NEW JERSEY

Court of Errors and Appeals.

NICOLA CETOLA,
Plaintiff-Appellant,

vs.

LEHIGH VALLEY RAILROAD COMPANY, a Corporation,
Defendant-Respondent.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT.

Statement of Facts.

On January 17th, 1916, at ten o'clock in the morning, plaintiff was in the employ of the defendant, cutting certain rails—about eleven palms (8½ inches)—or 7¾ ft. distant from where certain other employees of the defendant were also engaged in cutting rails. While so engaged, the plaintiff was called by the foreman to come to where the other men were working, "to drop a rail down and cut it" (fol. 20, p. 17). Four men were handling this rail at that time, and when plaintiff came to where these four men were, and before he had an opportunity to touch the rail, or had anything to do with it, these four men dropped the rail and broke it, where they had first cut it, with a chisel, and the purpose of dropping it, was to break it where it had been cut (p. 12, case). The plaintiff did not reach there in time to assist these men in the handling of this rail (fol. 10, p. 13, case). One end of the rail remained upon the ground (fol. 30,

p. 16), and these four men were engaged in lifting the other end of it for the purpose of dropping it to break it.

When these rails were taken from the truck which necessitated the lifting of the entire weight of the rail, the plaintiff testified that you could never lift a rail like that unless seven persons would get hold of it.

This testimony refers to the lifting of the entire weight of the rail from the truck. Plaintiff testified (fol. 20, p. 16) that he had lifted rails of the same kind, while working for the company. The plaintiff testified (fol. 30, p. 18) that he had seen men handle the same kind of rails, and the same number of men handle them that day, before plaintiff was injured, and that they handled them all right with the same number of men (four men).

It is true that the plaintiff testified (fol. 30, p. 18) that it required seven men to handle the rail of the size which fell on his foot, but this testimony certainly must relate to the previous testimony of the witness, that seven men were required to lift a rail of that size off of a truck, and could not refer to the lifting of one end of it, to break it off, for the reason that the plaintiff had testified to a previous question (fol. 20, p. 18) that he had seen the same number of men, i. e., four men, handle the rails and that they handled them all right; and this statement is in no way affected by the testimony of the plaintiff (fol. 30, p. 19), in which he says that he had seen no less than seven persons lift one end of the rail.

For the next question and answer, he states he had seen four men do it, and it is true that plaintiff testified (fol. 10, p. 20) that he thought it was dangerous. He does not say that he knew it was

dangerous, or in what respect he thought it was dangerous. He had previously testified (fol. 30, p. 18) that he had seen four men handle a rail of this kind, and that they had handled them all right.

Russo testified that four men were not enough to handle that rail, and he also testified that before the plaintiff touched the rail, the rail was dropped on his foot (fol. 40, p. 20).

POINT I.

The plaintiff did not assume the risk of injury.

To assume the risk of injury, it is necessary that the plaintiff should have been assisting in doing the work which was being done, which caused the injury to him. And while it is true that in answer to a call of the foreman he went over to the place where the four men were handling the rail, which fell on him, yet up to the time it did fall on his foot, he had not assisted in any way in the handling of the rail.

It cannot be said that the fact that the plaintiff proceeded to this point, constituted an assumption of a risk of the falling of the rail, *a risk which the plaintiff could not have assumed until he actually took hold of the rail.* Furthermore, *the plaintiff on reaching the place where these men were handling this rail, may have observed the risk and refused to assume it by failing to assist the men in any way.*

It cannot be said that the plaintiff could not assume a risk of which he would not be aware until he had actually commenced performing the work which these other men had been doing.

If for illustration, the foreman, instead of calling plaintiff to assist these other men in handling the rail, had called him to do some other work, which merely required his passing the place where these

four men were handling the rail, and while so passing, these men had dropped the rail upon his foot, it cannot be maintained, under such circumstances, that the plaintiff would have assumed the risk of injury from the dropping of the rail. The illustration is in no wise different from the facts in this case. Plaintiff had nothing to do with the work being performed by these four other men, until he had actually taken hold of the rail to assist them in doing the work.

It appears from the evidence, that the rail was not dropped by the four men handling it by reason of the excessive weight of the rail, or the insufficient number of men handling it, for it appears from the evidence that the whole object and purpose of lifting one end of the rail was to drop it so that the end which had been cut by the chisel would break off, and the rail was not accidently dropped, but deliberately dropped by the four men, and the plaintiff testifies that he had frequently seen four men do this, and do it successfully.

POINT II.

The judgment of non-suit should be reversed.

Respectfully submitted,
CHAS. M. EGAN,
Attorney for Appellant.

POINT III.

THE ACCIDENT AROSE SOLELY OUT OF THE NEGLIGENCE OF A FELLOW - SERVANT.

The accident was due to the negligence of the foreman, a fellow servant, in not procuring and requiring a sufficient number of men to handle the rail which fell on plaintiff's foot.

"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."

Grybowski vs. Erie R.R.CO.,
New Jersey Supreme Court -

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

NICOLA CETOLA,
Plaintiff-Appellant,
vs.
LEHIGH VALLEY RAILROAD COMPANY,
Defendant-Respondent.

On Appeal from Supreme Court.

Brief of Collins & Corbin, on Behalf of Defendant-Respondent.

(1)

Statement of the Case.

The appeal in this case brings before this court for review the judgment of non-suit entered in the Supreme Court (Hudson Circuit) in favor of the defendant and against the plaintiff in an action wherein Nicola Cetola brought suit against the Lehigh Valley Railroad Company to recover damages for injuries alleged to have been sustained by him on January 17, 1916, while in the employ of the said Lehigh Valley Railroad Company in interstate commerce (pp. 3, 4).

At the close of the plaintiff's case counsel for defendant moved for a non-suit on several grounds (p. 22).

The trial judge, after hearing counsel for plaintiff on the grounds urged for non-suit, granted the motion on the ground that the plaintiff has assumed the risk of injury sustained by him (pp. 24-28). It is from this judgment of non-suit that the present appeal is taken (pp. 1, 2).

As stated, the trial judge non-suited plaintiff on the single ground that he assumed the risk, but, under the well-settled rule that a judgment entered upon a non-suit directed by the trial judge and brought up for review, will be affirmed if correct on any legal ground, although the reason advanced by the Court below is erroneous, we assume that this court will pass upon all of the grounds urged on the motion for non-suit in the case *sub judice.*

Gilliespie v. *Ferguson Co.,* 78 N. J. L., 470, 473.

Sadler v. *Young,* 78 N. J. L., 594, 597.

Meisel v. *Merchants National Bank,* 85 N. J. L., 253.

Herrera v. *Manhattan Electric Co.,* 85 N. J. L., 248.

The brief filed on behalf of the plaintiff-appellant does not conform to the rule of this court promulgated at the June Term, 1912, to take effect November Term, 1912.

The brief on behalf of the appellant does not contain a statement of the case presenting succinctly the questions involved, and it does not contain any specification of the grounds of appeal relied upon. It will be observed that the grounds of appeal of the appellant set forth five distinct alleged reasons why the judgment of non-suit was erroneous, while the brief contains but two points—first, that the plaintiff did not assume the risk of injury, and, second, that the accident arose solely out of the negligence of a fellow servant.

