hand side of the engine?

A Yes.

Q Looking in which direction?

A Back.

Q And the engine was headed west?

A West.

Q You were looking east?

A I was looking east.

Q Right alongside of the track on which the engine was?

A Right alongside of the track I was, right alongside of the track.

Q When you looked back did you see anybody?

A No, sir.

Q Did you take any pains to see if there was any one around the man-hole?

A Well, I couldn't hardly help seeing anybody, if there was anybody near it.

Q Did you see anybody around the man-hole?

A No.

Q Did you look to see if there was anybody there?

A Why, I looked back, right straight back, because it is customary when you move an engine, back up or go ahead, you always look the direction you move.

By the Court.

Q Well, where was this man-hole, on the same side of the engine you were on?

A Yes, sir.

George Sheddlar, direct.

By Mr. Hobart.

Q Was there anybody anywhere around the man-hole when you looked about and hollered to the fireman?

A No, sir.

Q Could you see the man-hole?

A No, well, you could see it if you made it your business to look right at it—it is just back of the tanks.

Q Were there some arc lights around there?

A There was a big electric light, but not quite near the head—a few feet back of it.

Q At the time you told the fireman to back was there anybody then in sight around the man-hole?

A No, nobody in sight.

Q How far did the fireman back?

A Oh, I should judge, about three or four feet.

Q Now he was on the same side of the engine as you were?

A Yes.

Q That is, he had moved over to the engineer's side, had he?

A Yes.

Q Was he looking back?

A He was looking back, yes.

Q When you moved this three or four feet was there any signal given?

A No.

Q Now what the first thing you knew of anything wrong?

A After he backed up.

Q Yes.

A Why, just as quick as he backed up about three or four feet, well, you can imagine how long it took, just a few seconds, of course, we heard some one holler and he stopped.

Q Right at that time where were you standing with reference to the engine?

A Well, just about the same place; I followed him right back.

Q When you told the fireman to back, were you alongside of the engine, or behind the engine, or where?

A No; I was right alongside of the engine, between the engine and tender.

Q How far were you then from the man-hole?

A Well, let me see, perhaps—I couldn't just say exactly, maybe eight or ten feet.

Q About eight or ten feet?

A About eight or ten feet.

Cross examination by Mr. Hardenbrook.

Q The fireman, as I understand you to say, ran the engine a little bit too far over this ash pit?

A Yes.

Q And then it became necessary for you to tell him to move it back some three or four feet?

A Yes, sir.

Q At that time that you told him to move it back three or four feet this man Grybowski had not been hurt, had he?

A He had not been hurt?

Q What's that? He had not been hurt?

A No, not that I know of.

Q Then I understand you to testify that you told the fireman to move the engine three or four feet?

A Back.

Q And that he did it without giving any signal?

A He did it without giving any? What kind of a signal do you mean?

Q Never mind. Your counsel asked you if any signal was given when you moved back three or four feet and you said no, didn't you?

A Well—

Q Did you say it? Yes or no?

A Wait a minute. I don't understand what you mean.

Q When Mr. Hobart, the counsel for this company, asked you on direct examination a moment ago,

if any signal was given when he backed back those three or four feet, you said no signal was given, didn't you?

A Well, that is enough. When I tell him to back up three or four feet, that is my signal—that is for him to back up.

Q Well, there was no bell rung or whistle blown?

A Yes, sir; the bell was rung.

Q What did you mean when you told Mr. Hobart no signal was given?

A What I mean by that, by signal—giving a man the back up signal or to come on or to go ahead—not by ringing a bell or blowing a whistle. We don't call that signalling.

Q It was this moving back those three or four feet which became necessary for the reason that the fireman had gone on too far which caused the accident to the man, was it not?

A Was it necessary to back up?

(Question repeated.)

A It was necessary, yes.

JEREMIAH McCARTHY, sworn.

Direct examination by Mr. Hobart.

Q Were you the fireman with Mr. Sheddlar on the night of this accident?

A Yes, sir.

Q You recollect you engine going into the passenger shed with the train?

A Yes.

Q Where did you go after that?

A We backed it on the turntable.

Q What was your recollection as to whether you backed up with the train or whether you backed up light?

A Why, we backed up light.

Q After you got to the turntable where did you go?

A Why, we turned the engine around and pulled up over the ash pit.

Q Who was running the engine as it pulled towards the ash pit?

A Why, the engineer, until we came close to the ash pit.

Q Did you stop before you got to the ash pit?

A Yes.

Q What did the engineer do after you stopped?

A He lit a torch and got down on the left side and walked around to the right side on the front of the engine.

Q Did you take charge of the engine then while he was on the ground?

A Yes.

Q What did you do in the way of operating the engine?

A By that time 612 was on the pit ahead of us and he moved out of the pit, and the engineer on the ground said, "Move the engine up on the pit now," and I started the bell ringing and moved up very slow, and he moved around on the right side of the engine, and I got up on the pit and I stopped—I went a little bit too far over the pit. On account of the red firebox in the front of the engine, he said to me, "Back up a little bit." The bell was still ringing and I reversed the engine and I backed up three or four feet.

Q At the time you backed up those three or four feet on which side of the engine were you?

A I was on the right side.

Q Was that the same side on which the engineer was at that time?

A Yes.

Q When the engineer gave you—or when the engineer told you to back up, which way were you looking?

