NEW JERSEY COURT OF ERRORS AND APPEALS.

STEPHEN NEVICH,
Petitioner-Appellee,
vs.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Prosecutor-Appellant.

BRIEF OF PROSECUTOR.

Statement.

This appeal brings up for review the judgment of the Supreme Court affirming in part an award of compensation made to the petitioner by the Honorable George G. Tennant, Common Pleas Judge of Hudson County under the provisions of the "Workmen's Compensation Act," P. L. 1911, Chapter 95.

The Supreme Court, in affirming in part the award made by the Common Pleas, held that the accident of the petitioner arose out of his employment but that there was no evidence adduced to support the finding of a total disability, in view of which situation this appellant has appealed to this Court, alleging error in both the findings of the Common Pleas Court and the affirmance of such error by the Supreme Court—that the accident to the petitioner arose out of his employment, and the appellee has filed cross appeal alleging that the Supreme Court erred in its determination that there was no proof before the Common Pleas Court that the petitioner suffered permanent injuries.

The situation which gave rise to the petitioner's claim against the appellant arose as follows:

Prior to and on September 12, 1914, the petitioner had been employed by the appellant in carrying water (p. 15, ll. 15-16) for one of its concrete gangs doing construction work in Hoboken, Hudson County, New Jersey, the purpose of the petitioner in carrying water being to keep filled a certain water barrel used by the concrete workmen (p. 18, ll. 21-23).

On the day in question the defendant had been carrying water for the concrete gang when two men came and upset the barrel of water (p. 15, ll. 21-25) and carried it away (p. 21, ll. 1-4). The defendant did not see these men take the barrel away (p. 21, ll. 25-27), his attention being first called to the fact when his boss ordered him to go and get the same, it then being in the street (p. 21, ll. 31-33). When the defendant approached the two men they threw the barrel down (p. 24, ll. 38-39) and the defendant, after picking it up, started to carry it back to the railroad premises and had gone about fifty paces when the two men came and assaulted him (p. 22, ll. 10-21). These men were strangers to the defendant, he having never seen them before. They were not members of the concrete gang or employed in any capacity by the Railroad Company (p. 19, ll. 20-32) and the only other time that the defendant saw these men was when they were arraigned for the assault upon him in the police court in Jersey City (p. 20, ll. 20-29).

The determination by the Common Pleas Judge was to the effect "that on September 12, 1914, the said Stephen Nevich while in the course of his employment and engaged in the work of filling the barrel with water preparatory to using said water for mixing cement, was instructed by his foreman to recover said barrel which had been

emptied and carried off by two men; that he had recovered said barrel as per his instructions and while returning with it to the yard was set upon and attacked by the two men and severely injured" (p. 12, ll. 12-15).

From the injuries received by the assault of these two men the petitioner developed chorea or hemi-chorea which the Common Pleas Court found to create a total and permanent disability (p. 21, ll. 25-27).

ARGUMENT.

POINT I.

The accident did not arise out of the defendant's employment.

In view of the fact that we have but one case in this State in which the right to recover under the Workmen's Compensation Act has arisen out of an accident which was the result of a felonious assault by a person not a fellow servant of the injured party, and the further fact that "the language of the British Workmen's Compensation Act with reference to accidents arising out of and in the course of employment is identical with that of our own, the well considered English cases construing that language will be useful in construing the same language in our Act."

The recent opinion of the Court of Errors and Appeals in the case of *Hulley v. Moosbrugger,* 95 Atl., 1007, from which the above quotation has been made, deals with accidents which were the result of horseplay or skylarking, and although some of the English cases cited therein are cases where a malicious or felonious intent was shown, and others were cases arising from injuries inflicted by fellow-servants, we will not here attempt to distinguish the cases there cited, but would but call this Court's attention to them, and add to the

cases there cited so many other of the English cases as we deem specially pertinent to the situation presented by the evidence in the instant case and in which we feel the Common Pleas Judge had misdirected himself in point of law.

In *Baird & Co. vs. Burley,* 45 S. L. R., 416—1 B. W. C. Cases, p. 7—, it appeared that two lads were employed in working in a mine; that one of the lads took up a handful of rubbish and threw it at the other, who, in avoiding being struck in the face by it, brought his head against the side of the mine and was injured. The Court held that it certainly was not part of one of the lad's employment to throw a missile at his fellow-workman, nor was his doing so a risk incidental to the other's employment which the employers might be supposed to have undertaken the chance of when they employed him and that the throwing of the missile was a gratuitous piece of mischievous folly on the part of the other lad and that the accident was not one which arose out of the employment in which the person injured was engaged.

In *Blake vs. Head,* 5 B. W. C. Cases, 303, it appeared that an errand boy was attacked with a hatchet while at his work by his employer, who was subject to fits of melancholia, and had been in an insane asylum. Cozens-Hardy, M. R., at page 304 said:

> "I think it was an intentional felonious act and the injury certainly did not arise out of the employment. If the applicant had been an attendant in a lunatic asylum and had been attacked by one of the patients there would have been very good ground for saying that there was an accident arising out of his employment as being a risk incidental to the employment, but that is not the case here."

In *Poulton vs. Kelsall,* 5 B. W. C. Cases, p. 318, it appeared that during a strike of carters at

Manchester the employers had asked the workman if he would volunteer to go to the station with a horse and van and get up goods from there. He consented and it was ultimately agreed that if he was injured by any of the strikers he should be compensated. He made, under police escort, two or three journeys to and from the station and although some stones were thrown at him, he met with no serious harm. At noon he left to go home to get some necessary rest and while on his way home was brutally assaulted by two strikers, which assault incapacitated him. Cozens-Hardy, M. R., purposely avoided saying that the accident did not *arise out of* the workman's employment, but held that the accident did not arise *in the course of his employment.*

In the case of *Murray v. Denholm & Co.,* 5 B. W. C. C. 496, it appeared that the employees in a wood yard had gone out on a strike and that other workmen were put in to take their places. The strikers made an attack upon the works and assaulted the strike breakers. One of the workmen who was injured claimed compensation.

The point directly in issue in the case was whether this was an accident arising out of the employment. As in some of the other cases cited, there was considerable discussion by the Court as to whether the injury of the workman was an accident, but having in the instant case conceded that the defendant petitioner's injury was an accident, the reference to the *Murray* case is only for the purpose of showing that the Court held that it was not an accident arising out of the workman's employment.

Lord Justice Clerk in discussing the case said:

> "In the present case the injury was not the act of a fellow workman. It was the act of persons who had given up their situations for reasons of their own and who, with the

intention of doing violence, forced their way into the premises and having forcibly overcome the police, proceeded to do violence to persons lawfully there. In these circumstances, how can the injury suffered by the workman be held to have arisen out of his employment? He was lawfully employed; he was within the enclosed premises of his master; he had the protection of the police. It was only by the persistent violence of the strikers that he came into danger. That they desired to drive him out of his employment is certain. They were venting their ill will on him because he chose to accept employment and to work perfectly legally, and in the due exercise of personal liberty. Is it to be held that in every case where violence or bloodshed are resorted to in disputes as to wages, such violence and bloodshed are to be held to arise out of the employment of the injured party? Of course in a sense it is the fact of his employment that induces the malicious persons to do him injury, but while the injury is done because he has undertaken the employment, it does not arise out of the employment. It arises out of the frame of mind of the attacker whose act is malicious and criminal" (pp. 504-5).

In the case of *Murphy v. Berwick,* 43 Ir. Lt., 126, 2 B. W. C. Cases, 103, it appeared that one Mary Murphy claimed compensation for injuries sustained by her out of and in the course of her employment as a cook at the railway hotel. The applicant was cooking at a range stove in the kitchen when a customer in the hotel came into the kitchen under the influence of drink and made an effort to catch her. In running away from him the applicant ran into the wheel of a mangle and falling forward, her left hand was driven through a glass door causing severe injuries.

Sir Walker, Bart., L. C., there stated:

"The County Judge has not found whether this accident did or did not arise out of the

> employment. All the report says is 'I dismissed the case on the merits.' Having regard to the situation which the applicant had as cook on these premises and as to the duties which she had to discharge, I cannot see how it is possible to hold that this accident was one arising out of her employment. *To come to such a decision would be tantamount to holding that the employer was bound to insure her against all wrongful acts of his customers. No case has been cited in which the employer has been liable for the tortious acts of a third party where such tortious act was not a risk reasonably to be contemplated by the employee in undertaking the employment."*

The Court thereupon dismissed the appeal as not being an accident arising "out of" the employment.

In *Wilson v. Laing,* 2 B. W. C. Cases, 118, a domestic servant, while engaged in the performance of her duties, was struck in the eye by a child's ball playfully thrown at her by a fellow servant, the child's nurse, with the result that she almost completely lost the sight of her eye.

The Lord Justice Clerk said:

> "It is a very far-fetched idea that because this happened in a house where there were children and children's toys, therefore the risk of accident happening through a toy being thrown by one servant at another was one of the risks incident to the appellant's employment. The girl who threw the ball with the intention of striking the appellant was certainly acting outside the scope of her employment when she did so and the accident certainly did not arise out of the appellant's employment."

This case was then dismissed as not arising out of or in the course of the injured person's employment.

In *Mitchinson v. Day Brothers,* 6 B. W. C. Cases, 190, it appeared that Mitchinson was a

carter in the employment of a firm of removers of heavy machinery; that on the day of the accident he was in charge of a horse and van which was standing in the street; that a man by the name of Parks who was the worse for drink came towards the van and either touched or was about to touch the horse when Mitchinson warned him that the horse might hurt him. Parks then struck Mitchinson a heavy blow which caused his death. The assault was entirely unprovoked.

Cozens-Hardy, M. R., in the course of his opinion, holding that the accident did not arise out of the employment, said:

> "The risk of being assaulted by a drunken man was not in any way specially connected with or incident to the employment of a carter and therefore the decision in this Court, and in the House of Lords in *Warner v. Couchman,* 1912 A. C. 35 and 5 B. W. C. C. 177, applies. I think this contention must prevail unless the respondent's counsel can make good their proposition that the question of unusual risk incident to the employment arises only when no causes such as lightning and frost are concerned. * * * *It has been strenuously argued that as the driver was in charge of his master's property, any accident caused while defending or protecting that property was in his master's interest and must therefore be held to arise out of his employment. I do not accept this view. It seems to me to draw no distinction between 'in the course of' and 'arising out of,' and in fact to strike out of the statute the words 'arising out of.'* I have read and considered the evidence and the learned Judge's finding of facts. He does not find that there was any such risk incident to the employment of a carter. I think the foundation of his judgment is to be found in this passage: 'He was acting in his master's interest by endeavoring in the least offensive manner possible to prevent interference with his master's property and performing his positive duty, he met

> an untimely death.' In my opinion, this is not sufficient to justify the award and there is no evidence to justify the finding that the accident arose out of the employment."

The fellow members of the Court, Lords Buckley and Hamilton came to the same conclusion as Cozens-Hardy and the Court's determination was that this accident did not arise out of the employment of the workman.

In *Clayton v. Hardwick Colliery Co.*, 7 B. W. C. C. 643, it appeared that the workman was employed at a colliery as what was known as a belt lad. There were some forty or fifty other boys who were employed at the same work and several men. Their work consisted in picking out from the coal as it traveled along the moving belt any unmarketable coal, dirt or stone and throwing it into a tub close at hand, or to a heap at the side. There was a notice posted up that stone throwing was prohibited. On the day in question there appears to have been some larking among the belt boys. One of them threw a stone at the applicant who was so seriously injured that he had to have one of his eyes removed.

The County Court held that the accident was attributable to the special risk to which the boy was rendered liable by his employment and compensation was awarded him. There was no evidence introduced that stones were commonly thrown by the boys at each other. Cozens-Hardy, M. R., on the appeal of this case stated that what happened was that one of the boys atrociously and maliciously threw the stone which injured the applicant. He then went on to say that it seemed to him "quite impossible for us to say that this was a risk so especially incident to the employment that the accident could have been said to arise out of the employment" (p. 647).

There appears to be only two English cases that militate against our argument that this accident

to the defendant petitioner did not arise out of the defendant's employment, those cases being *Board of Management, Trim Joint District School v. Kelley,* 7 B. W. C. C. 274, and *Weekes v. Stead & Co.,* 7 B. W. C. C. 398.