In this brief we shall argue the points discussed in the brief of the appellant and the following grounds urged on the motion for non-suit (p. 22):

> "FIRSTLY. That it appears the relation of master and servant existed between the parties, and by implication of law there was an agreement between them whereby the plaintiff surrendered any right to any method or form or

kind of compensation or determination thereof other than as provided in Section 2 of Chapter 95 of the Laws of 1911 of the State of New Jersey, and being particularly paragraph 8 of said section."

"SECONDLY. On the ground that the risk of injury was assumed by the plaintiff as one of the risks of the employment." (This point is considered in appellant's brief.)

"THIRDLY. On the ground that there is no proof of negligence to go to the jury either on the part of the defendants or any of its officers, agents, or servants."

We shall hereinafter refer to the appellant as plaintiff and to the respondent as defendant.

(2)

Statement of the Facts.

The plaintiff was employed by the defendant as a laborer on January 17, 1916. The accident happened on that day at about half-past ten in the morning (p. 11, ll. 30-40). Plaintiff started work that morning at seven o'clock (p. 15, ll. 15-20). He had been working for the defendant for two months and a half when the accident happened (p. 16, ll. 10-25). During all that time he had been doing the same kind of work that he was doing when the accident happened (*id.*). The plaintiff was one of a gang of five men whose work consisted of making repairs to tracks (p. 10, l. 35 to p. 11, l. 10). On the morning of the accident and just prior thereto plaintiff was carrying rails from a pile near the track on which they were working to the track. The old track was being taken up and second-hand rails were being put down in place of those removed. The track in question was used indiscriminately in interstate and intrastate commerce (p. 11, ll. 1-10). The men would take a rail from the pile

near the track, measure off the length required, chisel around the rail at that point and then lift and throw it over the back of another rail to break it off (p. 10, ll. 35-40; p. 12, ll. 35-40; p. 17, ll. 15-35).

The plaintiff testified that immediately prior to the accident he was carrying rails on a truck. He said, "Carrying rails on a truck. We unloaded the rails and then we went to cut the rail from which I received this injury" (p. 12, ll. 10-15). When he was called to help lift the rail that fell on his foot he said he was "cutting another rail." At the time that he was called the other four men did not yet have hold of the rail. He was standing within seven feet of the other men when he was called. When he reached the men they were waiting for him. The rail was to be lifted as high as the knees of the men and then it would be dropped over another rail and thus broken. He was ready to take hold of the rail, but for some reason didn't, and the other men dropped it over the other rail and broke it (p. 12, ll. 30-40; p. 13, ll. 1-20).

On cross examination, he testified that the men had lifted the rails from the track, and that he had helped. In the same breath he said that no less than seven men could lift the rails (p. 15, ll. 30-40; p. 16, ll. 1-10). It was part of his duty to help lift the rails; and he had been doing so all of the morning of the accident (p. 16, ll. 20-30). He did that work every day while he had worked for the defendant (p. 16, ll. 25-30). In order to break the rail only one end of it was lifted (p. 16, ll. 30-35). The other four men had hold of the one end and he would have been the fifth man to take hold, the other end of the rail being on the ground (p. 16, ll. 35-40). On the morning of the accident he had also chiseled some of the rails, and he knew that after it was chiseled, the rail would have to be broken by

lifting one end and then dropping it over another rail (p. 11, ll. 20-30). Plaintiff testified that he had been doing this for "a long time" (p. 17, ll. 30-40) This particular gang of men had been working together all that morning, and at the place where the accident happened since nine o'clock (p. 18, ll. 15-25).

The trial judge then asked the witness:

> "Q Had you seen any men handle the same kind of rails and the same number of men handle them that day before you were injured? A Sure.
>
> Q Well, they had handled them all right, had they, then—the same number of men? A Yes; they did at times."

The plaintiff was then asked by his counsel, "How many men did it require, so far as you know, to handle a rail of the size of the rail which fell on your foot?" The witness answered, "No less than seven persons" (p. 18).

On further cross examination the plaintiff said that he saw other rails of the same kind handled by the same number of men that handled the rail that injured him on the same day; the men with whom he was working had (p. 19, ll. 10-20). On further examination by the Court, plaintiff changed his previous testimony and said that no less than seven persons could lift even one end of the rail. He knew that when only four men were lifting the rail that it was dangerous work and that when he went to assist them that it was dangerous of him to do so (p. 19, l. 30 to p. 20, l. 10).

The brief of the appellant incorrectly recites the testimony. On page 2 thereof, counsel says that the testimony of the plaintiff to the effect that it required seven men to lift the rail means *that it took seven men to lift the rail from the truck.* Counsel says, "This testimony refers to the lifting

of the entire weight of the rail from the truck,'' and the foregoing sentence is italicized (Brief, p. 2, second paragraph). This statement is not correct, for the witness specifically testified on examination by the trial judge that it took seven men to lift only one end of the rail from the ground. The question and answer is as follows:

> ''Q How many men lifted only one end of the rail up? A No less than seven persons.
>
> Q I thought you said you had seen four persons handle this same kind of work before successfully that day? A I never saw that. I saw those four persons do that, but they didn't do it right'' (p. 19, ll. 30-40).

It is impossible, therefore, to limit the testimony of the plaintiff, that it required seven men to lift one end of the rail, to merely taking the rail from the truck, for an examination of the testimony will show conclusively that what plaintiff meant was, that it took seven men to lift the rail from the ground, for he says so on several occasions (p. 18, ll. 35-40; p. 19, ll. 20-30).

There are two reasons why counsel for plaintiff should try to thus explain away plaintiff's testimony; first, to avoid the conclusion that must necessarily follow, that plaintiff assumed the risk of which he was aware, for he says that he knew it was dangerous to have only four men, and second, unless it is thus explained away we have two statements by the plaintiff which are diametrically opposed to each other. He said first that four men were enough and that he had seen that number on many occasions handle the rails. He then denied this, and said that it wasn't so, and that no less than seven men could do the work; otherwise it would be dangerous, and he knew it was dangerous. If we are to believe him at all, we assume we must believe what he said finally, although so far as de-

fendant is concerned it is immaterial, for in either event the non-suit was proper as will be hereinafter shown.

(3)

Brief of the Argument.

I.

THE RELATION OF MASTER AND SERVANT EXISTED BETWEEN THE PLAINTIFF AND DEFENDANT, AND BY IMPLICATION OF LAW THERE WAS AN AGREEMENT BETWEEN THEM WHEREBY THE PLAINTIFF SURRENDERED ANY RIGHT TO ANY METHOD OR FORM OR KIND OF COMPENSATION OR DETERMINATION THEREOF OTHER THAN AS PROVIDED IN SECTION 2 OF CHAPTER 95 OF THE LAWS OF 1911 OF THE STATE OF NEW JERSEY.

There was no evidence of an express statement in writing, prior to the accident, either as part of the contract of employment itself or by written notice from either party to the other that the provisions of section 2 of the Workmen's Compensation Act of this State were not intended to apply. Sections 7, 8 and 9 of said act provide as follows (P. L. 1911, Cr. 95, p. 136):

> "7. When employer and employee shall, by agreement, either expressed or implied, as hereinafter provided, accept the provisions of section 2 of this act, compensation for personal injuries to or for the death of such employee by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases except when the injury or death is intentionally self-inflicted, or

when intoxication is the natural and proximate cause of injury, and the burden of proof of such fact shall be upon the employer.