A When he told me to back up I turned around and looked to see if there was anything back of me.

Q You were looking then towards the rear of the engine?

A Yes.

Q Did you see anybody anywhere around this man-hole at this time?

A No; no.

Q Did you see anybody anywhere around it when your engine was backing?

A No, sir.

Q What was the first you knew that any accident had happened?

A Why, I heard the fellow holler.

Q At the time your engine was moving the three or four feet what was your bell doing?

A The bell was ringing.

Q What kind of a bell was it?

A Just an ordinary engine bell.

Q Runs by air, does it?

A Yes.

By a Juror.

Q It is an automatic device?

A Yes.

By Mr. Hobart.

Q Will you kindly tell us how it does operate?

A By opening a little valve in the cab the air goes out into the pipe, into a cylinder right close to the bell—when the air goes in and whenever it raises the piston in the cylinder up it starts the bell ringing.

Q Will the bell keep on ringing until the device is shut off?

A Yes, until you shut off the bell.

Q At the time you moved your engine for those three or four feet, had the ashes been dumped?

A No, sir.

Louis Gross, direct.

Cross examination by Mr. Hardenbrook.

Q How long had you been running an engine?

A Hadn't been running an engine at all; been firing for twenty-eight years.

Q A fireman?

A Yes.

Q Never did run an engine, did you?

A Well, I have run an engine around the yard and around the ash pit.

Q I couldn't hear you?

A Around the yard and around the roundhouse.

Re-direct examination by Mr. Hobart.

Q Were there any men working around the engine before you started to back up?

A Yes, there was two firemen or two men going to clean the fire out.

Q Was anything said by either you or the engineer to them?

A The engineer said, "Look out; we are going to back up a little bit."

Q How loud did he speak when he said that?

A Well, he hollered it right loud, so I could hear him up on the cab; he was on the right side.

Q What did these men do when he hollered?

A They just pushed out of the way.

Q Got out of the way?

A Yes.

LOUIS GROSS, sworn.

Direct examination by Mr. Hobart.

Q You are in the employ of Mr. Emanuel Gross?

A Yes.

Q He has a place of business at 325 Henderson street?

A 315.

Q Has had for some years past?

A Yes.

Q In connection with that business does he send drafts and checks to the various parts of Europe?

A Yes.

Q Are you familiar with the books and the way they are kept?

A Well, I could tell you if any money has been sent, yes.

Q You have a record of all moneys passing through the office?

A We have.

Q Have you, at my request, gone through your books for the year 1910 and 1911?

A I have gone through the latter part of 1910 and 1911.

Q All of 1911?

A All of 1911.

Q Have you been able to find any record of any remittances sent through your office by a man by the name of Joseph Grybowski?

A I have not found any by the name of Joseph Grybowski, but I found others by the name of Grybowski.

Q But not by Joseph Grybowski?

A Not by Joseph.

No Cross Examination.

Both Sides Rest.

MOTION FOR DIRECTION OF VERDICT.

Mr. Hobart. If your honor please, I move for a direction of verdict, and in as much as the evidence may be changed slightly, perhaps I would better repeat the grounds of the motion:

First. The defendant was not engaged in inter-state commerce at the time of the accident within the meaning of the Federal statute; engine 974 had completed its trip, passengers had been discharged, engine had backed to the turntable and thence to the ash pit for the purpose of having the ashes removed; and there was no proof to show where it was going after the ashes had been removed, nor whether or not it was regularly engaged in inter-state commerce.

Second. Plaintiff's intestate was not engaged in inter-state commerce at the time of the accident; the work he was doing was merely to keep the buckets and ash pit in proper working order; so far as engine 974 was concerned, the ashes from that engine had not yet been dumped into the pit at the time of the accident, and there is no proof that any of the ashes that the plaintiff's intestate had to do with came from engines engaged in inter-state commerce; so far as there is any proof on this subject all of the engines that dump such ashes, even if engaged in inter-state commerce, had completed their trip and were no longer so engaged.

Third. No negligence has been proved on the part of the defendant or any of its officers, agents, or employees, even if the Federal statute applies. When engine 974 was moved there is no proof that there was any failure to give any customary signal. Further, there is no proof that any of the employees knew that the plaintiff's intestate was coming from the manhole at the time the engine was moved. He had given no notice that he was about to do so, and the em-

ployees who have charge of the engine looked to see if there was any one on the track at the time the engine was moved, and their evidence is undisputed that they saw no one.

Fourth. The risk of injury was assumed by plaintiff's intestate, in coming out of the manhole at a time when he knew, or with reasonable care on his part should have known that the engine was moving or about to move; it was in plain sight of him as he climbed up the west side of the manhole, and only a few feet distant.

Sixth. Plaintiff cannot recover, as the benefit of the Federal statute does not accrue to a non-resident alien.

Seventh. The rights of the parties hereto are governed and limited by the provisions of Chapter 95, New Jersey laws of 1911.

(Discussion.)

Adjourned to March 17, 1914.

Jersey City, N. J., March 17, 1914, trial of cause resumed at 10 A. M.

The Court. The court will announce at this time, as suggested at the adjournment last evening, that it would announce its conclusion upon the motion to direct a verdict, this morning.

The court declines to direct a verdict, and the defendant may have its objection entered.