An examination, of the *Kelly* case, supra shows that the case was considered by the House of Lords (Irish) and Lord Viscount Halden expressly stated that the case raised the proposition as to the interpretation of the expressions "arising out of" and "in the course of" the employment. This case was decided in favor of the applicant by a divided court of four to three.

It appears that the applicant was the dependent of an assistant school master at a district school; that the deceased had power to inflict punishment upon the boys at his school, upon suitable action; that the boys in the school were not bad boys but two slight assaults had been previously committed by them on the school masters. The boys were angry at the deceased because he had stopped their playing in the school yard and because he had caught one of them stealing and they accordingly planned an attack on him which was subsequently committed, with the result that he was killed.

The County Court came to the conclusion "that there was a risk of violence from certain of the boys known by Kelley to be attendant to his position of Master" and that the accident was one "arising out of" the employment.

Much of the discussion in the case as reported, deals with the question as to whether the deceased came to his death by reason of an accident, but we concede in the present case that the petitioner Nevich received injuries through an "accident" and so much of the discussion in the *Kelley* case, supra, as deals with the question of whether the

assault was an accident is immaterial in its application to the case at bar.

In the majority opinion written by Viscount Halden he concludes that

> "There was evidence on which the arbitrator could find, as he did, that the accident so defined arose out of and in the course of his employment" (p. 284).

The dissenting opinion of Lord Atkinson at p. 309, represents our disagreement with the learned Common Pleas Judge in the case at bar when he says:

> "The fault I find with the findings of the learned County Court Judge on this point is this; that he appears to have judged of the conduct of the pupils of this school and of the risk incident to an assistant master's employment in it solely by reference to this murderous attack upon the deceased to the exclusion of the full history of the school for the twenty-two years preceding. There was nothing in that history, I think, to lead anyone to anticipate that an attack such as was made upon the deceased would ever be made. I have, therefore, great difficulty in coming to the conclusion that the risk of such an outbreak of violence taking place was a risk reasonably incidental to the deceased's employment. If the matter be judged by this oft applied test, the inclination of my opinion is that the injury by accident, if it was an injury by accident, did not arise out of the employment of the deceased."

And, again, Lord Shore's remarks at pages 315-316:

> "The nature of the employment must also be looked to because it appears to me"—and here the present case is very closely approached—"that it may be a vital and determining factor in the consideration of the question at issue whether the nature of the employment was such as to allow of the occurrence being

> treated as an injury by accident to the servant. Some employments are practically unaccompanied with danger from wilful occurrences; others are so accompanied. In the case of a warden in a prison, he may, with certain classes of prisoners be required to go armed and to be in constant watch over the preservation of his life and possibly in ninety-nine cases out of a hundred he does, but in the hundredth case an accident takes place and his injuries on such occasion fall within the very risk which is attached to his employment. They have been wilfully caused, but his hope and expectation was that he would survive uninjured. When the occurrence takes place, however, it is properly denominated an accident arising out of his employment."

Lord Shore then proceeds to discuss the position on an attendant in an asylum in charge of dangerous lunatics and also the case of a game keeper who in the course of his duty has to watch over the property committed to his charge against the marauding of poachers.

Lord Parker, also dissenting, makes the following query which is quite pertinent to the case at bar:

> "Had the legislature intended that workmen should be insured at their employers' expense against all injuries more or less sudden, more or less unexpected, and not self-inflicted, it was easy enough to say so" (p. 323)."

and again (p. 325):

> "If Kelley's injuries arose out of his employment within the meaning of the act it would seem to follow that any shop superintendent, any overseer or foreman, and indeed any person placed in authority over others who incurs the ill-will of, and is in consequence assaulted and injured by some subordinate, would be entitled to compensation."

In the other case, *Weekes v. Stead,* supra, it

appeared that the employer engaged a foreman whose duty it was to engage odd job men to assist with vans when furniture had to be moved. *The evidence was that the men who applied for the jobs were of a very rough class, who, if disappointed in what they wanted, were likely to show considerable resentment, sometimes assaulting the foreman. There was also evidence that other foremen in similar positions in the neighborhood had on several occasions been assaulted under similar conditions.*

The County Clerk found that Weekes met his death by an accident arising out of and in the course of his employment.

The Court of Appeals in England in confirming the award of the County Judge, after reviewing the evidence, through Swinfen Eddy, L. J., said:

> "In my opinion, having regard to the evidence proved and to the proper inference to be drawn from the facts provided, I think there was evidence from which the learned Judge could come to the conclusion that it was established that in this case there was proof of a special risk incident to the employment in which Weekes was engaged" (p. 405).

In view of the conclusions which we may reasonably draw from the English cases, hereinbefore referred to, the opinion of the Court of Errors in *Hully vs. Moosbrugger,* supra—that the accident was not one clearly within the scope of the employment of the defendant petitioner nor arising out of a risk reasonably incident to that employment—we believe applies with full force to the instant case.

We think that the case of *Schmoll vs. Weisbrod & Hess Brewing Company,* 97 Atl., Reporter, 723, is the case most applicable to the situation presented by the instant case. In that case it appears from the opinion of the Supreme Court that the

deceased, like in the instant case, was assaulted by some persons unknown to him. Similarly in the instant case the accident to the deceased could not reasonably be directly or indirectly connected with the employment of the deceased and in view of the fact that there was no proven circumstance before the Common Pleas Court in the instant case that connected the assault upon the appellee directly or indirectly with his employment as a water carrier, we respectfully contend that there was no proof before the Common Pleas Court that the accident to the petitioner appellee did arise out of his employment and it is respectfully urged that the affirmance by the Supreme Court of the judgment and award of the Hudson County Common Pleas with respect to its finding that the accident to the petitioner appellee arose out of and in the course of his employment should be reversed and set aside.

POINT II.

There was no proof of permanent injury.

"It is for the Court", said Justice Swayze, in *Feldman vs. Braunstein,* 87 N. J. L., p. 21,

> "under the statute to determine the compensation and the Court can only act on the facts before it, not upon the uncertain possibilities of the future."

An examination of the testimony of Dr. George W. King, on behalf of the defendant petitioner, shows that the defendant was suffering from chorea, a disease of the nervous system characterized by rapid, quick, involuntary muscular contractions (p. 30, ll. 8-18) and this was also the opinion of the physicians produced upon the behalf of the prosecutor, Dr. Stewart (p. 39, ll. 12-15) and Dr. Arlitz (p. 50, ll. 34-39) and while

by the Common Pleas Judge he could have prop-
incapacitated, he erred in his determination and finding that the injury was permanent in character. A brief reference to the testimony of the three doctors who were not at variance as to the disease of the defendant petitioner, shows that there was no evidence from which total disability could be inferred or found as a matter of fact.

"GEORGE W. KING, M. D.:

"Q. The very fact of such a condition following a traumatic injury—is there more likelihood of its getting well? A. That fact would indicate that there is a grave lesion, it indicates a lesion of the motor area of the brain; there is some injury there, and it appears—probably after he had a concussion of the brain, there might have been some hemorrhagic dots, small blood vessels might have oozed out and caused hemorrhage in that particular location. That might have caused these muscular contractions. Sometimes it is absorbed and it clears up, and sometimes it might take a year or over to do so. *It ought to clear up in a year. Sometimes it remains longer. If it clears up and the tissue is not broken and destroyed, he will get well, but if there is destruction of the brain tissue he will not get well. How far that condition is gone it is impossible to determine*" (p. 31, ll. 22-40).

"ROBERT STEWART, M. D.:

"Q. What have you to say as to the probability of this condition clearing up or disappearing? A. Personally, I think the man has a very good chance, under continued treatment, to improve and get better, I would not say absolutely well, but to be of service to himself, and to be able to do his daily work, and make a living (p. 41, ll. 1-10).

"Q. Is it your opinion that this condition is a permanent total disability of this man? A. Well, no, I do not think it is—the statement I made before, under proper treatment he could recover * * * (p. 41, ll. 11-16).

"Q. You said that under continued treatment he would get better? A. He has improved * * * (p. 43, ll. 9-10).

"Q. Could you say in this case, positively, he could recover? A. I answered that before by saying no, but the man, to the best of my opinion—this man will improve, and *has improved under treatment*" (p. 48, ll. 6-10).

"WILLIAM J. ARLITZ, M. D.:

"Q. What in your opinion, Doctor, are the probabilities of this condition clearing up—the present condition that Mr. Nevich is in? A. Cases of this kind usually recover—I could not tell you how long it will take for him to recover—then he might go along apparently well for a long time and he might have a shock or a blow, might have a blow, and he would relapse into the same condition. That is the history of all of these cases. * * * (p. 51, ll. 18-26).

"Q. Well, would you say, Doctor, that his injury is permanent, or is it not permanent? A. I could not say that" (p. 55, ll. 3-5).

When it is observed that the condition for which the prosecutor has been called upon to make compensation is claimed to have been the result of a traumatic injury (See Dr. King's testimony, p. 31, ll. 1-10), it becomes vitally important in the consideration of the case to ascertain whether the defendant ever received such an injury. One learns from the testimony of the physicians at the hospital—Dr. Steadman (p. 56, ll. 27-31) and Dr. Londrigan (p. 54 et seq.) *that they could find no evidence of an injury or trauma* (p. 60, ll. 13-18).

The situation is quite similar to that in the case of *Reimer vs. Proctor Publishing Co.*, 85 N. J. L., 41, where the Court said, at p. 443:

"We think the furthest this testimony goes is to show a possibility that the death was due to the accident. Where the doctors refuse to state that the death was caused by the accident, there is no basis for an infer-

ence to that effect by the Court. The burden of proof is in accordance with the ordinary rule, upon the petitioner."

All of the evidence in this case points to the fact that the defendant petitioner was assaulted, but we most respectfully contend that an examination of the record fails to disclose (the defendant-petitioner's physician having assumed the fact) that the defendant petitioner suffered an injury which accelerated or made manifest a condition which the defendant-petitioner had latent, within him. However, if this Court is of opinion that the defendant's condition arose from the assault, the only finding the Common Pleas Court could have properly made would have been that the defendant-petitioner's disability, while, at the time of the hearing it was total, was under the evidence, at the most, temporary and not permanent in character.

Respectfully submitted,

POINT III.

For the reasons hereinbefore stated the affirmance by the Supreme Court of the award made by the Hudson County Common Pleas Court should be set aside.

FREDERIC B. SCOTT,
Attorney and of Counsel for Appellant.

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FOR DEFENDANT:

Notice of Appeal.

(Filed June 16, 1916.)

New Jersey Supreme Court.

STEPHEN NEVICH, *Petitioner-Appellee,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Respondent-Appellant.*	On Petition for Compensation.

WILLIAM PERLIS, ESQ.,

Attorney of Petitioner-Appellee.

SIR:

YOU WILL PLEASE TO TAKE NOTICE that The Delaware, Lackawanna & Western Railroad Company, the above respondent-appellant, hereby serves notice of appeal from the affirmation of the above case by the Supreme Court of the State of New Jersey, affirming the judgment of the Hudson County Court of Common Pleas, to the Court of Errors and Appeals for the State of New Jersey, and the said respondent-appellant hereby writes and sets down its grounds of appeal as follows:

1. Because the New Jersey Supreme Court erred in its affirmation of the determination of the Hudson County Court of Common Pleas that the injury to the petitioner was an accident arising out of and in the course of the said petitioner's employment.

2. Because the New Jersey Supreme Court erred in its affirmation of the determination of the Hudson County Court of Common Pleas that the injury to the petitioner was a risk incident to the petitioner's employment and that it was a risk which was directly connected with the petitioner's employment.

3. Because the New Jersey Supreme Court erred in this, that it determined that the petitioner received his injuries in his endeavor to protect his employer's property from theft, which finding was neither susceptible of determination from the evidence submitted to the Supreme Court on the appeal of said case from the Hudson County Court of Common Pleas, nor was such a finding made and determined by the Hudson County Court of Common Pleas in making the award in said matter.

Yours truly,

FREDERIC B. SCOTT,

Attorney of Respondent-Appellant.

Notice of Cross Appeal.

(Filed June 16, 1916.)

NEW JERSEY SUPREME COURT.

STEPHEN NEVICH, *Petitioner,* *Cross-Appellant,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Respondent,* *Cross-Appellee.*	On Petition for Compensation.