"8. Such agreement 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 2 of this act, and an acceptance of all the provision of section 2 of this act, and shall bind the employee himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during the bankruptcy or insolvency.

"9. 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 2 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 2 of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section 2 of this act and have agreed to be bound thereby. In the employment of minors, section 2 shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor."

It has been decided by the Supreme Court and by the Court of Errors and Appeals of this State that the Workmen's Compensation Act applies to persons employed in interstate commerce, when the accident occurs without negligence.

Rounsaville v. *Central R. Co.*, 94 Atl., 392.

Winfield v. *Erie R. Co.*, 96 Atl., 394.

This Court in the Winfield case, *supra,* said:

> "What the appellant in the present proceeding seeks to enforce against the defendant company is not a liability arising out of its negligence, but a contractual obligation created by section 2 of our Workmen's Compensation Act with the consent of both employer and employee, and which exists, although no negligence can be imputed to the employer."

In the Rounsaville case, *supra,* the Supreme Court said:

> "In all these respects the Workmen's Compensation Act differs. Liability thereunder is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject the statutory contract. A new right of action is given, of a character unknown to our law, at least for several centuries. The liability of the employer depends, not on any fault of his own or his servants, but on whether, by act or by silence, he has adopted the statutory terms."

In other words, if both parties remain silent the law conclusively presumes that the provisions of section 2 of the Workmen's Compensation Act applies. Under section 8 of the act this agreement, which is implied by the law, "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 2" of the act.

Since there is no evidence in the case at bar that the plaintiff, by express statement in writing, prior to the accident, gave notice that he did not intend to be bound by the provisions of section 2 of the Workmen's Compensation Act, he, under section 7 of that act, accepted the provisions of section 2 and agreed that in the event of injury he would receive

compensation in accordance with the terms of said section. Having agreed to receive compensation according to section 2, he further agreed, under section 8, to surrender his right to any other method, form or amount of compensation, or determination thereof than as provided in said section, and by not serving said notice he surrendered his right to any other method, form or amount of compensation, or determination thereof other than as provided in section 2. Of course, in the Rounsaville and Winfield cases there was no evidence of negligence, but that fact does not, in any way, distinguish those cases from the case now *sub judice,* so far as concerns this implied agreement.

The law having been settled that the Workmen's Compensation Act applies to persons engaged in interstate commerce, *no reason exists in logic or on principle why the provisions of that act should not apply to all persons engaged in interstate commerce irrespective of whether there is any evidence of negligence on the part of the employer.* The act itself makes no such distinction, but applies to every contract of employment made in this State. As stated by the Court in the Rounsaville case—"We are now dealing with the simpler question, whether a New Jersey court will enforce a New Jersey contract according to the terms of a New Jersey statute. The question hardly calls for an answer." The Court in that case held that the New Jersey act applied. So far as concerns the implied contract, the facts are the same in this case, and, therefore, there is no reason why the act should not apply here. The contract of the employment in the case at bar having been made in this State and neither party to it not having served notice not to be bound by the New Jersey act they thereby conclusively agree to be bound by the provisions of Section 2 and surrender their rights to

any other method, form or amount of compensation, or determination thereof. It is impossible to limit the application of the act to cases in which negligence is proven. Such a construction cannot be sustained on principle or by any logical reason. If the act applies to any contract which involves the employment of a person in interstate commerce it applies to every such contract. The case of *Grybowski* v. *Erie,* 95 Atl. 764, affirmed at the June term, 1916, of this court, on the opinion below, does not touch the present question for this point was not raised in that case.

We respectfully submit that since there is no evidence in this case that the plaintiff served notice as required under section 9, not to be bound by section 2 of the Workmen's Compensation Act, he conclusively agreed, under section 7 of the act, to receive compensation under the provisions of section 2 and surrendered under section 8 of the act, his right to any other method, form or amount of compensation, or determination thereof other than as provided in section 2 and therefore the trial judge would have been justified in non-suiting the plaintiff on this ground.

II.

THE PLAINTIFF ASSUMED THE RISK OF INJURY.

This is the ground upon which the trial judge non-suited the plaintiff (p. 24). In the statement of facts we showed how the plaintiff told two conflicting stories as to the number of men required to lift the rail in question. He testified at first that four men could lift the rail without any trouble; that he had seen four men do the work on many occasions; and then he denied the story and said that four men could not possibly do the work, and that no less

than seven men were required. He further said that he knew that when only four men were doing the work that it was dangerous, and that he knew this fact when he went to help the four men.

Assuming plaintiff's story, that it required seven men to lift the rail, and that four men could not possibly lift it, and that he knew it was dangerous for four men to attempt the work, to be true, it is clear that plaintiff assumed the risk.

A railroad company is not liable for an injury to a section hand caused by the accidental stumbling of the foreman while assisting such section hand and another person in carrying a heavy tie over rough ground, where the section hand knew the condition of the ground.

Lee v. *Chesapeake & O. R. Co.,* 18 Ky., 829; 38 S. W., 509.

One engaged with co-employees in moving iron rails assumes the risk from the rebounding of a rail as it is thrown upon the other rails, and the employer is not liable therefor because he may have failed to furnish tongs or other appliances proper and convenient for that work.

Beichert v. *Reed,* 20 App. Div., 635; 47 N. Y. Supp. 119.

3 Labatt's on Master and Servant, 2nd Ed., p. 3120; sec., 1173; note (f).

Among other things, the employee with knowledge will assume the risk of injury from the dangers of working with insufficient help.

White v. *Owosso Sugar Co.,* 149 Ore., 473; 112 N. W., 1125.

Manore v. *Kilgore Peteler Co.,* 107 Minn., 347; 120 N. W., 340.

Terry v. *Merrill Log Co.,* 65 Wash., 225; 118 Pac., 27.

Cases in New Jersey in point are:

Benjamin Atha Co. v. *Costello,* 63 N. J. L., 27.

Dillenberger v. *Weingartner,* 64 N. J. L., 292.

Christianson v. *Lambert,* 67 N. J. L., 341.

See also *Thompson on Negligence,* Vol. 4, Sec. 4829.

Also 1907 *Supplement to Thompson on Negligence* (White), Sec. 4829, p. 858.

Under the latest decision of the United States Supreme Court, the assumption of risk, even though the risk be obvious may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty.

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

See also 239 U. S., 595.

Toledo &c. R. Co. v. *Slavin,* 236 U. S., 454; 59 L. Ed., 671.

The United States Supreme Court, in the Horton case, *supra,* in 233 U. S., 492, at page 503, speaking through Pitney, *J.,* in explaining the distinction between contributory negligence and assumption of risk, holds as follows:

> "The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the

risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account of fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. Coctaw, Oklahoma & Gulf R. Co. *v.* McDade, 191 U. S., 64, 68; Schlemmer *v.* Buffalo Rochester & Pittsburgh Ry. Co., 220 U. S., 590, 596; Tex. & Pac. Ry. Co. *v.* Harvey, 228 U. S., 319, 321; Gila Valley Ry. Co. *v.* Hall, 232 U. S., 94, 102, and cases cited."