It is stipulated that by the mortality table, plaintiff's Exhibit P. 2, the expectancy of life of the deceased is forty years, and the expectancy of life of the father is twenty years.

COURT'S CHARGE TO JURY.

Gentlemen of the Jury:

This is an action brought under the Act of Congress entitled "An Act relating to liability of common carriers by railroad to the employees in certain cases," which act was approved April 22, 1908, and the amendment thereto approved April 5, 1910. Section one of the act approved April 22, 1908, is as follows:

> "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 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 representatives 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, tracks, roadbed, works, boats, wharves or other equipment."

Before you can find for the plaintiff, the burden is upon the plaintiff or the plaintiff's witnesses to satisfy you by the greater weight of the evidence on the following points: First, that the defendant company was engaged at the time of the accident in interstate

commerce by railway; that is, operating in one or more states or parts of states as distinguished from operating entirely within the borders of a certain state, and as described also in the section of the act which I have just read to you. Second, that the plaintiff's intestate, that is, Joseph Gribowski at the time of the accident was an employee of the defendant engaged in such inter-state commerce. Upon these points the courts have said:

> "The Federal employers' liability act (which is the common title given to the act which I have read you a part of) applies only to injuries suffered by employees while the carrier is engaged in an act of inter-state transportation, and to such employees only as at the time of the injury have a real and substantial connection with such act of inter-state transportation."

And again:

> "Under the Federal employers' liability act a right of recovery exists only where the injury is suffered while the carrier is engaged in inter-state commerce and while the employee is employed in such commerce, but it is not essential that the co-employee be also employed in such commerce."

And again:

> "One engaged in the work of maintaining tracks, bridges, engines or cars in proper condition after they have become and during their use as instrumentalities of inter-state commerce, is engaged in inter-state commerce, and this even if those instrumentalities are used in both inter- and intra-state commerce."

The third point that I have just called your attention to is that the accident or fatality was occasioned by the negligence of the defendant or its employees. This must appear from a clear preponderance of the

evidence, and the obligation to show negligence in the defendant or defendant's employees is upon the plaintiff or the plaintiff's witnesses. The mere fact that an accident happened is not enough to fix legal responsibility upon the defendant, nor does it prove that the defendant or the defendant's employees were negligent.

There is no statute in the State of New Jersey, nor does the court know of any holding of any court of the State which fixes or regulates or requires an audible warning or otherwise, by ringing a bell or blowing of a whistle or other means of warning where the engine or locomotive is in the railroad company's yard. The duty of the defendant and the defendant's servants was to use reasonable care. When they have done that they have performed their full duty, and if it is not shown to you by the evidence upon the part of the plaintiff and through the plaintiff's witnesses that they failed in the use of reasonable care, which is what a reasonably prudent person would do and perform at the time and under the circumstances and conditions existing, then the plaintiff has failed to show negligence, and of course your verdict must be for the defendant. If the evidence does not warrant you in finding all of these three items, or if you are unable to find any one of them, then your verdict must be for the defendant, because the plaintiff must have shown you by a fair and satisfying preponderance of the evidence that those three items existed before he can under any circumstances recover.

If you find that the plaintiff has by a clear, fair and satisfying preponderance of the evidence shown you that these three items of which I have just spoken exist, then you may turn your attention to the consideration of contributory negligence and assumption of risk on the part of the plaintiff's intestate, that is, Joseph Grybowski.

Contributory negligence is the doing or not doing of those acts and things which a reasonably prudent

person, under the existing circumstances and conditions, would or would not have done to have avoided injury to himself, and either the doing or not doing of which was the proximate cause or causes of the injury.

Upon the assumption of risk, the Federal court has said:

> "That an employee may have assumed a risk from one of two contributing causes of an injury will not defeat his right to recover where the other cause is one for which the master is liable."

If you conclude, under the rules and instructions which I have given you, that the plaintiff is entitled to recover, then you are to keep in mind this, that such recovery can only be for the benefit of the father, a man fifty years of age and whose expectancy of life, measured by the table of mortality which is in evidence, is twenty years; the recovery can only be for the pecuniary or money loss sustained by the father because of the deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased. The pecuniary loss or damage must be one which can be measured by some pecuniary standard. It is not for the loss of society or companionship. There must appear some reasonable expectation of pecuniary assistance or support of which the father has been deprived. The testimony on the part of the brother of the deceased was that thirty-two dollars was forwarded by the deceased during his lifetime to the father every other pay day, which has been explained to mean ever other two weeks.

There have been offered in evidence receipts of transmission of money as follows: September 29, 1909, 70 rubles.

The receipt itself shows the value in our currency of 70 rubles to be $36.50. Another under date of Jan-

uary 13, 1910, for the same amount, 70 rubles, in our currency being $36.50. A third dated April 1, 1911, for 30 rubles, showing in our currency a value of $15.75. It is further in the testimony that the earning capacity of the decedent was about ten dollars per week when working full time. The contribution was no doubt dependent upon decedent's earnings and his own necessity for money and his personal desire to contribute, and there was nothing compulsory. Now you must deal with probabilities as to this contribution. The mortality table, which is in evidence, would show that the deceased had a probable expectancy of life of forty years, he being twenty-two years of age. Among the probabilities which you must take into consideration are these—they may not be all; there may be others which you will find: the son may have died from natural causes soon after the accident, had an accident not happened; so might the father; the father may not live the twenty years which the mortality table shows; he might die at an earlier age; the son might have become out of employment and not have been earning any sum of money from which he could contribute to the father; he might have married and his entire earnings might have gone to the support of his family, and the contribution entirely taken away from the father. You must take all such probabilities in consideration in arriving at a verdict, if one you are to arrive at for the plaintiff.