FREDERIC B. SCOTT, ESQ.,
Attorney of Respondent-Appellee.

SIR.:

YOU WILL PLEASE TAKE NOTICE that Stephen Nevich, the above Petitioner Cross-Appellant, hereby serves notice of cross-appeal from the reversal of the above case by the Supreme Court of the State of New Jersey, reversing the judgment of the Hudson County Court of Common Pleas, to the Court of Errors and Appeals of the State of New Jersey, and the said petitioner cross-appellant hereby writes and sets down his grounds of appeal as follows:

1. Because the New Jersey Supreme Court erred in its reversal of the determination of the Hudson County Court of Common Pleas that the injury to the petitioner resulted in a total permanent disability.

2. Because the New Jersey Supreme Court erred in this, that it found no evidence adduced to support the finding of total permanent disa-

bility, when the testimony shows there was some evidence to justify a finding of total permanent disability.

3. Because the New Jersey Supreme Court erred in reviewing and considering the question of the extent of petitioner's injuries, which was a question of fact and was supported by the evidence; therefore, the finding thereof of the Hudson County Court of Common Pleas should not have been disturbed by the New Jersey Supreme Court.

Yours truly,

WILLIAM PERLIS,
Attorney and of Counsel with
Petitioner Cross-Appellant.

Writ of Certiorari.

(Allowed Dec. 23, 1915.)

STATE OF NEW JERSEY, SS.:

(Seal.)

THE STATE OF NEW JERSEY to the Honorable GEORGE G. TENNANT, one of the Judges of the Court of Common Pleas of Hudson County, and Joseph McGovern, Clerk of said Court.

GREETING:

We being willing for certain reasons to be certified of a certain judgment made and entered in a cause lately pending before you under and by virtue of Chapter 95 of the Laws of 1911, between Stephen Nevich, Petitioner, and The Delaware, Lackawanna and Western Railroad Company, Defendant do command you that the said judgment and the determination of facts on which the same was entered, together with all

things touching and concerning the same, as fully and completely as before you they remain or in your custody or control, you do certify and send to our Justices of our Supreme Court at Trenton on the 6th day of January, 1916, that thereon may be done what of right and according to law ought to be done.

WITNESS, his Honor, Wm. S. Gummere, Chief Justice of the Supreme Court of Judicature of New Jersey at Trenton aforesaid, this 23rd day of December, A. D. 1915.

WM. C. GEBHARDT,
Clerk.

FREDERIC B. SCOTT,
Attorney.

Allocatur.

I allow the within writ. Let it be sealed.
December 18, 1915.

F. J. SWAYZE.

Return.

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

GEORGE G. TENNANT,
Judge.

Attest:
JOHN J. MCGOVERN,
Clerk.

Order.

HUDSON COUNTY COURT OF COMMON PLEAS.

STEPHEN NEVICH,
Petitioner,
vs.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Respondent.

A petition having been filed in this cause by Stephen Nevich, petitioner, praying for the compensation payable by the Delaware, Lackawanna & Western Railroad Company, the respondent, it is on this 7th day of September, A. D. 1915, on motion of William Perlis, attorney for petitioner:

ORDERED, that the hearing of said matter be and hereby is set down for Friday, the 8th day of October, 1915, at the Court House, Jersey City, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard. And it is further

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

GEORGE G. TENNANT,
Judge of the Hudson County
Court of Common Pleas.

Petition.

(Filed Sept. 7, 1915.)

HUDSON COUNTY COURT OF COMMON PLEAS.

STEPHEN NEVICH, *Petitioner,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Respondent.*	Under Employers' Liability Act. On Petition for Compensation, etc.,

To his Honor GEORGE G. TENNANT, a judge of the Court of Common Pleas of the County of Hudson and State of New Jersey.

Your petitioner, Stephen Nevich, respectfully shows:

1. That he resides in the Borough of Secaucus, in the County of Hudson and State of New Jersey, and that on or about September 12, 1914, he was employed by the defendant at its place of business, in the City of Hoboken, County of Hudson and State of New Jersey, as laborer about the yards.

2. That on the day and year aforesaid, while so employed, he was attacked and assaulted by two men unknown and strange to your petitioner

3. That as a result of said assault your petitioner has been and is still in a nervous and shaky condition, and is permanently incapacitated from performing any manual labor.

4. That the said defendant, the employer of your petitioner, had actual knowledge and notice of his said injury.

5. That at the time of said injury and prior thereto, your petitioner received as compensation

from the said defendant wages at the rate of Nine ($9) Dollars per week.

6. That your petitioner and the said defendant have failed to agree upon the amount of compensation due to your petitioner for his said injuries.

7. Your petitioner therefore prays that your Honor will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the supplements thereto and amendments thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

his
STEPHEN X NEVICH,
mark
Petitioner.

J. G. KOVEN,
Witness.

STATE OF NEW JERSEY, }
County of Hudson. } ss.:

STEPHEN NEVICH, of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has had the same read to him and is familiar with the contents thereof; and that the matter and things therein set forth are

true according to the best of his knowledge and belief.

his
STEPHEN X NEVICH.
mark

J. G. KOVEN,
Witness.

Subscribed and sworn to before me this 28th day of August, A. D. 1915.

WILLIAM PERLIS,
Attorney-at-Law,
Of New Jersey.

Answer.

(Filed Sept. 14, 1915.)

The above respondent answering the allegations contained in the petitioner's petition, says:

I. It admits the allegations contained in the first paragraph of said petition.

II. It has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the second paragraph of said petition.

III. It denies the allegation contained in the third paragraph of said petition.

IV. It admits the allegations contained in the fourth paragraph of said petition.

V. It denies the allegations contained in the fifth paragraph of said petition.

VI. It admits the allegations contained in the sixth paragraph of said petition.

VII. It denies the allegations contained in the seventh paragraph of said petition that the "Act prescribing the liability of an employer to make compensation," etc., is applicable to the case of the petitioner under the facts set out in his petition.

Answer.

FURTHER ANSWERING SAID PETITION, this respondent denies that said petitioner was injured by an accident arising out of and in the course of his employment.

Your respondent shows that since September 12, 1914, it has paid the petitioner the sum of Two Hundred and Eighty Dollars ($280.00), and if this Court should find and determine that the petitioner has a claim or cause of action under and by virtue of the Act referred to in the seventh paragraph of said petition, the respondent prays that it be allowed a credit *pro tanto* on account of so much as this Honorable Court shall find and determine is due said petitioner.

And it will ever pray.

FREDERIC B. SCOTT,
Attorney of Defendant.

STATE OF NEW YORK,
County of New York, } ss.:
City of New York.

A. D. CHAMBERS, of full age, being duly sworn, on his oath says: That he is Secretary and Treasurer of the Delaware, Lackawanna and Western Railroad Company, the respondent in the foregoing answer; that he has read said answer and that the same is true to the best of his knowledge, information and belief.

A. D. CHAMBERS.

Sworn to before me this 13th day of September, 1915.

Joseph Fiell,
A Foreign Commissioner
of Deeds for the State of
New Jersey in New York.

(Seal.)

Determination.

(Filed Dec. 17, 1915.)

A petition having been filed in the above stated matter, praying for the compensation to which the petitioner may be entitled to by virtue of the terms and provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, together with the several supplements thereto and Acts amendatory thereof, and a time and place for the hearing of the said petition having been fixed, and it appearing to the Court that said petition and the order fixing the time and place of said hearing have been duly served upon the respondent on September 7th, 1915, and an answer having been filed by the said respondent on September 14th, 1915, and the petitioner and the respondent having appeared on October 22nd, 1915, the date set for the summary hearing herein, the petitioner being represented by William Perlis as his attorney, and the respondent by Frederic B. Scott as its attorney, and the Court having heard the testimony offered in behalf of the parties hereto, and counsel having been heard, I do find and determine from the evidence taken in the cause, as follows, to wit:

FIRST: That the petitioner was, on September 12th, 1914, in the employ of the respondent in the capacity of a laborer about the yards owned by the respondent.

SECOND: That at the time of the injury the

said Stephen Nevich received as wages in said employment the sum of $9.60 per week.

THIRD: That on September 12th, 1914, the said Stephen Nevich, while in the course of his employment and engaged in the work of filling a barrel with water, preparatory to using said water for mixing cement, was instructed by his foreman to recover said barrel which had been emptied and carried off by two men. That he had recovered said barrel, as per his instructions, and while returning with it to the yards, was set upon and attacked by the said two men and severely injured.

FOURTH: That the respondent herein had knowledge and notice of said accident.

FIFTH: That as a result of said accident the said Stephen Nevich sustained serious injury; he was knocked unconscious and laid up in St. Mary's hospital in Hoboken, N. J., for seven weeks; ever since he regained consciousness, his head, hands and legs tremble and shake rythmically. His illness and condition is classified as that of "chorea".

SIXTH: That the petitioner is entitled to compensation for a total and permanent disability.

SEVENTH: That petitioner is entitled to costs in this proceeding. Respondent is hereby given a credit of $360, which sum had been paid to the petitioner by the respondent.

IT IS THEREFORE, on this 17th day of December, A. D. 1915, on motion of William Perlis, attorney of the petitioner,

ORDERED, that the respondent herein pay, or cause to be paid to the said petitioner the sum of Five Dollars for four hundred weeks beginning September 26th, 1914, and also the costs of the proceeding, amounting to Thirty-six Dollars and Forty-nine Cents.

IT IS FURTHER ORDERED that William Perlis, the attorney for the petitioner, be and he hereby is allowed the sum of One Hundred and Fifty Dollars, as counsel fee herein, the same to be paid by the petitioner in equal weekly installments of One Dollar each and every week.

GEORGE G. TENNANT,
Judge.

Certificate.

I, JOHN J. MCGOVERN, Clerk of the County of Hudson, and also Clerk of the Common Pleas Count of Hudson County, the same being a court of record, do certify that the foregoing is a true and correct transcript of the record and judgment in the case of Stephen Nevich vs. The Delaware, Lackawanna & Western Railroad Company as the same remains on file and of record in my office.

IN WITNESS WHEREOF, I have set my hand and the official seal of said Court this 5th day of January, 1916.

JOHN J. MCGOVERN,
Clerk.

Testimony.

HUDSON COUNTY COURT OF COMMON PLEAS.

TENNANT, J.

STEPHEN NEVICH, *Petitioner,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Respondent.*	On Petition for Compensation under Employers' Liability Act.

Hearing of the above entitled case, October 22, 1915, before Hon. GEORGE G. TENNANT, Judge.

APPEARANCES:

MR. WILLIAM PERLIS, for the Petitioner.
MR. FREDERIC B. SCOTT, for the Defendant.

MR. SCOTT: I would like to amend my answer to set up that the petitioner has been paid three hundred and sixty dollars, instead of two hundred and eighty dollars.

MR. PERLIS: I have no objection.

It is admitted that the petitioner was employed by the defendant, that the defendant had notice of the injury.

STEPHEN NEVICH, the petitioner, sworn, testified as follows:

DIRECT EXAMINATION BY MR. PERLIS (through Interpreter):

Q. You are the petitioner in this case? A. Yes.

Q. Where do you live at present? A. Snake Hill Poorhouse.

Q. On or about September 12, 1914, were you employed by the Lackawanna Railroad in Hoboken? A. Yes.

Q. What were your duties? A. I carry water towards the cement.

Q. On September 12, 1914, what did you do? A. I carry water until the last day.

Q. What day was that? A. It was on Saturday.

Q. What happened after you carried this water? A. I carry a barrel of water; I went to work with a shovel, and two men came and upset the barrel of water. The boss said, "You take the barrel back."

Q. What did you do? A. I went to—towards the barrel, and two men came and beat me up.

Q. What do you remember—what was the next thing that happened to you? A. I fell, and I fell unconscious, don't remember, after that, what took place.

Q. When you awoke, where were you? A. In the hospital. I woke up, I find myself in the hospital; that was on Sunday morning.

Q. What hospital? A. St. Mary's, Hoboken.

Q. How long were you in the hospital—do you know? A. Seven weeks.

Q. Did you shake when you woke, as you are shaking now? A. If I was in such a condition, how can I work, if I was in such a condition?