In the case now *sub judice,* merely stating the proposition is sufficient under the cases to show that the plaintiff assumed the risk.

The defense of assumption of risk remains in all cases except those where the violation by the carrier of any statute enacted for the safety of em-

ployees contributed to the injury or death of the employee, as specified in Section 4 of the Federal statute, even thought it has been abolished by a State statute.

See Horton and Slevin cases, *supra;* also the following recent cases:

Jacobs vs. *Southern R. Co.,* U. S. Sup. Ct. Advance Opinions 1915 (p. 588).

Bougham vs. *N. Y., P. & N. R.,* 60 *id.* 592.

Chesapeake, etc., R. Co. vs. *Proffitt, id.* 620.

There is no claim made in the case at bar that the carrier violated any statute for the safety of its employees and therefore the defense of assumption of risk is a good defense here.

Counsel for the plaintiff cites no authorities to support his contention that the plaintiff did not assume the risk of injury. An analysis of the argument under Point I of his brief will demonstrate that either the defendant was not negligent or that the plaintiff assumed the risk; and in either event the judgment of non-suit was proper.

Counsel says that to assume the risk of injury it is necessary that the plaintiff should have been assisting in doing the work which was being done which caused the injury to him. There can be no doubt that plaintiff was assisting in doing the work, for he was one of five men of a gang who had been doing nothing else that morning but this very kind of work.

Counsel next says, that it cannot be said the fact, that the plaintiff proceeded to this point (where the men were lifting the rail) constituted an assumption of a risk of the falling of the rail, a risk which the plaintiff could not have assumed until he actually took hold of the rail. This argument is fallacious, in that it disregards entirely the fact that the plaintiff testified that no less than seven men could lift the rail, and that he knew it was dangerous

for four men to attempt to do so. If he knew these facts, and knew that it was dangerous, and, nevertheless, attempted to assist the four men in lifting the rail, then he assumed the risk. On the other hand, if we believe his other testimony, that four men could very easily have lifted the rail, and that he had seen that number of men lift the same kind of rail on many occasions, then the conclusion necessarily follows that there was no negligence on the part of the defendant in having only four men, or five, including the plaintiff, to do the work.

Counsel then says, it cannot be said that the plaintiff could not assume a risk of which he would not be aware until he had actually commenced performing the work which the other men had been doing. But in the light of the plaintiff's own testimony that he knew that not less than seven men could handle the rail in question and that he knew that when four men were attempting to do the work it was dangerous, it cannot be said that he was not aware of the risk involved.

III.

THERE WAS NO EVIDENCE THAT THE DEFENDANT WAS NEGLIGENT.

Counsel for the plaintiff does not cover this point in his brief, but seems to assume that the defendant was negligent.

Counsel is inconsistent in doing so, for in the Statement of Facts and Point I of his brief he tries to argue that the plaintiff's testimony, that no less than seven men could do the work, is limited to merely lifting the entire weight of one of the rails from a truck. If we assume for the moment that counsel is right in this contention, it must necessarily follow that the defendant was not negligent; for if four men were perfectly capable of doing the work in question and seven men were not nec-

essary, it follows that there is no evidence in the case of any negligence on the part of the defendant.

Counsel for the plaintiff added a Point III to his brief after it was printed, which is entitled, "The accident arose solely out of the negligence of a fellow servant." The point only contains two short paragraphs, the first of which states; "The accident was due to the negligence of the foreman, a fellow servant, in not procuring and requiring a sufficient number of men to handle the rail which fell on plaintiff's foot." The second paragraph is, "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." This is the entire point.

It is sufficient to say that the complaint does not charge that the accident arose solely out of the negligence of a fellow servant, and the grounds of appeal do not contain any such ground. The complaint will be examined in vain for any allegation to the effect that the accident arose out of the negligence of a fellow servant; also the grounds of appeal are limited to the negligence of the defendant, and not to the acts of a fellow servant.

This court on appeal will not consider questions not raised in the trial court or not contained in the grounds of appeal.

Marten v. *Brown,* 81 N. J. L., 599.
Battschinger v. *Robinson,* 83 N. J. L., 739.
Travisano v. *Stefanelli,* 84 N. J. L., 767.

The plaintiff is only entitled to try the claim set up in the complaint, and no other. Using the language of Gummere, *C. J.,* in *Murphy* v. *North Jersey St. Ry. Co.,* 71 N. J. L., 5; 58 Atl. 1018:

> "This was the claim that was set up by the plaintiff in his declaration, and denied by the defendant in his plea, and which the plaintiff

> was bound to establish by proof in order to entitle him to a verdict. * * * It is elementary that a plaintiff cannot recover for a cause of action other than set out in his declaration. * * * The defendant is only required to prove that he was not guilty of the negligent act charged against him in the declaration."

Having thus definitely ascertained the controversy that was tried, and also remembering that the grounds of appeal are thus limited, the plaintiff is not now entitled to try any other issue than the one set up in the pleadings and grounds of appeal.

As stated, the only negligence charged was that of the plaintiff in failing to provide; first, "a requisite and sufficient number of men to do the said work," and, second, "to provide reasonably safe appliances to be used in and about the same."

There was no evidence that any appliances of any kind were needed, or that the plaintiff's injury resulted from a failure to use any certain kind of appliances. And we are therefore limited to the question whether the defendant did or did not supply a requisite and sufficient number of men. The plaintiff testified time and again that four men could easily do the work, and had done it, and plaintiff had been doing the work for two and a half months, and he ought to know.

Counsel for the plaintiff in his brief says that plaintiff's testimony, that seven men were necessary, ought to be limited to the lifting of the rails from the truck, and the plaintiff meant that four men were sufficient to lift the rail from the ground in order to break it. If counsel is right in his contention, the conclusion necessarily follows that there is no evidence in the case of any negligence.

On the other hand, as shown in Point II, if seven men were necessary to lift the rail from the ground in order to break it, we have the testimony of the

plaintiff that he knew that seven men were necessary, and that four men were not enough, and that it was dangerous for four men to attempt the work, and that he knew it was dangerous when he attempted to help the four men. On that testimony the conclusion must necessarily follow that the plaintiff assumed the risk of which he was aware. No amount of explanation will prevent either one or the other of the two results that must necessarily flow from plaintiff's testimony, depending on which version of it is adopted.

Conclusion.

We respectfully submit that the judgment of the trial court should be affirmed, with costs.

Dated, June 29, 1916.

COLLINS & CORBIN,
Attorneys of Defendant-Respondent.

GEO. S. HOBART,
Of Counsel.

INDEX.

New Jersey Supreme Court.

HUDSON COUNTY.

NICOLA CETOLA, *Plaintiff-Appellant,* *vs.* LEHIGH VALLEY RAILROAD COMPANY, *Defendant-Respondent.*	*Notice of Appeal and Grounds of Appeal to the Court of Errors and Appeals.*

To Collins & Corbin, Attorneys for Defendant-Respondent:

SIRS:

Take notice, that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, and the following are the grounds of appeal:

First—That the Court erred in granting the motion of the defendant for non-suit against the plaintiff, and in favor of the defendant.