Then again, whatever sum you find for the plaintiff, if you find any, must be what is known as a capital fund; that is, it must be the present value or present worth of that sum which you would otherwise find would be the total of his contributions. Again, you must be satisfied by a clear preponderance of the testimony of the plaintiff's witnesses that the decedent's father had a reasonably probable expectance of contributions, and you must also be satisfied as to the amount thereof; because, if the plaintiff's witnesses

have not satisfied you as to this point, you have nothing upon which you can base your verdict and therefore you cannot find a verdict.

On the question of contributory negligence, to which I have before alluded, I have to say to you that in an action upon this statute or under this statute contributory negligence may not defeat the right of the plaintiff to recover. Section 3 of the act provides, among other things, this:

> "The fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

If you find that plaintiff's intestate was guilty of contributory negligence, then, if you have to find the amount of damages to which decedent's father is entitled, you are to abate or deduct from that sum the amount you shall find represented decedent's proportionate contributory negligence, and your verdict will be for the difference.

Now, gentlemen of the jury, you must carefully keep in mind the different points upon which I have attempted to advise you. You are not to take the statement of court or counsel as to the testimony, but you are to depend upon your recollection of what the testimony was as it was given; from that you are to determine what are the facts. Those facts are the evidence in the case, and from those facts and that evidence you are to draw the conclusions, and the evidence and conclusions applied to the law and *vice versa* will be the method in which you will determine what your verdict shall be.

I have been asked to charge several charges on the part of the defendant.

The first request I refuse, except as I have already charged upon that point.

The second request is: "If the jury find that the plaintiff's intestate either in fact knew or by the exercise of reasonable care on his part should have known that the engine by which he was struck was approaching, then he assumed the risk and there must be a verdict for the defendant." I decline to charge in that language, but in place of it I charge as follows: that if you find from the evidence that the deceased party knew or reasonably should have known the risks surrounding his employment and work and that it was in disregard of that knowledge on his part which he had or should have had that the accident happened, you may find that he assumed the risk that brought about his death, and in that event you may find for the defendant.

The third request I decline.

The fourth request I decline.

The fifth request is: "If any verdict is found in favor of the plaintiff, the amount thereof must be limited to such amount as will compensate the father of the plaintiff's intestate for the pecuniary or money loss sustained by him by reason of the death of plaintiff's intestate." I charge that, in connection with what I have already charged upon that subject.

The sixth request I refuse.

The seventh request I also refuse, except as I have already charged upon it.

THE JURY RETIRED.

DEFENDANT'S OBJECTIONS.

Mr. Hobart. On behalf of the defendant I object to the charge on the following points:

I object to the refusal of the court to charge defendant's first request in the language of the request.

I object to the refusal to charge defendant's second request as requested, and to the modification of the language.

I object to the refusal to charge defendant's third request.

I object to the refusal to charge defendant's fourth request.

I object to the refusal to charge defendant's sixth request.

I also object to the refusal to charge defendant's seventh request.

Then as to the main charge I object as follows:

I object to the part of the charge which, in discussing the question of whether or not the carrier was engaged in inter-state commerce, said that one engaged in repairing the instrumentalities of inter-state commerce was engaged therein.

I object also to the court's leaving that question to the jury at all, on the ground it is a question of law.

I also object to the court leaving to the jury the question whether the plaintiff's intestate was himself employed in interstate commerce, on the ground that that was a question of law.

I also object to the part of the charge which dealt with the question of assumption of risk, particularly that part which purported to quote from some case, as follows: "That an employee may have assumed a risk from one or two contributing causes of an injury will not defeat his right to recover where the other cause is one for which the master is liable."

I also object to that part of the charge which dealt with the question of contributory negligence and directed the jury that they might deduct from any verdict they might find the decedent's proportionate contribution. That is in connection with the seventh request, which was refused.

COPY OF DEFENDANT'S REQUESTS.

1. Before the jury can bring in a verdict in favor of the plaintiff and against the defendant, they must find first that the defendant at the time of the accident was engaged in interstate commerce, and second, that at said time plaintiff's intestate was employed by the defendant in such commerce; if the jury conclude that the plaintiff has failed to prove either one of these two facts, there must be a verdict for the defendant.

2. If the jury find that the plaintiff's intestate either in fact knew or by the exercise of reasonable care on his part should have known that the engine by which he was struck was approaching, then he assumed the risk and there must be a verdict for the defendant.

3. Plaintiff's intestate had no right to rely upon any signals being given by bell or whistle when the engine by which he was struck was about to be moved.

4. The amount of damages recoverable by the plaintiff's intestate, if a verdict is found in his favor, must be limited to the expenses of last sickness and burial, not exceeding the sum of two hundred dollars, as provided by Chapter 95, New Jersey Laws of 1911.

If number four is denied, then, in that event, the following requests are submitted:

5. If any verdict is found in favor of the plaintiff, the amount thereof must be limited to such amount as will compensate the father of the plaintiff's intestate for the pecuniary or money loss sustained by him by reason of the death of plaintiff's intestate.