Q. Did you shake, when you woke, as you are shaking now? A. Who would take me to work?

Q. (Question repeated.) A. A little, not quite so bad.

BY THE COURT:

Q. What was the condition of your health before this thing happened? A. I was healthy.

Stephen Nevich—Direct.

Q. Were you ever sick before this accident? A. No.

Q. When you were struck by these two men where did they strike you? A. They struck me with an iron on the head. After I fell unconscious I don't know where I was beaten.

Q. Before you fell unconscious where were you struck?

THE INTERPRETER: On the head, with an iron.

BY MR. PERLIS:

Q. Have you been able to do any work since that accident? A. No. After I left the hospital I was in the same condition as I am in now.

Q. Did anybody in your family ever have the same kind of shaking— A. (In English.) No, never.

Q. Did you understand that question?

MR. SCOTT: I ask that we have the balance of the examination without the interpreter.

MR. PERLIS: I am satisfied if he can understand.

Q. Are you married? A. (Without the interpreter.) Yes.

Q. Have yon any children? A. (Without the interpreter.) Three.

THE COURT: What difference does it make?

MR. PERLIS: I may ask for commutation.

CROSS EXAMINATION BY MR. SCOTT (without the Interpreter):

Q. Where were you born? A. Russia.

Q. How old are you? A. Thirty years.

Q. When did you come to this country? A. I forget that, I guess five, ten, years, I don't know what year, is it ten years. Is it now, in the country.

Q. You told us you have never been sick before? A. No.

Q. Like this. A. No.

Q. Are you sure of that? A. Three years ago, shake, right after Dr. Olpp fix me up, not sick at all.

Q. Three years ago? A. Three years ago; after three years, work, nothing.

Q. You went to Dr. Olpp? A. Dr. Olpp.

Q. Where is he—West Hoboken? A. West Hoboken.

Q. At that time you had a shaking in one of your arms? A. Little bit, in the right arm, and the fingers.

Q. And that was a shaking in your right arm and your fingers like the shaking you have now? A. No, just a little, can work all right.

Q. Where was the shaking in your right arm—from the shoulder down? A. In the fingers.

Q. Did your fingers contract and go in like that? (Indicating) A. No.

Q. Did they move and shake? A. This bit, shake, like this, little bit (indicating).

Q. How long did Dr. Olpp treat you for that? A. Four months, and the shake, after fix.

Q. He treated you four months for that shake in your fingers? A. Yes.

Q. Did you go to Dr. Olpp every week during that four— A. One time, get me fixed all right, after, no go no more, go to work.

Q. After you left Dr. Olpp did that shaking stop? A. Stop shaking, nothing.

Q. How long after you got the shaking stopped was it before you went to the Lackawanna Railroad Company to work? A. I guess, four months the shake, after one month, fix, the doctor.

Q. Then you went to the Lackawanna to work? A. I don't know; all the summer.

Q. When did you start to work there? A. I don't know.

Q. Was it a couple of months before the accident? A. I guess five months.

Q. About five months before the accident. You carried water? A. Yes, carry water.

Q. For that concrete gang? A. Yes, the concrete gang.

Q. Where did you get that water from? A. I don't know; from the pump.

Q. Do you remember the day you got hurt? A. No.

Q. Do you remember the day you got hurt—before you got hurt? Do you remember going to work? A. Yes.

Q. Where were you working then? A. Working in brick yard, Homestead brick yard.

Q. On the day you got hurt, where were you? A. Lackawanna Railroad.

Q. In Hoboken? A. In Hoboken, at the side of the tunnel.

Q. You were carrying water all that day? A. Carry water.

Q. Where were you getting your water from, from the pump? A. From the pump.

Q. Or from a barrel? A. From the pump, carry water, in the pump, fill up the barrel.

Q. Where was this barrel? A. Barrel stand on the railroad.

Q. Was it near the tracks? A. Yes, on the tracks.

THE COURT: Do I understand that the work—he was employed by the defendant, respondent?

MR. SCOTT: Yes. The petitioner says he was assaulted by parties unknown to him.

THE COURT: I wish you would ask him about that; get right to that.

Q. Will you just tell us what you were doing just before you got hurt? A. They beat me up on the track.

Q. What happened to the barrel? Did anybody take it? A. Yes, two men take it.

Q. Who were those two men, do you know? A. I don't know what kind of men, I no see him before.

Q. Did you ever see them before? A. No.

Q. They were not men working in your gang, were they? A. No, no work that.

Q. They were not workmen? A. No.

Q. They were not men working with Mr. Orcott, back here, (indicating) they were not doing any building? A. I no see them men before.

Q. You never saw them before? A. No.

Q. When this barrel fell down, and you went to get the barrel— A. Dump the water, take the barrel away, we go for barrel, boss says to me, "Go again, Steve, get the barrel back."

Q. These men took the barrel away? A. Yes, we go for the barrel.

Q. You went down to get the barrel? A. Yes.

Q. When you went down to get the barrel— A. Yes.

Q. —did these men say anything to you? A. No, say nothing.

Q. Didn't say anything? A. No.

Q. Did they do anything to you? A. Two men.

Q. You told us about being hit? A. No.

Q. With a piece of iron? A. No tell nothing.

Q. Did one of the men hit you with a piece of iron? A. Yes, on the head, black eye, after, lay down to die.

Q. You don't know what became of this man, or those men, do you know where they went to? A. No, speak good English, talk in Polish.

Q. (Through Interpreter) Do you know where those men went to? A. They ran away.

Q. (Through Interpreter) Did you ever see them again? A. In the Court.

Q. (Through Interpreter) You saw them in court? A. Yes.

THE COURT: What court?

Q. (Through Interpreter) Do you know what court that was? A. I forget.

Q. (Through the Interpreter) In the police court in Jersey City? A. In that court.

BY THE COURT (Through Interpreter):

Q. What was it you were going to do, or you were just about to do, when one of these men hit you with the iron on the head? A. The boss called me from the work I was doing, to go to carry this water.

Q. The barrel fell down? A. The two men throw it over, upset it.

Q. Were you doing anything with that barrel when they turned it over? A. Those men carry the barrel away, and the boss ordered me to go there and bring it back.

Q. Did you see the men take the barrel away? A. Yes, I saw them. They already carried it a little ways when the boss called me to bring it back.

Q. Was there water in the barrel? A. No, sir.

Q. What was there in the barrel? A. Nothing.

Q. Was this the barrel you put the water in? A. Yes.

Q. Had you put any water in it that day? A. Yes.

Q. How did it get empty? Did they dip it out, or how did it get empty? A. It is used for cement.

Q. How did they get the water out of the barrel? A. With a pail.

Q. Dip the water out of the barrel, and throw it on the cement? A. Yes, they take the water out with a pail.

Q. What time of day was it that this thing happened? A. Quarter after four o'clock in the afternoon.

By The Court:

Q. Did you see the men taking the barrel away? A. No, sir. They had already got it away when my attention was called to it.

Q. When the boss told you to get it, when did you first see it after that? A. It was on the street.

Q. How far away from the place where it had been before? A. About twice the length of this room.

Q. Did they have the barrel then or was it lying down? A. They were near the barrel.

Q. Were they carrying the barrel? A. When I approached them they threw the barrel down.

Q. Did you pick the barrel up? A. Yes, and carry it back.

By Mr. Scott:

Q. You just told the Court you carried the barrel back. You told us a moment ago, after they hit you you lay on the ground to die. Which is true? Did you carry it back or did you fall on the ground? A. I didn't reach with the barrel back to the place.

Q. Did you start to carry the barrel back? A. Yes.

Q. Was it after you started to carry it back that they assaulted you? A. Yes.

Q. It was after you started back with the barrel they came up and hit you on the head with the iron? A. Yes. I carried it back when they came and struck me.

Q. How far had you got back towards the railroad property with the barrel before they came and assaulted you? A. About fifty paces, when they came and struck me, and the barrel fell.

Q. The railroad Company has already paid you three hundred and sixty dollars? A. (In English) Yes.

Q. Since this accident? A. (In English) Yes.

Q. The Railroad has already paid you three hundred and sixty dollars? A. (Question interpreted) A. Three hundred and sixty dollars.

Q. After you got out of the hospital, how is it you came to go to Snake Hill? A. (Without Interpreter) No got money, no can live, go to Snake Hill.

Q. When did you go to live at Snake Hill? A. (Without Interpreter) Seven weeks now.

Q. Since that time have you been out there all the time? A. (Through Interpreter) I only went home to see the children.

Q. How many times have you been home to see the children? A. (Through Interpreter) Three times.

Q. When you are alone do you have these shaking spells like you have had this morning on the witness stand? A. (Through Interpreter) When I am alone and nobody talks to me, then I slacken up.

Q. Do they disappear entirely? A. (Through Interpreter) No, I shake. When anyone talks to me then I get worse.

RE-DIRECT EXAMINATION BY MR. PERLIS (Through Interpreter):

Q. How much were you earning at the time you were employed? What did you make a week when you were working for the Lackawanna Railroad? A. Nine dollars and sixty cents a week. One dollar and sixty cents a day.

BY THE COURT: (Through the Interpreter):

Q. How long were you in the hospital after the injury? A. Seven weeks.

Q. What hospital?

MR. PERLIS: St. Mary's Hospital.

Q. After you came out of St. Mary's Hospital were you in the same condition as you are in now? A. Same.

Q. Are you any better now than when you came out of the hospital, or worse? A. I am worse now.

THE COURT: Was hospital treatment provided for the first two weeks?

MR. PERLIS: I don't know.

THE COURT: Has he had medical or drug bills he has had to pay during those two weeks?

MR. PERLIS: Not to my knowledge.

RE-CROSS EXAMINATION BY MR. SCOTT (without Interpreter):

Q. You know Dr. Stewart? A. I know him.

Q. Did you ever tell Dr. Stewart— A. No.

Q. —that you have felt better that your shaking had been less since you— A. Talk to me in Polish; no understand good English.

Q. (Through Interpreter) Did you ever tell Dr. Stewart that you felt better, that your shaking had been less since the accident? A. I did.

Q. (Through Interpreter) Did you tell Dr. Stewart that under his treatment you had got better? A. I did not.

GEORGE W. BIRCH, a witness produced on behalf of the petitioner, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. PERLIS:

Q. Are you connected with St. Mary's Hospital? A. Yes.

Q. In what capacity? A. Nurse.

Q. Do you know whether that hospital keeps records? A. Yes.

Q. Are you familiar with the records? A. Yes.

Q. Are you familiar with the records of this case? A. Yes.

Q. Will you kindly turn to it. A patient held up and beaten, admitted to the hospital suffering from concussion of the brain—

MR. SCOTT: Have you shown that these records are records made by this gentleman?

MR. PERLIS: He is familiar with the entries in it.

Q. Who makes the entries? A. The entries in the record book?

Q. You make the entry in this book? A. This is an entry I have made (indicating).

Q. Is that the original entry? A. Yes, original entry; this history is written by the physician.

Q. You copy from that in the book? A. No, sir, this record doesn't go in the book.

Q. In any book? A. No, sir.

Q. Whose writing is that? A. The doctor's writing.

Q. (By the Court) Is this the interne's examination? A. Yes, the history, written as soon as he comes in.

THE COURT: You offer it in evidence? (Witness Reads) Patient held up and beaten, admitted to the hospital suffering from concussion of the brain, later developed paralysis of the left arm, of a spastic type, and the slight paralysis of the left side of the face, with strabismus of both eyes. This strabismus may have been present before the injury. Physical examination shows no sign of wound to justify existing condition. (Signed) Dr. Holden.

Q. Is this an exact copy of it (indicating)? A. That is a copy I wrote myself.

MR. PERLIS: I offer the original.

MR. SCOTT: I object.

THE COURT: Objection sustained.

Q. Did Dr. Holden make any writing in regard to this case? A. Simply this here.

Q. Where did you get this information? A. That is the history, written as soon as the patient is able to give it.

Q. Who wrote this? A. Dr. Holden.

Q. This is his writing? A. Yes, this is his writing, and that is his signature.

Q. Are you familiar with his writing? A. Yes.

MR. PERLIS: I offer it.

MR. SCOTT: I still object.

Q. Is Dr. Holden connected with St. Mary's Hospital? A. He left there the first of October.

Q. Do you know where he is located? A. No, I don't.

THE COURT: What do you want to prove?