Second—That the Court erred in refusing to submit to the jury the question of fact as to whether the defendant was guilty of negligence in that it did not attend the laying of its tracks in a reasonably safe and skillful manner.

Third—That the Court erred in refusing to submit to the jury the question of fact as to whether the defendant was guilty of negligence, in that it did not employ a requisite and sufficient number of men to do said work.

Fourth—That the Court erred in refusing to submit to the jury the question of fact as to whether

the defendant was guilty of negligence, in that it did not provide reasonably safe appliances to be used in and about said work.

Fifth—That the Court erred in refusing to submit to the jury the question as to whether the negligence of the defendant was the cause of the injuries received by the plaintiff.

CHARLES M. EGAN,
Attorney for Plaintiff-Appellant.

Dated April 5th, 1916.

COMPLAINT.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

NICOLA CETOLA,
Plaintiff,

vs.

LEHIGH VALLEY RAILROAD COMPANY, A CORPORATION,
Defendant.

The plaintiff above named, residing in Jersey City, Hudson County, New Jersey, says:

First—That at all the times hereinafter mentioned, the defendant was a corporation, and as such, operated a railroad at Jersey City, New Jersey, for the carriage of passengers and freight.

Second—As such common carrier, defendant was engaged in carrying passengers and freight to and from the State of New Jersey, from and to the State of New York and Pennsylvania, and other States of the United States, and was engaged in commerce between the States of New Jersey, New York and Pennsylvania, and other States of the United States.

Third—That on the 17th day of January, 1916, the plaintiff was employed in such commerce by the defendant, in the laying of and repairs to certain of its tracks at or about Johnson avenue, in the city of Jersey City, New Jersey, and which tracks were used by said defendant in such interstate commerce.

Fourth—That the injuries hereinafter mentioned

were received by the plaintiff while employed in such commerce, and were inflicted by the defendant while engaged in such commerce.

Fifth—That it then and there became the duty of the said defendant to attend the laying and repair of such tracks in a reasonably skillful manner, and to employ a requisite and sufficient number of men to do said work, and to provide reasonably safe appliances to be used in and about the same, so that the plaintiff might not be subjected to extreme and unnecessary danger.

Sixth—That the said defendant at the time and place aforesaid, disregarded its duty in that behalf, in that it did not attend the laying of said tracks in a reasonably careful and skillful manner, and did not employ a requisite and sufficient number of men to do said work, and did not provide reasonably safe appliances to be used in and about the same, so that plaintiff might not be subjected to extreme and unnecessary danger.

Seventh—That at said time and place the said defendant, by its agent, servants and employes, caused a certain rail, weighing upwards of 900 pounds, by the reason of the negligent and careless manner in which the defendant, its agents, servants and employes, were handling said rail, to be negligently and carelessly dropped on plaintiff's right foot.

Eighth—That by reason whereof, the front portion of plaintiff's right foot and toes were crushed, so that it became necessary to amputate the same.

Ninth—That by reason whereof, plaintiff has from thence hitherto, and now is, unable to carry on his usual occupation, and has been and will be subjected to great pain and suffering, and has ex-

pended and will be required to expend large sums of money in an effort to heal himself from said injuries, which the plaintiff alleges to be of a permanent character, and to incapacitate him from future work or manual labor, to his damage, $10,000.00.

Tenth—That this action was commenced within two years from the time of 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 employes in certain cases," being a public act and approved April 2nd, 1908, and the supplements thereto, and amendments thereof, an action 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.

Eleventh—Plaintiff demands damages $10,000.00.

CHARLES M. EGAN,
Plaintiff's Attorney.

ANSWER.

Defendant, Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, having its office in New Jersey, at the foot of Washington street, Jersey City, says that:

First Defense.

1. It admits the allegations of paragraphs one, two, three, four and five, except that it says that the injuries sustained by the plaintiff were not inflicted by this defendant.

2. It denies the allegations of paragraphs six, seven, eight, nine and ten, except that it admits that the plaintiff's foot was struck by a rail and by reason thereof he sustained certain injuries, and except that it admits that this action was commenced within two years from the date of said accident.

Second Defense.

The accident set forth in the complaint was due to one of the risks of injury assumed by the plaintiff as part of the terms of his contract of employment with this defendant.

Third Defense.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff, and the damages, if any, must therefore be diminished in proportion to the amount of such contributory negligence attributable to the plaintiff.

Fourth Defense.

Before the happening of the accident set forth in the complaint, plaintiff made an agreement with the defendant whereby he surrendered his right to any method, form or amount of compensation or determination thereof, other than as provided in Section II. of Chapter 95, Laws of 1911, of the State of

New Jersey; under paragraph 8 of said act, said agreement is a bar to the present action.

COLLINS & CORBIN,
Attorneys of Defendant.

REPLY.

The above named plaintiff for a reply to the 2nd, 3rd and 4th defenses of the defendant's answer, says: That he denies each and every allegation therein contained.

CHARLES M. EGAN,
Plaintiff's Attorney.

INTERROGATORIES—P 1, P 2

NEW JERSEY SUPREME COURT.

NICOLA CETOLA,

vs.

LEHIGH VALLEY R. R. Co.

Tried March 15, 1916, before Speer, J., and a jury.

CHARLES M. EGAN and F. N. HARDENBROOK, for the plaintiff.

COLLINS AND CORBIN (Mr. Hobart), for the defendant.

Mr. HARDENBROOK—I offer in evidence certain interrogatories which were served upon the defendant, together with a letter which an be used as a stipulation, admitting certain facts.

(Interrogatories marked P 1; letter designated P 2).

EXHIBIT P 1.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

NICOLA CETOLA,
Plaintiff,

vs.

LEHIGH VALLEY RAILROAD COMPANY, A CORPORATION,
Defendant.

Interrogatories

To Collins & Corbin, Attorneys of Defendant:

SIRS:

Please take notice, that pursuant to the statute made and provided, the plaintiff serves the following interrogatories upon the above named defendant and demands that the said defendant serve answers under oath upon the plaintiff as prescribed by law:

First—State the owner of the railroad track located at or about the place where the plaintiff received the injuries set forth in the complaint on the 17th of January, 1916.

Second—State what repairs, if any, were being made to the said track at said time.

Third—State for what the said track was used.

Fourth—State the kind and character of traffic operated over said track.

Fifth—State whether or not the said track which was being repaired at that time was used in interstate commerce by the defendant.

Sixth—State who was the foreman in charge of

the repairing of said tracks at said point, at said time

Seventh—State the kind and character of work in which the plaintiff was engaged.

Eighth—State the number of men employed with the plaintiff, in the work in which he was engaged at said time.

CHARLES M. EGAN,
Plaintiff's Attorney.

Dated February 16th, 1916.

EXHIBIT P 2.

COLLINS & CORBIN
Counselors at Law
No. 243 Washington Street

Jersey City, N. J., Feb. 21, 1916.

Cetola vs. Lehigh Valley R. R. Co.

Charles M. Egan, Esq.,
15 Exchange Place,
City.