6. The evidence in the case shows that the father of the decedent, for whose benefit this action is brought under the Federal Statute on April 22, 1908, is a non-resident alien and therefore has no right under said statute to recover damages thereunder; and on this ground the jury must bring in a verdict in favor of the defendant.

(Copy of Additional Request.)

7. If the jury find that the accident was due to contributory negligence on the part of the plaintiff's intestate, the damages, if any, that may be found against the defendant, must be diminished in proportion to the amount of the negligence of plaintiff's intestate as compared with the combined negligence of plaintiff's intestate and that of the defendant.

Exhibits P. 3 and P. 4.

EXHIBIT P. 3.

HENRY J. SCHNITZER,
141 Washington Street, New York City.

Drafts and Money Orders.
Foreign Money Bought and Sold.
Letters of Credit Issued. Collections.
Foreign Express. Agent for all Continental Steamship Lines. Notary Public.

$36.80/100.

Received from Josef Grybowski, at 806 Newark Ave., Jersey City, N. J., for remittance to Andrej Gribowski, residence, Dudy, i post Iwia Pow Aszimany Gub Wilno.

For Rubles: 70.

New York City, N. Y., 1/13/1910.
No. 55407.

HENRY J. SCHNITZER,
By

EXHIBIT P. 4.

HENRY J. SCHNITZER,
141 Washington Street, New York City.

Drafts and Money Orders.
Foreign Money Bought and Sold.
Letters of Credit Issued. Collections.
Foreign Express. Agent for all Continental Steamship Lines. Notary Public.

$15.75/100.

Received from Josef Grybowski at 147 Pavonia Ave., Jersey City, N. J., for remittance to Andrej

Exhibit P. 5.

Grybowski, residence, in Dudy, wot eoss Iwia uj Aszimany Gub Wilno.

For Rubles: 30.

New York City, N. Y., Apr. 1, 1911.
No. 107755.

HENRY J. SCHNITZER,
By

EXHIBIT P. 5.

HENRY J. SCHNITZER,
141 Washington Street, New York City.

Drafts and Money Orders.
Foreign Money Bought and Sold.
Letters of Credit Issued. Collections.
Foreign Express. Agent for all Continental Steamship Lines. Notary Public.

$36.80/100.

Received from Josef Gribowski, at Great Meadows, N. J., for Remittance to Andrej Grybowski, residence, Dudy, post Iwia Pow Aszimany Gub Wilno.

For Rubles: 70.

New York City, N. Y., 9/29/1909.
No. 47942.

HENRY J. SCHNITZER,
By

Opinion of Supreme Court.

Filed Nov. 5, 1915.

New Jersey Supreme Court.

FEBRUARY TERM, 1915

CONSTANTINE GRYBOWSKI, Admr., *vs.* ERIE RAILROAD COMPANY.	*Appeal from Hudson Circuit Court.*

Argued before Gummere, Chief Justice, and Justices Garrison and Minturn.

For the appellant, George S. Hobart.

For the respondent, Frank M. Hardenbrook.

The opinion of the Court was delivered by Gummere, *C. J.*

This action was based upon the Federal Statute of April 22, 1908, entitled, "An Act relating to the liability of common carriers by railroad to their employees in certain cases." The plaintiff's intestate, on January 11, 1912, while in the employ of the railroad company at its ashpit, in the Jersey City terminal yard, was run over and killed by a locomotive engine. This ashpit was constructed between and underneath certain of the yard tracks, and incoming locomotives were moved over it so that the ashes which had accumulated during their trips might be dumped into it. The plaintiff's decedent was engaged in cleaning out the ashes therefrom, and was just coming out of the pit, when the accident occurred which caused his death.

The trial resulted in a verdict for the plaintiff and from the judgment entered thereon the defendant company appeals.

The first ground upon which the defendant seeks a reversal of the judgment is the refusal of the trial court to direct a verdict in its favor. This motion was rested upon several grounds: first, that the proofs did not bring the case within the federal statute, as the accident to plaintiff's decedent did not happen while the defendant was engaged in interstate commerce, and that the decedent did not come to his death while employed by the defendant in such commerce. We think the motion to direct a verdict upon the ground stated was properly denied. The first section of the Federal act provides that every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in 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 representatives * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carriers. The proofs show that the ashpit was a part of the plant of the defendant company, that it was a necessary part of that plant, and that it was used both in interstate and intrastate commerce. The keeping of it clean, and thereby maintaining its effectiveness, was required equally for both kinds of commerce, just as the keeping in repair of tracks or bridges which are used for both kinds of commerce is a necessary incident to each of them. In *Pederson* vs. *D., L. & W. R. R. Co.*, 229 U. S. 146, it was held that "one engaged in the work of maintaining tracks and

bridges in proper condition after they have become and during their use as instrumentalities of interstate commerce is engaged in interstate commerce, and this, even if those instrumentalities are used both in interstate and intrastate commerce"; and the application of this principle led the court to hold that an employee who was injured while repairing a bridge which was so used, by being run down by an intrastate passenger train, was entitled to maintain an action under the Federal statute. (Note—It is to be observed that the syllabus of the cited case shows that the train which ran down the employee was an interstate train. The body of the opinion, however, page 150, shows this statement to be inaccurate, and that the train was an intrastate one.) Although in the Pederson case it was conceded that the railroad company was engaged in interstate commerce at the time of the occurrence of the accident, the principle of the decision would necessarily have compelled such a finding, even in the absence of the concession, for the *plaintiff* could not, at the time of the accident, have been employed by the carrier in such commerce unless the latter at the same time was engaged therein. Under the law as laid down by the cited cases, therefore, and which is controlling upon us, the present case comes within the federal statute.