MR. PERLIS: That he was suffering from concussion of the brain. The record shows that, so far as we have it here. It is material to our case.

THE COURT: You cannot show it in that way. Have you subpoenaed the doctor?

MR. PERLIS: No. I don't know anything about Dr. Holden. He is no longer connected with the institution. I will withdraw the offer temporarily.

Q. The names of Dr. Steadman and Londrigan appear there? A. Yes.

Q. In their handwriting? A. No, sir.

Q. In Dr. Holden's handwriting? A. Yes.

Q. From your knowledge of the institution and its records, why do their names appear there? A. They were the attending physicians.

Q. Before this is put in the record, must they pass upon it, do you know?

MR. SCOTT: I object. It contains an unwarranted assumption of fact. I don't admit it is a record, a competent record binding this defendant.

THE COURT: I don't think it is admissible.

Q. Do you know whether they examined this petitioner? A. That I don't know, sir.

George W. Birch—Cross.
Pauline Nevich—Direct.

CROSS EXAMINATION BY MR. SCOTT:

Q. Dr. Holden was a young interne? A. He was the interne at the time.

Q. Interne? A. Yes.

PAULINE NEVICH, a witness produced on behalf of the petitioner, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. PERLIS:

Q. Are you the wife of Mr. Nevich? A. Yes.

Q. How long are married? A. Nine years.

Q. Do you remember your husband being like this before September 12, 1914? A. No.

Q. Was he never before like that? A. Never. Always worked.

Q. How long has he been in that condition? A. Second year.

Q. Since the accident? A. Yes.

Q. Did you visit him in the hospital? A. Yes.

Q. How soon after the accident? A. On the following week.

BY THE COURT:

Q. Do you remember the day he was hurt? A. I remember it.

Q. Did he go out in the morning from your home? A. He went to work in the morning.

Q. Where did you live at that time? A. Same place where I am living now.

Q. Where? A. Essex—

THE COURT: Where was he working at that time.

MR. PERLIS: Hoboken.

Q. Were you ever married before? A. No, sir. first marriage.

Q. You have children by this gentlemen? A. Three children.

Q. They are all living? A. Two died.

Q. Have your children who are living anything the matter with them? A. No, sir.

Q. How old are the children who are living? A. One, four; one, five; one, one year.

Q. When your husband went away that morning was he in good health or bad health? A. Good health.

Q. Could he walk? A. He could walk well.

Q. Did he have any such symptoms as he shows today, shaking and convulsions? A. No, sir.

Q. You saw him after he went to the hospital? A. Yes, on the following Wednesday.

Q. Is that the first you saw him? A. Yes.

Q. Why didn't you see him during that week? A. I was ill, confined with a baby.

Q. When you saw him at the hospital was he conscious? A. No sir, he was unconscious.

Q. When was the first time you saw him in the hospital, when he was conscious and could talk with you? How long after he was hurt? A. I don't remember. I was there very many times.

Q. When you first saw him and he could talk to you, or he could understand you, did he act like he does now? A. Worse.

By Mr. Perlis:

Q. What do you make a living from?

Mr. Perlis: On the matter of commutation.

A. I must go out to wash. I have two boarders, and some of my neighbors assist me.

Q. Is that the only income you have? A. Yes.

Q. Is that why your husband is in the Poor House, in Snake Hill? A. Yes.

Pauline Nevich—Cross.
George W. King—Direct.

CROSS EXAMINATION BY MR. SCOTT:

Q. How long have you been married? A. Nine years.

Q. Did you go with your husband when he went to Dr. Olpp for the—whatever was the matter with his hand? A. No, sir.

Q. Can you tell us about his hand? Do you remember when he went to Dr. Olpp? A. I don't remember that.

Q. What was the first time—the date of the first visit you made to the hospital, after the accident? A. I believe he was taken to the hospital on Saturday, I went there the following Wednesday.

GEORGE W. KING, a witness produced on behalf of the petitioner, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. PERLIS:

Q. You are a practicing physician in the State of New Jersey? A. Yes.

Q. How many years? A. Thirty-six years.

Q. Tell us where you studied medicine.

THE COURT: Are the doctor's qualifications admitted?

MR. SCOTT: No, I desire him to put in his qualifications.

Q. Tell us where you studied medicine. A. I am a graduate of medicine for thirty-six years, and thirty-one years medical superintendent of the Hudson County Hospital for the Insane; the past three and one half years county physician. The greater part of my life I have spent in the care of the treatment of nervous and mental diseases.

Q. Did you ever examine Stephen Nevich? A. I did.

Q. When? A. Monday last, at the Almshouse, Laurel Hill.

Q. When you examined him what did you find? A. I found he was suffering from muscular contractions of an involuntary and complicated nature, suffering from a grave form of nerve disease called chorea. Under excitement he became —his movements were accelerated, accentuated, and when his attention was distracted they could be lessened somewhat. I remember spending some time with him, went all over him, made a thorough neurological examination of his condition, and I am perfectly satisfied he suffered from what is called chorea.

Q. At any time during your examination did his shakiness subside? A. It subsided, but not completely. There was more or less marked tremor in some of the muscles of his body particularly the muscles of the neck. They were never at rest.

Q. What is chorea? A. Chorea is a disease of the nervous system, characterized by rapid quick, involuntary muscular contractions. A man is unable to hold a glass of water in his hand, simply because he was told to hold it. He would tremble and spill almost the whole of it. He might possibly, if he was not thinking of it, hold it; if his attention was called to it, his will, voluntary control, disappeared. It is a condition resulting from itself. It is known as St. Vitus' dance, Sydenham's chorea, chorea which as a rule occurs in young children, rarely in people of his age, which type of chorea occurs very rarely in patients of his age.

Q. What was your diagnosis of the cause of that disease? A. From what I have heard of the case, from my knowledge, and what history I have

heard about it, and knowing that that disease is produced by trauma, or traumatic injury, that the man left that morning in perfect health, and that he was unconscious when brought to the hospital, therefore having received an injury to the brain, therefore it is entirely reasonable to suppose that the cause of his disease was an injury which he received before being admitted to the hospital.

Q. Can you say whether this injury is likely to remain permanent? A. Chorea lasting a year in adults rarely gets well. It does get well sometimes. I have not been so fortunate as to see cases that I have been in existence for that period of time get well; but in my reading, and in the experience which I have had with other men, there are some cases reported, of chorea existing a year or more, following in a recovery, but it is a very rare—

Q. The very fact of such a condition following a traumatic injury—is there more likelihood of its getting well? A. That fact would indicate that there is a grave lesion, it indicates a lesion of the motor area of the brain; there is some injury there, and it appears—probably after he had a concussion of the brain, there might have been some hemorrhagic dots, small blood vessels might have oozed out and caused hemorrhage in that particular location. That might have caused these muscular contractions. Sometimes it is absorbed and it clears up, and sometimes it might take a year or over to do so. It ought to clear up in a year. Sometimes it remains longer. If it clears up and the tissue is not broken and destroyed, he will get well, but if there is destruction of the brain tissue he will not get well. How far that condition is gone it is impossible for me to determine.

Q. (By the Court.) What would you say as to

the extent of the disability at this time? A. Total disability from any manual labor.

Q. (By the Court.) He is unable to perform any work? A. Entirely incapacitated in my judgment.

CROSS EXAMINATION BY MR. SCOTT:

Q. You don't know anything about the previous history of this man? A. I have no knowledge of his previous history, outside of what he has told me himself.

Q. You don't know whether he had ever suffered a similar shaking in any part of his body before the accident? A. He had told me he had had a slight tremulous condition of his hand some time ago, but he went to a physician and he was prescribed for by that physician, and that condition disappeared after a short time.

Q. You have described his present condition as what? A. Chorea.

Q. With any—is there any other medical or further descriptive nature of chorea he is suffering from? A. I don't know how I could make it any clearer. It is characterized by those muscular movements which you have seen when he was on the stand, particularly when he is requested to do certain things, they are exaggerated and complicated. It is typical of chorea.

Q. What kind of chorea is it? A. There are two types of chorea, what is called Huntington's chorea, which was described in 1872, I think, by Doctor Huntington of Long Island. That is chorea which occurs in adults, and that is of hereditary nature, it occurs in families. It is called chronic chorea, and hereditary chorea; that disease is almost invariably accompanied with mental symptoms, mental derangements. He has none of the symptoms of mental derangements, but

he has some of the symptoms of Huntington's chorea, but it strikes me he has more of the symptoms of Sydenham's chorea, the ordinary St. Vitus's dance, which occurs in young children. I would be more inclined to state from my knowledge of this case that he is suffering from Sydenham's chorea.

Q. When you made this examination last Monday, how long did it take? A. Probably an hour, or longer.

Q. In what manner did you make it? A. Well, we stripped the man completely. He was unable to disrobe himself, as he was clumsy, and couldn't unlace his shoes. I believe one— I think Dr. Furst was with me—I think he unlaced his shoes. We had him stripped, went over the reflexes, went over the skin for anaesthesia, examined his reflexes, examined his pupils to see if there was any abnormality there. We found as a result of our neurological examination he had that exaggerated condition of his reflexes which occurs in all nervous diseases. His pupils were sluggish to light, although not entirely unresponsive; his knee reflexes it was almost impossible to take, because he was so excited that when we gave him that tap he would jump, excessively, so that we were unable to make a satisfactory examination of the knee reflexes.

Q. Those are all the things you found in that examination? A. Yes.

Q. Have you examined him since? A. No. Only by observation, observing him when he was on the stand here.

Q. Isn't it your opinion, Doctor, that this condition was directly—that this condition he is in at the present time was brought on directly by a trauma or blow? A. In the absence of any other cause, I can come to no other conclusion.

Q. Isn't it your opinion as an expert that this

condition can be produced by a blow? A. The authorities are pretty well—

Q. Is it your opinion? A. It is my opinion and my experience.

Q. You are then willing to state the condition you found him in is directly due to this blow he received in September, 1914? A. I say, in the absence of any other cause I am compelled to come to the conclusion.

Q. Did you endeavor to ascertain the previous history of this man? A. As well as I could. I went into his family history, spoke of his parents, asked particularly—I had a suspicion this was what is called Huntington's chorea. I inquired particularly about his brothers and sisters, and if there was any in his family line, which was denied by him.

Q. Did you take into consideration his condition he suffered with and went to Dr. Olpp for? A. I took that into consideration, but I considered it a trivial matter. It was, the way he represented to me; there was no loss of function there, that could not be described as chorea at that time, that could not be a partial chorea.

Q. He has described this morning on the witness stand the condition he was suffering from in that hand, that it was like the condition he is suffering now, only not so violent, that there was shaking there. A. I didn't understand him to say that.

MR. PERLIS: I object to the question; he has not testified to that.

THE COURT: There is no question yet.

Q. Is it your opinion that that condition, as he described it to you, with your knowledge of the man as you have learned it from your examination, that the prior shaking had any relation to the present condition he is suffering from?

A. I do not see any reason to warrant me in coming to that conclusion.

Q. Isn't it a fact that the condition of character that this man is suffering from, is never produced by a trauma unless the person is a subnormal person and not a person in good health at the time? A. Oh, no, no, that is not so. A person—of course, if a person is susceptible to that disease, if he has a hereditary taint in his family history and he is therefore susceptible to that disease, then of course a slight trauma would be apt to produce it, but it is not necessarily proven—there is no reason to believe that when a person receives that disease from a trauma, he gets it simply because he has a tendency to that disease.

Q. So that, in your opinion, if he was a normal, healthy person before the accident, the blow on the head he received, did produce this condition? A. That is my opinion, yes.

Q. And that, having in mind and before you, the fact that this shaking arm condition before, for which he went to Dr. Olpp, has no bearing on the fact that the blow received by him, might have accentuated or made manifest the condition he is now suffering from? A. That might be possible, certainly. I do not know his condition. Dr. Olpp can better determine that. It may be possible. I do not know about that because I did not see him in that condition. I do not know what his condition was.

Q. (By the Court.) If he had that condition, and had such a trauma as described, would such a trauma have accelerated it? A. Yes, it would, yes.

Q. (By the Court.) He might have had that condition? A. Yes.

Q. (By the Court.) And the trauma might have accentuated it? A. Yes.

THE COURT: If so, what is your understanding of the law?