Dear Sir:

On receipt of plaintiff's interrogatories served Feb. 16th, we made inquiry of the defendant and are informed as follows:

1. The owner of the railroad track is Lehigh Valley Railroad Company of New Jersey, which is now, and at the time of the accident was, operated by the defendant under lease.

2. At the time of the accident plaintiff, with other men, was engaged in making repairs to this track, by removing old rails and putting in good

second-hand ones which were taken from a pile near the track.

3, 4 and 5. Track in question was used indiscriminately both in interstate and intrastate commerce.

6. Foreman in charge was one Steve Shoplick.

7. Answered above.

8. Four other men, including Shoplick, were working with the plaintiff.

We are willing to stipulate the above facts at the trial if you so desire, provided you will accept this stipulation in lieu of formal answers to the interrogatories.

We understand the case has been noticed for trial for March 2nd. Kindly advise if you will be ready for trial when reached.

Yours truly,

COLLINS & CORBIN.

GSH/C

NICOLA CETOLA, sworn, testified through an interpreter:

Direct examination by Mr. Hardenbrook.

Q. You are the plaintiff in this suit? A. Yes.

Q. On the 17th of January last you were working for the Lehigh Valley Railroad Company, were you not, at Jackson street, or Jackson avenue, in Jersey City? A. Yes, sir.

Q. About what time of day were you hurt? A. About half-past ten.

Q. In the morning or in the night? A. In the morning.

Q. How much wages were being paid you at that time? A. $1.65 per day.

Q. Just prior to receiving some injuries, which I will ask you about in a moment, where were you working? A. We were working down in the Green' yard in Claremont avenue.

Q. What were you doing just immediately before receiving the injuries which I will ask you about? A. Carrying rails on a truck. We unloaded the rails and then we went to cut the rail from which I received this injury.

Q. Did anyone call you over to the point where you were afterwards hurt? A. Yes, sir; the boss.

Q. Where were you at the time he called you; how far away from there? A. About eleven palmas away.

Q. Eleven what? A. He used the Italian measure called a palma, which is a span of the hand.

Q. What were you doing at that time when he called you? A. I was cutting another rail.

Q. What did the foreman say to you or call to you to do? A. He says "Come down here"—to come down here to drop this rail down and cut it.

Q. What men, if any, had hold of that rail or were working with that rail which the foreman called you over to help with? A. There were four men and with I would make five; but I didn't get there in time to get hold of this rail.

Q. At the time that you were called there did the four men have hold of this rail? A. No, sir; not yet.

Q. What did these four men do with this rail after you came over there? A. They broke it and it fell on my foot.

Q. In what manner did they break it? A. They cut it first off with a chisel and then they drop down and it cut down itself.

Q. You stated that you were working a little distance from there and the foreman called you over to help those men. What were those men doing when you got there? A. At that time they were waiting for me, but I did not reach there in time and they dropped it.

Q. When you got there tell exactly what happened. A. While I was about to reach this spot where the four men were I was also ready to get hold of this rail, but they did that themselves; they dropped it and then I was injured.

Q. How far did they lift the rail up before they dropped it—these four men that had hold of it? A. As far as their knees.

Q. About how long was this rail? A. I did not measure the rail, but I think it was about thirty-three palmas.

Q. Thirty-three? A. Palmas.

Q. That is feet, you mean?

THE INTERPRETER—No. The ordinary span of a hand. I asked him if he could tell it in feet, but he says he can't.

Q. About how big square was this rail; what were its dimensions?

Q. Did you have hold of this rail at all when these men dropped it, or had you taken hold to help them? A. No, sir; I did not get there in time to hold the rail. They dropped it.

Q. Just as you got there this rail was dropped; is that right? A. Yes; they did.

Q. And it fell on your right foot? A. Yes—

THE INTERPRETER—He says "Yes," but in English he says, "Yes; my left foot."

Q. And you were taken to St. Francis' Hospital? A. Yes, sir.

Q. You have been confined in St. Francis' Hospital from that date down to to-day? A. Yes, sir.

Q. You are still in the hospital under treatment? A. Yes, sir; I went out to-day.

Q. When you got to the hospital what did they do to your foot? A. They put three stitches on and then they placed my foot in splinters or a cast for eight days.

Q. Did they amputate your toes or not? Did you have your toes cut off? A. They amputated two fingers on third day of February.

Q. The big toe and the one next to it? A. Yes, one and two.

Q The large toe and the one next to it? A. Yes, sir.

Q. How far back from the end of the toe did this amputation occur? A. The big toe—one back here—and the next one right here.

Q. Did they take off all the toe or part of it? A. The big toe is amputated altogether. The other one right here—nearly all.

MR. HOBART—We will stipulate that the rail in question was 27 feet long and that they attempted to chisel off the end of it at a point about 10 feet from the end.

Mr. HARDENBROOK—What was the width of it?

Mr. HOBART—I do not know that.

THE COURT—I might say, while you are hunting it up, that I have looked up this measure of a palma. There are two measures; one, English, three or four inches, and the other the Roman measure, which the Italians use, which is

eight and one-half inches. That is a palma.

Q. Did you have much pain or suffering in your foot? A. At present?

Q. Since you were hurt? A. Yes, sir.

Q. You are still in the hospital? A. Yes.

Q. Unable to do any work? A. No.

Q. What shape are your toes in now, if you can tell in a general way; are they healed up or not? A. Very bad.

Cross-examination by Mr. Hobart.

Q. What time did you begin work on the day that you were hurt? A. Seven o'clock.

Q. What kind of work did you do that morning between seven o'clock and the time that you were hurt? A. We went to deliver some stuff down in the Green' yard, down in Claremont avenue; we took a truck and we left the truck there; and from there we went to Jersey avenue, and then we loaded another truck with rails, and then we went to send this truck some place else where they were needed at the time, and then from there they brought us to the place where we were to cut down this rail, where I was injured.

Q. When you unloaded the rails from the truck did you help lift them? A. Yes, sir.

Q. What kind of rails were they; how long were they? A. They were short rails.

Q. Do you know how long they were; did you measure them? A. No, sir.

Q. How many men lifted them when they were taken from the truck? A. As many as we were there; sometimes if there were many men they all would help.

Q. Sometimes three men; sometimes four men? A. You never could lift a rail like that unless seven persons would get hold of it.

THE COURT—Unless what?

A. Seven persons.

MR. HOBART—"Unless seven persons could get hold of it."

Q. How long had you worked for the company? A. At the time I was injured it was about two months and a half I was working for the company?

Q. And what kind of work did you do? A. On the tracks.

Q. Lifting rails? A. To do all kinds of work—railroad work.

Q. Was part of your work the lifting of rails? A. Sometimes we would do all kind of work, fixing ties and other kinds of work.

Q. Did you ever lift rails while you were working for the company? A. Yes, sir.

Q. Did you lift rails of the same kind as the one on the day of the accident? A. Yes, sir.

Q. How many times did you do that? A. How many times? I don't remember.

Q. Did you do some work of that kind every day when you worked for the company? A. Yes, sir.

Q. At the time that you were hurt was all of the rail up in the air or was only one end of it lifted? A. Only one end was up in the air.