The second ground upon which the motion was rested was that there was no evidence which would support the conclusion that the accident was the result of any negligence on the part of the defendant, or of any of its agents or employees. The accident occurred from the backing of the engine; it had been run upon the pit, and been brought to a stop after clearing the manhole in which the decedent was working by three or

four feet. The engine was backed by the fireman, under instructions from the engineer, who was at that time upon the ground alongside of it. The engineer testified that before directing the engine to be moved he looked toward the rear to see if everything was clear, and saw no one in the way, but that he made no special observation of the manhole. No warning was given the decedent of the intended movement of the engine, unless the bell was rung by the fireman; and this was a disputed fact in the case. If the bell was not rung, as the jury might have found, then it cannot be said, as a matter of law, that in backing the engine over the manhole without first using reasonable care to ascertain whether any one was in it and likely to be endangered thereby, and without giving warning of such movement, the engineer and fireman were, each of them, free from negligence. Moreover, there was evidence to show that the decedent came out of the manhole of the ashpit in response to a signal given to him by a fellow employee who operated the gas engine which furnished the motive power to hoist the loaded buckets out of the ashpit; and it was for the jury to decide whether it was negligence to give such a signal without first ascertaining whether or not the engine was about to be moved. The motion to direct a verdict upon this ground was, therefore, properly denied.

The third ground upon which the defendant rested its motion was that the plaintiff was barred from a recovery because her decedent had assumed the risk of the accident, which produced his death. This ground, also, we think is without substance. The doctrine of assumption of risk has no application to such risks as arise solely and directly out of the negligent acts of fellow

servants. And if it did so apply, as a general rule it would have no pertinence in the cases of accidents, the right of recovery for injuries arising out of which is regulated by the federal statute; for to so hold would be to nullify the declaration of Congress that every common carrier by railroad engaged in interstate commerce, shall be liable in damages to the personal representative of any employee who shall lose his life while employed in such commerce, when his death results "from the negligence of any of the officers, agents or employees of such carrier."

A further ground of appeal urged before us is that the trial court erred in refusing to charge the jury, in response to defendant's request, that in case of a recovery the plaintiff's damages "must be limited to the expenses of last sickness and burial, not exceeding the sum of $200, as provided by Chapter 95 of the Pamphlet Laws of 1911" (our Workmen's Compensation Act). In our opinion, this request was properly denied. It has been held by the United States Supreme Court that the Federal Employers' Liability Act of 1908 superseded all state laws upon the subject of the liability of carriers by railroad engaged in interstate transportation, to their workmen injured while employed in such commerce. *Second Employers' Liability Cases,* 223 U. S. 1; *Seaboard Air Line Ry.* v. *Horton,* 223 U. S. 492. The necessary corollary of this judicial declaration is that no state, by subsequent legislation, can impair or curtail in any degree the rights conferred upon the employee, or his personal representative, or the liabilities imposed upon the carrier, by that statute.

Lastly, it is asserted that there was error in refusing to charge the defendant's request that

if the decedent contributed, by his own negligence, to the accident, "the damages, if any, that may be found against the defendant must be dimnished in proportion to the amount of the negligence of plaintiff's intestate as compared with the combined negligence of the plaintiff's intestate and that of the defendant." As a matter of fact, no such refusal appears in the record. Before the request was submitted the trial judge, in charging the jury, read to it that portion of the federal statute which deals with this matter, and which is in the following words: "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," and then said to them, "If you find that plaintiff's intestate was guilty of contributory negligence, then, if you have to find the amount of damages to which decedent's father is entitled, you are to abate or deduct from that sum the amount you shall find represented decedent's proportionate contributory negligence, and your verdict will be for the difference." At the close of his instructions to the jury he refused to charge the request, except as he had already charged it. It is not suggested in counsel's brief that what was said to the jury was not an accurate statement of the law upon the subject, and the defendant was entitled to have nothing more from the mouth of the court. It is elementary that all that the trial judge is required to do in dealing with such requests, when the legal principles embodied therein are sound, and are applicable to the matter under discussion, is to charge the substance thereof. And this, we consider, was done in the present case.

The judgment under review will be affirmed.

Order of Affirmance.

An appeal, having been taken to this court from a judgment entered in the Hudson Circuit, in favor of the above named plaintiff-respondent, and against the above named defendant-appellant, on the 17th day of March, 1914, for the sum of $1,200, and $55.83 costs, and the said appeal having come on for argument before this court, and the court having filed its opinion on the 5th day of November, 1915, affirming the said judgment with costs,

It is on this 13th day of November, 1915, Ordered and adjudged, that the said judgment be and the same is in all things affirmed with costs of this court, to be taxed.

Entered November 16, 1915,
On motion of
FRANK M. HARDENBROOK,
Attorney for Plaintiff-Respondent.

Judgment Record.

(SUPREME COURT.)