MR. SCOTT: If we are liable, we are liable for the acceleration but taking into consideration that fact, which I shall subsequently develop, that this condition is not a permanent injury—

THE COURT: Aside from that—where do you get your theory of the law? Have you read *Hanglin v. Swift?*

MR. SCOTT: No, sir.

THE COURT: That is an opinion I wrote here that has been affirmed by the Supreme Court. There are some cases collected there, which speak of the doctrine of acceleration.

Q. You have already stated you had never had the experience of a case of St. Vitus's dance clearing up? A. I have yet to see a case of St. Vitus's dance occurring more than a year recover. I do not say they could not get well.

Q. But you have never had that experience? A. It has not been my good luck.

Q. But you are told there are cases that have come under your observation, by conversation with other practitioners? A. My reading of authorities has proven that. They rarely get well after that length of time.

Q. Will you tell us what your reading has disclosed as to how quickly this condition clears up? A. The duration of this disease—normal duration—three to six weeks, sometimes six months, rarely within a year.

Q. These cases you have spoken of— these exceptions— A. There are cases—there is one case reported by a German authority named Westphal, that got well after two years. There is another case where a person got well after two and a half years.

Q. These "getting well" cases—do you know whether they got well gradually or do they get well suddenly? A. They all get well gradually.

Q. Isn't it your opinion that this condition that this man is suffering from is due to hemorrhage of the brain? A. I am unable to state what it is due to. I have made autopsies—I have made considerable autopsies in these cases— sometimes I have found nothing; I have made autopsies where I have found punctated cuts in the motor area of the brain, where hemorrhage has taken place. Sometimes you make autopsies and your findings are entirely negative.

Q. Can you point to one symptom you found in this man that he has now that would indicate he had a hemorrhage of the brain? A. It is not in evidence—the record of the hospital said he had hemaplegia.

Q. That you found. A. I found none whatsoever.

RE-DIRECT EXAMINATION BY MR. PERLIS:

Q. In these cases where you said recovery has been had, were those adult cases or minor cases, as well as children? A. There have been two cases of adults reported, children also have been reported. Children get well, nearly always get well from chorea. It is the rule for children to get well.

Q. Is it the rule of adults? A. Ninety-seven per cent. of children as a rule get well.

Q. What is the rule of adults? A. It is not so good. They get well, but the prognosis of chorea in adults is unfavorable.

MR. PERLIS: I close the petitioner's case.

ROBERT STEWART, a witness produced on behalf of the defendant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. You are a practicing physician? A. I am.

Q. Graduate of what College? A. New York University Medical College.

Q. What is your occupation now? A. I am resident physician of the Hudson County Almshouse.

Q. You have been there how long? A. Over ten years, nine years I was connected with the Hudson County Hospital for the Insane under Dr. King.

Q. Do you know this petitioner? A. Yes.

Q. Will you tell us when you first saw him? A. I first saw Steve Nevich about the twenty-eight of December, 1914, when I received word from Mr. Rowe of the Lackawanna Railroad about his case, and asking me to go to see him and examine him. I went and examined him and wrote Mr. Rowe, and asked for the privilege of having a second—

MR. PERLIS: I object to his story.

Q. What did you do? A. I saw him again.

Q. When? A. I went to Sauer Island, where there is this big smelting furnace up there, I had to walk two miles—

Q. Where? A. Over from Secaucus.

Q. In Hudson County? A. Yes.

Q. You saw him? A. Yes.

Q. Tell us what you found at that time. A. I found him in about the same condition as to-day. I went over his body very carefully, excluded any injury to the brain. At that time he told me he had these contractions, these tremors in his hand about three years before, and had lasted four

months and he had gone to Dr. Olpp for treatment, and under his treatment he had been cured.

Q. What conclusion did you come to as to his condition at your first examination. A. Well, I am—I asked for a second examination. I examined him about January 2nd, to confirm my findings at the first examination. I wrote a letter which you will find—

Q. 1915? A. Yes, 1915. I wrote a letter to Mr. Rowe, telling him what I found.

Q. What were your conclusions? A. My conclusions were at that time he had chorea on one side of his body; hemichorea, I called it, because it is half.

Q. That conclusion was reached after how extensive an examination? A. About five or six hours, in the two examinations; took me ten hours, including traveling time.

Q. At the second examination, how long did it take you to examine him? A. The second examination he came to see me.

Q. At the County Hospital? A. Yes.

Q. Tell us what his condition was, in comparison with your first examination. A. It was about the same. I excluded everything that would indicate hemorrhage of the brain, or any lesion to the brain, any part of the brain; his pupils were normal, they reacted to light, there was nothing to indicate any lesion whatever. I was led to believe it was some taint he had in the family, and so said at that time, and you have, in my letter—

Q. Have you seen him since that time? A. Yes, many times; he has been an inmate of my institution since August 25, 1915, has been under my care continuously up to the present time, unless he would leave the institution to visit his home, or see his lawyer, or something like that.

Q. Will you tell us what you have observed—
A. I have observed that he—

Q. —during the time he has been under your care? A. Steve is all right when he is alone. I have peeked in the bath room and watched him in there, he has very little of this shaking; I have watched him when he would be asleep in bed, there is no shaking whatever. Ask him to write, his hand would tremble very much, but if he would go by himself he could write.

By The Court:

Q. That is substantially Dr. King's theory, if you ask him. A. It is a nervous tremor.

Q. You think he is purposely feigning? A. No; if he intensifies his thought it aggravates the tremor.

Q. You agree with Dr. King with reference to that? A. Yes, but since I have considered his case more thoroughly I would say that he has hysterical chorea.

By Mr. Scott:

Q. What are your grounds for so believing? A. Why, my grounds are these; his symptoms are imaginary, he has no real symptoms, the only thing he has is the shaking, you see, but he can be very quiet when he wants to.

Q. (By the Court.) You mean he can control himself? A. To some extent he can. I will tell you why. He dresses himself and undresses himself, attends to his daily needs. When I first saw him he was bad, but under my treatment he has progressed and improved wonderfully. In fact, I told his people some time ago, they may recollect, that if he would go to an institution where he could be treated, he would continue to improve, and they would not take him in a hospital, and he came to our place—

Robert Stewart—Direct.

MR. PERLIS: I object to this.

Q. What have you to say as to the probability of this condition clearing up or disappearing? A. Personally, I think the man has a very good chance, under continued treatment, to improve and get better, I would not say absolutely well, but to be of service to himself, and to be able to do his daily work, and make a living.

Q. Is it your opinion that this condition is a permanent total disability of this man? A. Well, no, I do not think it is—the statement I made before, under proper treatment he could recover.

BY THE COURT:

Q. What would you say as to his present condition? Is he totally disabled now? A. He is not totally disabled.

Q. Could he perform work? A. He could do many things.

Q. What could he do? A. He can carry water in a pail, he could carry a load of some kind, he could be a messenger, he could shovel, he could use a shovel, he could swing a broom, he could do many things. The great thing about him is that he shakes.

CROSS EXAMINATION BY MR. PERLIS:

Q. How many patients have you in the Almshouse? A. About seven hundred and thirty-five.

Q. Do you keep any records? A. I certainly do.

Q. Have you them in court with you today? A. I have records there, I have some records there, I wrote. I want to say the records I keep are my own personal records.

Q. Isn't your institution a county institution? A. Yes.

Q. Are there not public records there in which you make records of a case? A. Not from a medical standpoint. It is not a hospital.

Q. Were you appointed by the County? A. Yes.

Q. What are your duties? A. My duties are resident physician, to take care of the sick.

Q. How often did you examine Nevich while he was under your care in the hospital? A. Maybe a dozen times.

Q. Do you examine every patient a dozen times? A. If I thought it was necessary to examine them, yes. Some I have examined one hundred times.

Q. Beside being resident physician at the almshouse you are on the staff of the Lackawanna Railroad, aren't you? A. I simply have taken Dr. King's place there, done nothing except I am called upon, if they have to have a doctor they send for me, ask me to come over, ask me to take care of it; I take care of it whether they pay me or not. I will charge them.

Q. You mean the Lackawanna? A. Or the Erie—has sent for me; never given me a fee. I go; it is simply human nature to do that.

Q. When you examined this man why did you exclude any injury to the brain? A. Because he told me that he—he told me he was paralyzed. If a man has ever been paralyzed he has some indication of an injury, a person can see. I excluded everything that would tend to show or prove he had been paralyzed.

Q. Isn't it a fact, this nervous tremor, you have testified to, is one of the characteristics of that disease? A. Not always.

Q. It is not? A. In a minor chorea you have a spasmodic jerking in the face, such as a winking of the eye, or a drawing of the cheek.

Q. In your opinion you say it is hereditary? A. It might be.

Q. Couldn't this be a case de novo? A. It could be.

Q. But you would not say it was? A. I have no way of finding out. I went into his family history and he does not know anything about his parents.

Q. You said that under continued treatment he would get better? A. He has improved.

Q. What did your treatment consist of? A. This man has taken large doses of liquor potassii arsenitis, called Fowler's solution, noted for its efficacy in chorea. And the men in this country who have cured chorea have cured more cases with arsenic than any other drug.

Q. How long have you been giving him that treatment? A. Since he has been in the institution.

Q. How long? A. Since August 25th of this year.

Q. When you call this chorea— A. Hysterical chorea.

Q. What do you mean by hysterical chorea? A. Hysteria is a peculiar ailment, with no known pathological reason for it. It does occur after lesion.

Q. You say it results from injury? A. It can result without there being any injury.

Q. From what? A. That is something no man in the profession can tell you.

Q. Chorea is sort of an unknown quantity? A. Yes, it is. There are so many lesions found on autopsies that you cannot blame any one special lesion for the disease.

Q. Chorea is sort of a general classification? A. Chorea is a nervous disease marked by certain symptoms you see in that man.

Q. Would you say he has symptoms of Huntington's type of chorea? A. There is no differ-

ence in symptoms of Huntington's chorea and chorea major and minor.

Q. So far as you know, he may have Huntington's? A. He may.

Q. Isn't it true of the characteristics of that type of chorea that embarrassment or emotion will tend to aggravate the jerkiness? A. That is true of all choreas.

Q. If you look at a person, and he sees you looking at him, that also tends to aggravate it to a certain extent? A. Why, certainly.

Q. That is what you call intentional tremor? A. Yes.

Q. Where he is conscious of the fact that you are looking at him? (No answer.)

Q. Also, isn't it characteristic of chorea, either Huntington's type or the other, that when he is not watched, it will relapse to a certain extent? A. It is, of other diseases, notably hysteria.

Q. When he is asleep it subsides? A. Yes.

Q. You testified that was the condition of this man? A. Yes.

Q. What do you mean by hemichorea? A. Hemichorea is just a term, when chorea is restricted to half; hemi, half the body.

Q. You think he will have some relief after treatment? A. Hysteria goes the way of improvement, not of retrogression.

Q. Could you say definitely or positively how long it would be for this man to be cured? A. No one could do that.

Q. Nobody can? A. Nobody could say that.

By the Court:

Q. If you were, aside from your medical profession—had charge of a work, where you had to employ men, would you take him on as an ordinary workman, to do the character of work you

have described, carry water and use a shovel? A. No, I would not.

Q. Why not? A. Because if I was a good employer I would have my men examined by a physician and only take sound men.

Q. You conclude, then, he is not sound? A. He is not perfect, no.

Q. Would he be able to use a shovel or carry water as an ordinary man could carry water? A. No.

Q. You mean to say he might be able to carry water or use a shovel with some difficulty? A. He would be able to work and do things where he was not called upon to be particularly skilled, he could feed pigs, could tend a herd of cows, keep chickens, could do lots of things around; as for working as an engineer on a railroad or watchmaker—

Q. He has not been trained to that. But could he do the character of work he did before, as you heard the testimony in this case, carrying water for cement workers, or carrying sand? Would he be able to do that kind of work? A. Yes.

Q. Satisfactorily to the employer? A. I would not say that; he could do it in a measure, but he could not do that as an ordinary, perfectly normal—

Q. Do you think any one would employ him to do that kind of work in the condition he is in now? A. I think if he went—he might know somebody that would give him work.