Q. How many men had hold of the end? A. Four. Four men; but I was the fifth man to reach and help.

Q. Was the other end on the ground or on a railroad tie or somewhere else? A. On the ground.

Q. What is your age? A. Twenty-five years old.

Q. Before you went to work for the Lehigh Valley Railroad Company did you work for any other company? A. Yes, sir.

Q. What company? A. Lehigh Valley Coal Company.

Q. Did you ever work for any other railroad company? A. No, sir.

Q. How long did you work for the coal company? A. Thirteen months.

Q. What kind of work did you do for that company? A. Load and unload timbers, and also boards, and sometimes even coal.

Q. On the day when you were hurt did you see some of the men trying to break off the end of the rail by chiseling? A. Yes, sir.

Q Did you see them work with a chisel on the rail by which you were hurt? A. Yes, sir.

Q. Did you do any work yourself on that rail? A. No, sir.

Q. Did you do any work with a chisel on any other rail that morning? A. Yes, sir.

Q. You were trying to cut off the end of the rail and then to drop it so as to break it, were you not? A. Yes, sir.

Q. Were the men trying to break this rail, the one by which you were hurt, were they trying to break that in the same way as they had broken other rails? A. Yes, sir.

Q. In order to break the rail like that did the men have to drop the rail? A. Yes, sir.

Q. You knew how that work was to be done, did you not? A. Yes, because it is orders to do it.

Q. You had done it yourself before that, hadn't you? A. A long time before; yes.

Q. How close to the end of the rail that was in the air were these other four men who were lifting it; how close were they to the end of the rail? A. They were close by.

Q. At the end? A. There were one man each end; two men was another part, but they didn't

give me any time to do my part. When I got there they dropped this rail.

Q. When the rail dropped did any of the other men get hit? A. No, sir.

Q. Did they jump out of the way? A. They did; but in order to help them I was hurt myself.

Re-direct examination by Mr. Hardenbrook.

Q. Had you seen those men lifting this rail for any considerable length of time before you were hurt? A. Yes—no; they had lifted this rail up and then before I reached there they dropped the rail.

Q. How long had those men been working there, so far as you know, that morning before you were hurt? A. We went there together.

Q. About what time? A. About nine o'clock.

Q. And at this particular time had these men been drinking that were handling this rail which dropped down on your foot, so far as you know? A. I don't know that.

By the Court.

Q. Had you seen any men handle the same kind of rails and the same number of men handle them that day before you were injured? A. Sure.

Q. Well, they had handled them all right, had they, then—the same number of men? A. Yes; they did at times.

By Mr. Hardenbrook.

Q. How many men did it require so far as you know, to handle a rail of the size of the rail which fell on your foot? A. No less than seven persons.

Re-cross examination by Mr. Hobart.

Q. You told his Honor that other rails were

handled that day of the same kind, did you not? A. Yes, sir.

Q. And how long before the accident were they handled? A. Not a long time before that.

Q. Who were the men who handled those other rails, do you know that? A. I do not know their names, but there is Steve and Tony Russo and the other two persons; I do not know their names.

Q. Were they the same men who were handling the rail by which you were hurt? A. Yes.

Q. And they handled those other rails all right, didn't they? A. They did—but if they did or not I don't know; I wasn't there.

Q. Didn't you see them handling them? A. Can't a person get hold of a rail from the ground and drop it again? You can't see what he is doing.

Q. Can you tell us any time when you saw seven men handling a rail of that kind? A. Always.

Q. I did not ask you "always;" just name any time that you can fix. A. Whenever we have done work on the tracks I always saw the same number of men—the same men.

Q. The same foreman—Steve? A. Not; not only Steve; but other persons too.

By the Court.

Q. How many men lifted only one end of the rail up? A. No less than seven persons.

Q. I thought you said you had seen four persons handle this same kind of work before successfully that day. A. I never saw that. I saw those four persons do that, but they didn't do it right.

Q. What do you mean, they didn't do it right? A. I do not know what they did it for, but they did it to try; they wanted to show off, I suppose.

Q. Then when you saw four men lift it and you went up to help them you knew it was dangerous,

didn't you? A. But when a boss asks you to do a certain kind of work you must do it.

Q. Didn't you know when you went up to handle it that four men never did handle it and that it was dangerous? A. Yes; I thought it was dangerous.

By Mr. Hobart.

Q. You knew that there ought to be seven men at that rail, didn't you? A. Yes; it needed seven.

MR. HARDENBROOK—It is admitted on the record that the rail weighed 648 pounds; 24 pounds to the foot, 27 feet; that is 648 pounds.

ANTONIO RUSSO, sworn, testified through an interpreter.

Direct examination by Mr. Hardenbrook.

Q. Were you working for the Lehigh Valley Railroad Company at the time this man Cetola was hurt? A. Yes, sir.

Q. You were on this same work that he was on? A. Yes, sir.

Q. Did you have hold this rail which fell on his foot? A. Yes, sir.

Q. Tell the jury just what you saw of the accident and how it happened. A. We cut this rail with the chisel, and when we dropped the rail down it hurt this man—fell on his foot.

Q. How many men had hold of this rail which dropped on Cetola's foot? A. Four.

Q. Was that enough men to handle that rail. A. No, sir.

Q. And you heard the foreman call Cetola to come over and help him with the rail? A. Sure.

Q. And when Cetola got there before he touched

the rail the rail was dropped on his foot; is that right? A. Yes, sir.

Cross-examination by Mr. Hobart.

Q. How long have you worked for the company? A. That was my first day.

Q. How long did you work for the company after the accident? A. A month.

Q. Where are you working now? A. For the Central Railroad Roundhouse of the Central Railroad.

Q. Did you have hold of the rail near the end that was lifted? A. Yes, sir.

Q. And where did the other men have hold of it? A. Same place.

Q. Were you lifting it with your hands or your tongs? A. With our hands.

Q. Did you help lift other rails that morning? A. No. On that morning we took a truck with rails and two switch points.

THE INTERPRETER—He uses an English word. That is as far as he goes. I don't know what it is.

Q. Did you see Cetola, the man who was hurt; did you see him come over to the rail? A. Yes, I did.

Q. What was it that cut the rail, or chiseled it? A. Two other persons.

Q. Did you see that done? A. Yes, I did.

Q. When the rail dropped did the end break off where it had been cut? A. Yes, it broke off.

Q. That was what you were trying to do, wasn't it? A. Yes, that was the work.

Q. Did any of the other men get hurt in any way when the rail fell? A. No, sir.

PLAINTIFF RESTS.

MOTION FOR NON-SUIT.

Mr. HOBART—I ask for a non-suit on the grounds which I will state.

First—That it appears the relation of master and servant existed between the parties, and by implication of law there was an agreement between them whereby the plaintiff surrendered any right to any method or form or kind of compensation or determination thereof other than as provided in Section 2 of Chapter 95 of the Laws of 1911 of the State of New Jersey, and being particularly paragraph 8 of said section.

THE COURT—What is the point about that?

Mr. HOBART—The question is whether this part of the compensation act is applicable to interstate commerce cases, and we desire to raise the point in the hope that some time we may get it decided.

Secondly—On the ground that the risk of injury was assumed by the plaintiff as one of the risks of the employment.