CONSTANTINE GRYBOWSKI, Admrx., etc., of JOSEPH GRYBOWSKI, deceased, *vs.* ERIE RAILROAD COMPANY.	*On Appeal from Hudson County Circuit Court. Affirmance.*

Frank M. Hardenbrook, Attorney.

The defendant, Erie Railroad Company, hereby appeals from the judgment of the Hudson County Circuit Court, the record of said case being in the words and figures following, to wit:

The defendant was summoned to answer unto said plaintiff therein in an action at law upon the following complaint:

Then follows—

(1) Copy of Complaint, see pp. 9-12 hereinbefore.

(2) Copy of Answer, Order to Strike Out and Judgment of Hudson Circuit Court, see pp. 13-15 hereinbefore.

(3) Notice and Grounds of Appeal, pp. 1-8 hereinbefore.

The Judgment Record in the Supreme Court then continues as follows:

This cause was heard before our Supreme Court at the February Term, 1915, and judgment of

affirmance was rendered in favor of the plaintiff November 16, 1915.

Whereupon it is adjudged that the said plaintiff, Constantine Grybowski, Admrx., etc., of Joseph Grybowski, deceased, do recover against the said defendant, Erie Railroad Company, the sum of twelve hundred and fifty-five dollars and eighty-three cents damages and costs below; and also the sum of forty-six dollars and fifty cents, costs in the Supreme Court, making in the whole the sum of thirteen hundred and two dollars and thirty-three cents.

Damages and costs below.....	$1,255.83
Costs Sup. Ct.....	46.50
Total	$1,302.33

Judgment entered November 16, 1915.

WM. S. GUMMERE, *C. J.*

Notice and Grounds of Appeal.

Filed Nov. 24, 1915.

To Frank M. Hardenbrook, Esq., Attorney of Plaintiff:

TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Hudson County Circuit Court erroneously struck out paragraph "2" of the answer of the appellant, reading as follows:

> "2. At the time of the death of plaintiff's intestate, Joseph Grybowski, the said Joseph Grybowski was in the employ of the defendant, pursuant to a contract of hiring made subject to the provisions of Section II of the Statute 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' (being Chapter 95 of New Jersey Laws of 1911); and whatever rights, if any, the plaintiff and the next of kin of said Joseph Grybowski have to recover compensation from this defendant by reason of the death of said Joseph Grybowski, are governed and limited by the provisions of said Section II of the said Statute of the State of New Jersey."

2. The trial court denied the motion of the appellant to nonsuit the respondent at the trial

of the case, whereas said motion should have been granted for one or more of the following reasons urged in behalf thereof:

(a) Defendant was not engaged in interstate commerce at the time of this accident, within the meaning of the Federal statute; the engine that struck the decedent had completed its trip, passengers were discharged, engine had backed; the accident happened while engine was at the ashpit for the purpose of having the ashes removed.

(b) Plaintiff's intestate was not engaged in interstate commerce at the time of the accident, the work he was doing being merely to keep the ashpit in proper working order, and so far as the particular engine was concerned the ashes had not been dumped into the pit at the time of the accident, and there is no proof that any of the ashes that the intestate had to do with came from the engine engaged in interstate commerce. So far as any proof on the subject is concerned—as far as can be gathered from the proofs as testified to—all of the engines that dump these ashes, even if engaged in interstate commerce, had completed their trips and were no longer so engaged at the time of the dumping.

(c) No negligence has been proved on the part of the defendant, or any of its officers, agents or employees. When the engine was moved there is no proof of any failure to give any customary signals. There is no proof that any of the employees knew that plaintiff's intestate was coming from the manhole at the time the engine was moved.

(d) The risk of injury was assumed by plaintiff's intestate in coming out of the manhole at

a time when he knew or with reasonable care on his part should have known that the engine was moving and was in plain sight.

(e) Under the Federal statute, on which this suit is based, even if there was any proof of pecuniary loss, the plaintiff cannot recover, as the benefit of the Federal statute does not accure to non-resident aliens.

(f) The rights of the parties hereto are governed and limited by the provisions of Chapter 95, New Jersey laws of 1911, and this Court therefore has no jurisdiction to entertain this cause of action.

3. The trial court denied the motion of appellant to direct a verdict in its favor, whereas said motion should have been granted for one or more of the following reasons urged in behalf thereof:

(a) The defendant was not engaged in interstate commerce at the time of the accident within the meaning of the Federal statute; engine 974 has completed its trip, passengers had been discharged, engine had backed to the turntable and thence to the ash pit for the purpose of having the ashes removed and there was no proof to show where it was going after the ashes had been removed, nor whether or not it was regularly engaged in interstate commerce.

(b) Plaintiff's intestate was not engaged in interstate commerce at the time of the accident; the work he was doing was merely to keep the buckets and ashpit in proper working order; so far as engine 974 was concerned, the ashes from the engine had not yet been dumped into the pit at the time of the accident, and there is no proof that any of the ashes that the plaintiff's intestate

had to do with came from engines engaged in interstate commerce; so far as there is any proof on this subject, all of the engines that dump such ashes, even if engaged in interstate commerce, had completed their trip and were no longer so engaged.