Q. Give him a job—do you think he would be working? A. I don't want to say.

By Mr. Perlis:

Q. Do you think he is able to work? A. No.

Q. Do you think he would be able to take a glass of water and bring it up to you? A. I would not say that. I testified to the fact we

had to feed him, hold his hand, but lately he has fed himself.

Q. Did you see him feed himself? A. Yes.

Q. Take a glass of water? A. Yes. He spilled it.

Q. Could he reach his lips? A. If it is filled to overflowing he will spill it, but if it is half full he will drink it.

BY THE COURT:

Q. With ease, as you or I would, or does he have difficulty in raising it to his lips? A. He raises a glass perfectly when he is alone; if I were present observing him, he certainly will spill it all over.

Q. Do I understand you to mean he feigns that shakiness, or is it simply because of the conscious timidity caused by his choreic condition? A. He has that consciousness.

Q. That is part of the disease? A. That is—he has a hysterical disease.

Q. I understand that. A. This man has left our institution at six o'clock in the morning, walked to Secaucus and back, walked as good as any man, and that is a distance of six miles.

BY MR. PERLIS:

Q. Did you see him walk from the witness stand to his present seat? A. Yes.

Q. Is that the way he walks to his home? A. No; I testified when he knew he was observed he is very much worse.

Q. Let me ask you this question—you would not say exactly this injury you testify to was the cause of his present condition, would you? A. No, I would not.

Q. Let us suppose this question: he was employed in a sound, normal condition, say about five minutes before this supposed accident he was not

troubled in this way, after that, as he himself has testified, he was assaulted on the head, taken to the hospital, unconscious for a day, and immediately thereafter, as he testified, these shaking spells began. Now, having all these facts in mind, could you say that the injury was the proximate cause of his present condition?

MR. SCOTT: I object.

THE COURT: I suppose the Court will have to determine that.

MR. PERLIS: Sort of a hypothetical question.

THE COURT: I should say the question of the proximate cause would be one of law. I will overrule the question.

Q. You said that the type—the symptoms of Huntington's disease, and the symptoms of his present condition are about the same; is that right? A. All choreic symptoms are similar.

Q. They are similar? A. Yes.

Q. What basis have you to call this hysterical chorea rather than some other chorea if they are all alike? A. The fact he has had so many imaginary symptoms.

Q. What do you mean? A. Symptoms he thought he had, that an observer could not observe.

Q. Mention one. A. He thought he was paralyzed.

Q. Is that so? A. He said.

Q. Has he paralysis? A. He has not.

Q. What does hemiplaegia mean? A. One-sided paralysis due to hemorrhage of the brain.

Q. Wouldn't you call that paralysis? A. Yes, that is.

Q. Don't you think he had some foundation

when he said he thought he was paralyzed? A. He was not paralyzed. There is no evidence of it.

Q. (By the Court.) I suppose the layman confuses different kinds of paralysis with chorea? A. Yes.

Q. Could you say in this case, positively, he could recover? A. I answered that before by saying no, but the man, to the best of my opinion—this man will improve, and has improved under treatment.

Q. He will improve partially, but not entirely? A. I think that is unfair.

Q. I don't want to be unfair. I am asking you; will he not improve partially, but not entirely? A. He should improve. He might entirely improve, and he might—

Q. Have you read any medical authorities on this particular disease?

MR. SCOTT: I object.

THE COURT: He may answer yes or no. I will answer for him, yes.

A. Yes.

Q. Is George A. Peterson a recognized authority?

MR. SCOTT: I object. Medical books are only admissible in our courts where the witness predicates his opinion upon the books; you may contradict him where he has cited a book, but in no case are medical books allowed on cross examination, except for the purpose of contradiction. This witness has given his opinion, based upon reading and experience, and no one specified medical book.

MR. PERLIS: Can't you confront the witness with a medical book, after having had him define something?

THE COURT: I will allow the question.

A. No.

Q. It is not? A. No.

Q. What book is, do you know? A. There is no book authority on any subject, that I know of, in medicine.

Q. When you read up on a certain matter, of which you are doubtful, what books do you read? A. I read any books that will help me form my own opinion upon actual experience in a case.

THE COURT: Do you think you are going to gain by continued cross examination of this witness? He has testified substantially to the same thing, except some minor details, in corroboration of Dr. King.

MR. PERLIS: If he has corroborated Dr. King I will not press him any further.

WILLIAM J. ARLITZ, a witness produced on behalf of the defendant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. SCOTT:

Q. You are a practicing physician?

MR. PERLIS: The doctor's qualifications are admitted.

Q. You have seen Steven Nevich? A. I have.

Q. Will you tell us when you first saw him and under what conditions? A. I saw him during September of 1914, at the solicitation of—in consultation and at the solicitation of Dr. Steadman and Dr. Londrigan, who were on duty at the hospital. This man at that time gave a history of an injury of the head, and Dr. Steadman was in doubt and requested me to examine him. I did make an examination at that time. The man told me he was paralyzed in the left lower extremity and the left upper extremity. I went over him carefully and determined he did not have paraly-

sis, but they should make him get out of bed and make him walk about, and then I took the history of his case, through the Polish interpreter in the hospital. The history was that he had had an attack of this kind some years ago, while he lived in Russia, and taking that into consideration, and my own findings, I made a diagnosis of hysteria. At that time there were none of these choreaform movements he presents today.

Q. (By the Court.) Did you find any trauma of the head at that time? A. None whatever. There was not the slightest evidence of any trauma, there was not the slightest evidence of any concussion of the brain at that time. All of his reflexes were intensely exaggerated. He was transferred after that time to the medical service, it not being a surgical case. He had medical service for quite some time, I don't recall just how long.

Q. At that time did you examine him for the defendant, the railroad company? A. No. I didn't know he was an employe of the Lackawanna. I examined him at the request of Dr. Steadman, who usually calls me in to assist him in head cases.

Q. Subsequently did you examine him for the Lackawanna Railroad? A. I saw him about—I don't recall just how long afterward, but about three months. And at that time he presented this disturbance of the equilibrium and these choreaform movements.

Q. What in your opinion was he suffering from at the time of your first examination? A. He was suffering from a pronounced case of hysteria and at this time I am of the same opinion, he has a hysterical chorea.

Q. Will you tell us whether in your opinion that condition is apt to clear up or disappear, or remain as it is at present? A. Hysterias are all

dependant upon something that has gone before; therefore a person born with a nervous mechanism that averages below the standard or normal average, who gets in this condition, the biochemic reaction in the nerve cells does not take place as it does in a normal person. This man might go along continuously this way, he might recover in three, four or five days, no one can arrive at a definite conclusion, so far as hysteria is concerned. A hysterical person walks along the street apparently in the best of health, then suddenly has paralysis of the lower extremities, falls helpless, that person might lie in bed six months with that paralysis. The disease is not in the legs, the disease is in the mind.

Q. What, in your opinion, Doctor, are the probabilities of this condition clearing up—the present condition that Mr. Nevich is in? A. Cases of this kind usually recover—I could not tell you how long it will take for him to recover—then he might go along apparently well for a long time and he might have a shock or a blow, might have a blow, and he would relapse into the same condition. That is the history of all of these cases.

Q. Is it your opinion that if Mr. Nevich was a perfectly healthy man on the day of the accident and before the accident, that a blow on his head would produce the condition that he is now in? A. No, it would not.

Q. What condition would Mr. Nevich have to be in to have a blow on his head produce the condition that he is now in? A. He must have had this inherent quality of hysteria or a nervous organization very much below the standard.

By the Court:

Q. You think that if he had that condition and received a blow on the head or the neck that the condition might have been expedited or accelerated

so as to produce the condition you now find him in? A. Oh, surely; there is no question about that.

By Mr. Scott:

Q. But that trauma to a healthy person, or blow to a healthy person, would not have produced the condition this man is suffering from? A. The predisposition of all normal people who receive a blow or an injury or who have an illness is to recover, but the hysterical subject has not got that normal resistance and a blow would accentuate or aggravate their condition.

Q. How many times have you seen Mr. Nevich, Doctor? A. I saw him in the hospital on two or three occasions and I saw him once at my office.

Q. And was there any difference in his appearance at the different examinations? A. Well, I cannot say. He looks very much the same. I do not see very well with these glasses. I imagine he has a mustache, now, hasn't he?

Q. That is all.

Cross Examination by Mr. Perlis:

Q. Doctor, you said he did not have paralysis? A. He did not.

Q. He did not? A. No. He said he had a paralysis, but I proved to the doctors he did not. I had him get out of bed and walk about. I had him use his left arm. He complained at the time of a total disability to use the left arm and left leg.

Q. Hemiplegia is half paralysis, isn't it? A. Paralysis of half the body.

Q. You examined him how many times? A. That examination, I suppose we devoted a half hour to that examination.

Q. The first examination, when did you say it

took place? A. It was about the 13th of September—I think it was the day following the injury.

Q. The day following the injury? A. The day following that assault.

Q. When you examined him was he conscious or unconscious? A. Conscious.

Q. Conscious? A. Yes, sir.

Q. Who was present when you examined him? A. Doctor Londrigan, Doctor Steadman, the orderly and the Polish interpreter.

Q. At whose request did you examine him? A. At the request of Doctor Steadman and Doctor Londrigan.

Q. How many times did you examine him all told? A. Well, that was the first examination. The one following that was in the nature of an observation; it was not an examination. The first time I examined him was in my office some two or three or four months after that.

Q. At whose request? A. I beg your pardon?

Q. At whose request? A. I do not know that. I think at the request of Mr. Roe of the Lackawanna— the claim agent.

Q. You are employed by the railroad, the Lackawanna? A. I do their work; I am not in their employ.

Q. I mean in a professional way. A. Yes, sir.

Q. You said he suffered from hysteria? A. That was my diagnosis, yes.

Q. Hysteria and chorea? A. He did not have the choreaform movements when he came in the hospital.

Q. What has he got now, do you know? A. Oh, yes; he has choreaform movements now.

Q. He has? A. But I think the fundamental factor in his case is hysteria.

Q. And does chorea develop from that hysteria? A. Undoubtedly, because he did not have it at

that time. There is another thing about chorea: chorea is rather a common thing. It is quite common among children. A child will have an attack of chorea which will last for an indefinite period. It may last a week or two or a month or three months. That child is put under treatment and at rest and that child recovers. Now if that child has too much schooling or undue excitement that child may again at some time develop chorea.

Q. It remains in the system but it is dormant, isn't it? A. It is due to this fact generally, that the nervous organization to start with is not a normal nervous organization.

Q. Would you say that he is of a nervous type? A. Surely.

Q. He is? A. Surely.

Q. Do you know from your experience with Polish people whether they have got that trait? A. I know that the Poles—I know that perhaps the most nervous of all people are the Jews, and following the Jews we have the Poles and the Slavs. That is a well known fact.

Q. Did you find any trauma there? A. None.

Q. Now traumatic neurosis is almost identical with hysteria, isn't it? A. Hysteria might be a traumatic neurosis, yes.

Q. And the symptoms are almost alike; they are hard to distinguish? A. I would not say that, because a man might have a traumatic neurosis which might be in the nature of a phobia.

THE COURT: Now do you think anything will be gained by that?

MR. PERLIS: Well, not exactly. I just wanted to search this man's mind so far as this case is concerned.

THE COURT: I never like to see this play of wit between a lawyer and a doctor. It is not going to serve any purpose in the

determination of the issue. That is only my suggestion to you, though.

Q. Well, would you say, Doctor, that his injury is permanent, or is it not permanent? A. I could not say that.

Q. You could not say positively?

THE COURT: He has already said he cannot tell. Why not let it go at that? Why should you persist in that? He has already said very candidly and frankly that he cannot tell.

E. T. STEADMAN, sworn.

THE WITNESS: I wasn't called by this gentleman. I have no subpoena from this gentleman.

MR. SCOTT: I have no objection, Doctor.

THE WITNESS: It doesn't make any difference to me.

BY THE COURT:

Q. You are a practicing physician and surgeon, Doctor, are you? A. Yes, sir.

BY MR. PERLIS:

Q. Are you attending physician at St. Mary's? A. One of the visiting surgeons, yes, sir.

Q. Do you remember attending this fellow Nevich? If you saw the book would you remember it? A. I might recall it. I remember attending a man I have seen here in the court room about a year ago.

THE COURT: Just look at the book, Doctor, and tell.