Thirdly—On the ground that there is no proof of negligence to go to the jury either on the part of the defendant or any of its officers, agents or servants.

I will add another ground: That there is not sufficient proof to bring the case within the Federal statute. I might say that I raise that because I apprehend the United States Supreme Court has not as yet, squarely at least, passed upon the question of whether the engaging of the servant in interstate commerce is in itself an engaging by the company. It has been raised in several cases, but I do not think it has been finally passed upon. I will state that as one of the grounds of the motion, although I will not urge it at this time.

MOTION FOR NON-SUIT

It seems to me the important question to consider—perhaps two important questions at the present time are whether there is any negligence and whether the risk was assumed. There seems to be no doubt of the fact that this man knew what they were about to do. He knew the way in which the work was supposed to be done. He knew it was dangerous if, as he says, they needed seven men. There is some inconsistency perhaps in his testimony on that subject, but at any rate if it was dangerous to use four men or five, counting himself, he knew it perfectly. He was not a stranger to this kind of work; he had done the same kind of work before, and before he entered the employ of the railroad company he had been engaged in lifting heavy objects—timbers and boards, so he says, for another company; so he certainly knew the danger of heavy objects slipping and falling. He says specifically that he knew the danger of this particular rail under those circumstances

DECISION ON MOTION FOR NON-SUIT.

THE COURT—I will hear the other side, especially on the question of assumption of risk.

Mr. HARDENBROOK — This rail weighed 648 pounds. The evidence shows not only by the plaintiff but by the other witness that it took seven men to handle a rail of this character. It appears from the evidence that there was an insufficient number of men handling this rail, and that appears conclusively from the fact that the foreman—

THE COURT—Let's assume that, and that it would make a case of negligence.

Mr. HARDENBROOK— called this man over to help these four men.

THE COURT—All right.

Mr. HARDENBROOK—Now, this man is going over to assist these four men, which was recognized to be an insufficient number by calling this man in to help them—when this man reached that point, before he had any opportunity to put his hand on the rail or touch the rail, this rail was dropped on his foot. Now, where is the assumption of risk? There is no assumption of risk as I understand the law, where the injury is due to negligence.

THE COURT—Yes; there is, if he knew of it. The very last decision of the United States Supreme Court on the subject is authority for that very proposition.

Mr. HARDENBROOK—I understand; but he did not know, and had no means of knowing that these men intended to drop this rail before he got there, because he was called on to assist these men in raising it up, and when he got there, before he had a chance to put his hands to it, these four men, which

we will assume, as your Honor indicated, were an insufficient number of men to have, dropped it.

THE COURT—What do you say the danger that he thought existed was? He says that he recognized there was danger. Now, what do you think that danger was? That danger was that it would drop.

Mr. HARDENBROOK—I do not think the Court could go to the extent of attributing that conclusion to this witness' answer of "danger." I did not ask him what he meant by danger, and probably if I had he would have qualified it and explained it and finally would have ended up by saying he did not know what he was talking about. I cannot understand what he meant by saying he knew it was dangerous without—

THE COURT—If he had not said he knew it was dangerous it would have been just as dangerous as a legal proposition on his admission without his statement that he knew it was dangerous. If it takes seven men to handle a thing and only four of them were doing it, and they had it up in the air—

Mr. HARDENBROOK—And they called on him to assist them, and before he had a chance to touch it it dropped to the ground.

THE COURT—If he had handled it it still would have been dangerous according to his view of it because it required seven men to handle it, and when he got there only five would have been there.

Mr. HARDENBROOK—He had no notice that that rail was going to drop.

THE COURT—That was the only possible danger that one would expect from it. There is not any other danger you can conceive of when men are standing holding a rail up and there are an insuffi-

cient number of men, but that it will drop. You would not expect it to fly up; it would drop; and that is the danger that he recognized. You will find the doctrine laid down that "One engaged with co-employees in moving iron rails assumes the risk of injury from the rebounding of a rail as it is thrown upon other rails, and the employer is not liable therefor because he may have failed to furnish tongs and other appliances"—

Mr. HARDENBROOK—That is probably due to the well known fact that if you throw one iron substance onto another there will be a rebound.

THE COURT—Let's go a little further: "Among other things the employee with knowledge will assume the risk of dangers of working with insufficient help."

Mr. HARDENBROOK—That simply exemplifies what I have heard stated many times, that you can find decisions in this country on almost any side of any proposition.

THE COURT—Now, let's see what the United States Supreme Court would do with us if it eventually landed in the last place it could go. In Horton v. Seaboard Air Line, 233 U. S., 490, the Court says: "The assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted on the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of the wages. And a workman of

mature years is taken to assume risks of this sort whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from them, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them." Then the cases are cited innumerable on that point. Now I cannot imagine a case in which a man who sees a terrifically heavy object suspended in the air, held by insufficient force—suppose that instead of making this rather a balanced question we make an exaggerated statement of it, to make the point. Suppose this was a tremendous iron tank suspended in the air by what the workman knew was a chain that was too light to properly hold it, and the foreman had said to him, "Now you go out there and stand under that tank and sweep the floor and scrub it," and the workman knew that that thing was insufficiently held and he went out there and worked; now I do not know of any case in the world where the common law is administered that would not say that such act on his part was not an assumption of risk of injury from a defect of the physical presence of which he had knowledge, and of the injury from which he had an appreciation. That would seem to me to be an extravagant example of the situation here. Now, here this is all that happens: This man knows that these men cannot hold it up because it requires seven men to do it sufficiently. He knows

that the crowd already there are a woefully ineffective bunch because he has been called to assist in doing what both he and the foreman recognize is being insufficiently done, or done with insufficient strength or help; so he ambles up there and he says he recognized when he went up that that was a dangerous thing, and when he got up there the only danger that any human being could apprehend rationally from going up there happened and it fell on his foot, and now he would ask us to hold that he did not assume the risk the presence of which he realized then and acknowledges now. I do not see how I can safely say that that is a question for the jury. I have reached the stage in my judicial career which may be expressed this way: that where there is any kind of a question for the jury in the light of what the upper courts are doing I want the jury to handle it; but here there does not seem to be any such question. (Exception noted by plaintiff.)

THE COURT—I might say that these points that I have decided you will find laid down in Dillenberger v. Weingartner, 35 Vroom, 292; Benjamin Atha Co. v. Costello, 34 Vroom, 27; and Christianson v. Lambert, 38 Vroom, 341.

POSTEA.

This case was tried before Honorable William H. Speer, Judge of the Hudson County Circuit Court, to whom the same was duly referred by Honorable Francis J. Swayze, Justice of the Supreme Court, holden in the Hudson Circuit. with a jury, at the Hudson Circuit on March 15, 1915. Evidence for the plaintiff was presented and a motion for a non-suit was made on behalf of the defendant, and the Court being of the opinion that the evidence for plaintiff was insufficient to entitle him to recover, granted said motion for non-suit.

WILLIAM H. SPEER,
Judge.

Dated March 24, 1916.

JUDGMENT.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant recover of the plaintiff, its costs, which are taxed at thirty-nine dollars and ten cents.

Judgment entered March 25, 1916.

WM. S. GUMMERE, C. J.