(c) No negligence has been proved on the part of the defendant or any of its officers, agents or employees, even if the Federal statute applies. When engine 974 was moved there is no proof that there was any failure to give any customary signal. Further, there is no proof that any of the employees knew that the plaintiff's intestate was coming from the manhole at the time the engine was moved. He had given no notice that he was about to do so, and the employees who have charge of the engine looked to see if there was any one on the track at the time the engine was moved, and their evidence is undisputed that they saw no one.

(d) The risk of injury was assumed by plaintiff's intestate, in coming out of the manhole at a time when he knew, or with reasonable care on his part should have known that the engine was moving or about to move; it was in plain sight of him as he climbed up the west side of the manhole, and only a few feet distant.

(e) Plaintiff cannot recover. as the benefit of the Federal statute does not accrue to a non-resident alien.

(f) The rights of the parties hereto are governed and limited by the provisions of Chapter 95, New Jersey laws of 1911.

4. The trial court erroneously submitted to the jury the question of whether the appellant was

engaged in interstate commerce at the time of the accident upon which the suit was based.

5. The trial court erroneously submitted to the jury the question of whether the respondent's intestate was employed in interstate commerce at the time of the accident upon which the suit was based.

6. The trial court erroneously charged the jury as follows:

> "One engaged in the work of maintaining tracks, bridges, engines or cars in proper condition after they have become and during their use as instrumentalities of interstate commerce, is engaged in interstate commerce, and this even if those instrumentalities are used in both inter and intrastate commerce."

7. The trial court erroneously charged the jury as follows:

> "If you find that the plaintiff has, by a clear, fair and satisfying preponderance of the evidence shown you that these three items of which I have just spoken exists, then you may turn your attention to the consideration on contributory negligence and assumption of risk on the part of the plaintiff's intestate, that is, Joseph Grybowski.
>
> "Contributory negligence is the doing or not doing of those acts and things which a reasonably prudent person, under the existing circumstances and conditions, would or would not have done to have avoided injury to himself and either the doing or not doing of

which was the proximate cause or causes of the injury.

"Upon the assumption of risk, the Federal court has said:

" 'That an employee may have assumed a risk from one of two contributory causes of an injury will not defeat his right to recover where the other cause is one for which the master is liable.' "

8. The trial judge erroneously refused to charge appellant's request numbered "1":

"1. Before the jury can bring in a verdict in favor of the plaintiff and against the defendant, they must find first that the defendant at the time of the accident was engaged in interstate commerce; and second, that at said time plaintiff's intestate was employed by the defendant in such commerce; if the jury conclude that the plaintiff has failed to prove either one of these two facts there must be a verdict for the defendant."

9. The trial court erroneously refused to charge appellant's request numbered "2", and modified said request; and said request and the modification thereof reads as follows:

"The second request is: 'If the jury find that the plaintiff's intestate either in fact knew or by the exercise of reasonable care on his part should have known that the engine by which he was struck was approaching, then he assumed the risk, and there must be a verdict for the defendant.' I decline to charge in that language, but in place of it I charge as follows: 'That if you find from

the evidence that the deceased party knew or reasonably should have known the risks surrounding his employment and work and that it was in disregard of that knowledge on his part which he had or should have had that the accident happened, you may find that he assumed the risk that brought about his death, and in that event you may find for the defendant.' "

10. The trial court erroneously refused to charge appellant's request numbered "3":

"3. Plaintiff's intestate had no right to rely upon any signals being given by bell or whistle when the engine by which he was struck was about to be moved."

11. The trial court erroneously refused to charge appellant's request numbered "4":

"4. The amount of damages recoverable by the plaintiff's intestate, if a verdict is found in his favor, must be limited to the expenses of last sickness and burial, not exceeding the sum of two hundred dollars, as provided by Chapter 95, New Jersey Laws of 1911."

12. The trial court erroneously refused to charge appellant's request numbered "6":

"6. The evidence in the case shows that the father of the decedent, for whose benefit this action is brought under the Federal statute on April 22, 1908, is a non-resident alien, and, therefore, has no right under said statute to recover damages thereunder; and on this ground the jury must bring in a verdict in favor of the defendant."

13. The trial court erroneously refused to charge appellant's request numbered "7" and in connection therewith erroneously charged the jury on the subject of contributory negligence of the respondent's intestate. Said request numbered "7" reads as follows:

> "7. If the jury find that the accident was due to contributory negligence on the part of the plaintiff's intestate, the damages, if any, that may be found against the defendant, must be diminished in proportion to the amount of the negligence of plaintiff's intestate as compared with the combined negligence of plaintiff's intestate and that of the defendant."

The charge on this subject reads as follows:

> "On the question of contributory negligence, to which I have before alluded, I have to say to you that in an action upon this statute or under this statute contributory negligence may not defeat the right of the plaintiff to recover. Section 3 of the act provides, among other things, this:
>
> > " 'The fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.'
>
> "If you find that plaintiff's intestate was guilty of contributory negligence, then, if you have to find the amount of damages to which decedent's father is entitled, you are to abate or deduct from that sum the amount you shall find represented decedent's propor-

tionate contributory negligence, and your verdict will be for the difference."

14. The Supreme Court affirmed the judgment entered in the Hudson County Circuit Court in favor of the plaintiff and against the defendant, whereas said Supreme Court should have reversed said judgment for one or more of the grounds stated by the appellant in said Supreme Court.

COLLINS & CORBIN,
Attorneys of Appellant.