MR. PERLIS: I just wanted to identify it, that is all.

THE COURT: Witness being shown paper already referred to by Mr. Burke, is asked—

Q. Is that paper in your handwriting? A. No, sir; it is in the handwriting of the interne—the house surgeon.

Q. Are you familiar with the contents thereof? A. I recall the case, yes. I would not know the man if I saw him on the street, but I recall the circumstances, sir.

Q. Do you recognize by looking at this paper, under "Diagnosis," that this man Nevich was suffering from concussion of the brain and hemiplegia? A. No, sir; I do not recall it at all.

Q. Do you recall a complication of multiple bruises? A. I do not recall it at all. That was filled out by the interne.

By the Court:

Q. Do you remember the man being there, Doctor? A. I have a faint recollection of it. I am not sure.

Q. Do you remember anything about it at this time? A. I remember the patient. If this is the man—I asked Doctor Arlitz to see him with me because of some nervous condition I could not be sure of.

Q. Do you remember if he had any wound or injury, trauma of any kind, about the head or neck? A. No. I could not account for his nervous condition, so I asked Doctor Arlitz to look him over.

The Court: Anything further of this witness?

By Mr. Perlis:

Q. Who makes the entry in this record? A. The history of the patient is taken when the patient comes in.

Q. Who makes that entry? A. The interne.

Q. That is Doctor Holden in this case? A. Yes. He is not there now. He graduated a year ago.

Q. When do you attending physicians come in on the case? A. When I make my round in the morning. How long this man was there I do not know.

Q. And you examined him? A. I looked him over.

Q. And before it is put in the record you have to pass upon it, don't you? A. That was not shown to me. I did not see this at all. The history is taken by the interne when the patient comes in.

THE COURT: What is it you want to prove?

MR. PERLIS: I want to prove the man was suffering from these diseases as proven by this record.

THE COURT: You cannot prove it by this doctor.

MR. PERLIS: I am trying to show that before the interne can make it out the doctors must pass upon it.

MR. SCOTT: The doctor has testified it is just the reverse.

BY THE COURT:

Q. Did you have anything to do with the making up of the entry on that paper, Doctor? A. I did not.

BY MR. SCOTT:

Q. When you examined this man you say that you did not find—

MR. PERLIS: I beg your pardon. Are you calling him as your witness?

MR. SCOTT: I will use him as my own witness.

Q. When you examined this man you say you did not find—the condition you found him in was

such as warranted you or made you feel called upon to ask Doctor Arlitz to look into the matter? A. As neurologist of the hospital I asked him to look the man over to determine what caused his nervous symptoms.

Q. And were there any objective symptoms that you were— A. You mean in the region of the head?

Q. Yes. A. I just answered His Honor that same question. No; I could not find any.

Q. When you first examined him you were kind of doubtful about his condition, weren't you? A. I could find nothing about him to account for the nervousness which he had—therefore I called the neurologist. I do not know anything about neurology. I do not pretend to know. (Following testimony reported by Victory.)

JOSEPH LONDRIGAN, sworn.

THE COURT: You are a practicing physician and surgeon, Doctor?

A. Yes, sir.

THE COURT: Connected with St. Mary's?

A. Yes; assistant surgeon.

THE COURT: Were you there at the time this man was brought there?

A. No; I was not there when the man was brought in.

THE COURT: I mean were you serving there at that time?

A. Yes, sir.

THE COURT: Go on, Mr. Scott.

DIRECT EXAMINATION BY MR. SCOTT:

Q. Will you tell the Court the condition you found him in when you first saw him. A. Doctor Steadman and I were on duty. We visit the hospital every day at eleven o'clock, and I met him there and all the old cases that have been in the hospital, and asked for any new cases that had been brought in. This case was brought in and showed to us, and we examined it and found there was some history of an injury, blow, having been struck at this boy's head, and we looked for any evidence of injury, trauma, and could find none. There was apparently some nervous condition on the left side of the body which, as Doctor Steadman testified to, we could not account for; and we called in Doctor Arlitz as neurologist to determine that condition. We made a diagnosis of the condition and two or three days after the man was transferred to the surgical ward and we saw nothing further.

CROSS EXAMINATION BY MR. PERLIS:

Q. Do you think, Doctor, if I showed you a copy of the record it would refresh your memory to any extent in so far as this man's treatment is concerned?

THE COURT: What do you want to prove then?

MR. PERLIS: Same thing.

THE COURT: Who made the record?

MR. PERLIS: Yes.

THE COURT: Ask him if he made it out.

A. No; I did not make it.

Q. Did you make this record? A. I did not.

Q. Did you have anything to do with the compiling of that record? A. I did not.

Q. It was made by the interne? A. Yes, sir.

MR. PERLIS: That is all.

THE COURT: You say you got some information from the history that there had been a trauma?

A. Yes.

THE COURT: Where did you get that? A.

A. From the interne.

RE-DIRECT EXAMINATION BY MR. SCOTT:

Q. You also said when you examined him you couldn't find anything? A. No evidence then of any traumatic lesion.

RE-CROSS EXAMINATION BY MR. PERLIS:

Q. How long after he was in the hospital did you examine him? A. Next morning.

(Witness excused.)

MR. SCOTT: That is our case. I would just like to state to the court the propositions as to our contention. The first contention is that this is not an accident arising out of and in the course of the employment. If the Court should find against us on that, or find in favor of the petitioner, which is the proper way of putting it, then we will claim that in view of the testimony the Court would have the right to find that this condition will probably clear up, that no commutation be made.

THE COURT: You need not deal with commutation. There is no evidence to substantiate any commutation under the Act of 1913. I would have to refuse it. Commutation would not be allowed in this case. You need not say anything more about that.

Reasons.

(Filed Jan. 13, 1916.)

NEW JERSEY SUPREME COURT.

STEPHEN NEVICH, *Defendant in Certiorari,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Prosecutor.*	On Certiorari.

The above prosecutor herewith sets forth and assigns the following reasons why the award and judgment in the above matter should be set aside:

1. Because the Court erred in its determination that the injury to the petitioner was an accident arising out of and in the course of the said petitioner's employment.

2. Because the Court erred in its determination that the injury to the petitioner was a risk incident to the petitioner's employment, and that it was a risk which was in any way indirectly connected with the petitioner's employment.

3. Because the said Court erred in its determination that the injury to the plaintiff was permanent in character.

4. Because there was no evidence that the injury suffered by the petitioner was permanent in character.

5. Because the said award is for a total permanent disability of the petitioner, whereas, by law, if the petitioner is entitled to any compensation at all, he is entitled only to compensation for a temporary disability, and the said Court

erred in failing to determine the nature, extent and probable duration of said temporary disability.

FREDERIC B. SCOTT,
Attorney for Prosecutor.

Opinion.

(Filed June 10, 1916.)

NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1916.

STEPHEN NEVICH,

v.

THE DELAWARE, LACKAWANNA & WESTERN R. R. CO.

Argued February Term, 1916.

Decided June Term, 1916.

Certiorari removing judgment of Hudson Common Pleas.

WILLIAM PERLIS for Petitioner.

FREDERIC B. SCOTT for Defendant.

Argued before Justices Parker, Minturn and Kalisch.

PER CURIAM:

The petition filed in this case shows that petitioner was employed by defendant, and that at the time of his injury complained of, which was substantially during his business hours, he was instructed by his foreman to procure a barrel used as a receptacle for water, in the mixing of cement. The barrel had been emptied and carried off by two men, and while the petitioner was returning with it, he was attacked by the men, severely beaten and suffered the injuries there-

New Jersey Court of Errors & Appeals.

Stephen Nevich,	#
Petitioner-Appellee and Cross-Appellant,	#
-vs-	# On Certiorari to Hudson Common Pleas Court.
The Delaware, Lackawanna & Western Railroad Co.,	#
Respondent-Appellant and Cross-Appellee.	# On Appeal from New Jersey Supreme Court.
	# BRIEF FOR PETITIONER.
	#

The respondent-appellant and cross-appellee was the prosecutor in a writ of certiorari to set aside a judgment recovered by petitioner under the Workmen's Compensation Act, in Hudson County Common Pleas Court, awarding petitioner the sum of $5.00 per week for 400 weeks for a total and permanent disability. The Supreme Court affirmed the question of liability of respondent, and reversed the finding as to extent of disability. Each party appeals from the findings adverse to him.

The facts out of which the injury arose are not disputed and are as follows:- Petitioner was employed by the respondent prosecutor as part of a gang doing certain cement work along the line of respondent's railroad at their Hoboken yards, and his principal employment was in the carrying of water from a pump and keeping a barrel near the work filled with water for use in preparing the cement. While temporarily away from the barrel, the boss of the gang observed that two strangers had dumped the water from the barrel and carried it off some distance and dropped it, but remained near the barrel, and the boss thereupon directed Nevich to go and get the barrel back; that Nevich went and picked the barrel up and started back with it, when he was assaulted and struck with an iron on the head by these men and knocked unconscious, which injury has resulted in a nervous condition of "chorea" producing total and permanent disability.

The respondent's reasons for reversal of the decision of

the Supreme Court can be summed up as follows:-

1:: That it erred in affirming the trial court's finding that the injury was an accident arising "out of" and "in the course of" petitioner's employment as a result of a risk incident to the employment.

2:: That it erred in determining the injury arose in the endeavor of petitioner to protect his employer's property from theft, because the trial court did not so find.

3:- Petitioner's appeal is based upon the ground that, the Supreme Court erred in reversing the trial court's finding that the injury constituted a total and permanent disability.

Point I.

The injury was due to an accident arising "out of" and "in the course of" the employment and a risk reasonably incident to the employment under the facts of this case.

There can be no question that the injury was due to an accident, which has repeatedly been defined by our courts as an "unlooked for mishap or untoward event, which is not expected or designed".

There is no reasonable question, but that the accident arose "in the course" of the employment, for the recovery of the barrel and replacing of it in its usual position was directly incident to the regular work of Nevich and further, because the foreman gave him explicit orders to bring the barrel back.

If there were any doubt of this, it would seem that the express direction to do something even outside the usual employment, enlarges the scope of the employment. Geary v. Ginzler & Co. (1913) W.C. & Ins. Rep.214. The only serious argument made by the respondent in the trial court was that the accident did not "arise out of" the employment, on the theory that it was the act of third parties and which could not be deemed a risk incident to the employment. In the leading case of Bryant v. Fissell, 84 N.J.L. 72, the court says:-

"A risk is incident to an employment when it belongs to or is connected with what the workman has to do in fulfilling his contract: it may be an ordinary risk directly connected with the employment or an extraordinary risk which is only directly connected with the employment, owing to the special nature of the employment.

"For an accident to arise out of an employment, it is not necessary that the employment be the proximate cause of the accident".

It is enough if the employment be the cause in the sense, that, but for the employment the accident would not have happened.

Tarlekt v. Strauss
85 N.J.L. 152 Atl. 86 N.J.L. 708
Hanglin v. Swift & Co.
87 N.J.L.J. 81 Affirmed.

"An accident which happened to a workman when he is doing something which he was employed to do, arises out of his employment".

Houghton v. Route Const. Co.
85 N.J.L.J. 332
Newcomb v. Albertson
85 N.J.L. 455

"An accident also arises out of an employment if an employee is doing what he may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time".

Tarlekis v. Erie R.R.
Scott v. Payne Bros.
85 N.J.L. 446
Moore v. Manchester Lines.House of Lords
Appeal Cases (1910) 498

There are many cases where an injury caused by the act of a third party has been held to entitle an employee to compensation.

McNeill v. Mountain Ice Co.
88 N.J.L.J. 108

Weekes v. Steadt & Co.
7 B.W.C.C. 398
Pierce v. Prov. Cltg Co.
1 K.B. (1911) 997
Kelley v. Trim Joint Dist. School,
Gordon's W.C. Rep. (1912) 295
Nisbet v. Rayne & Burn
2 K.B. (1910) 689
S. W. R. Co.
2 K.B. (1905) 154
Bradley v. Wallaces Ltd
3 K.B. (1913) 629
Anderson v. Balfour
2 Ir. Rep. (1910) 497
Rowland v. Wright
1 K.B. (1909) 963
Martin v. Lovibond & Sons
2 K.B. (1914) 227
Perlsburg v. Muller
35 N.J.L.J. 202
Mathew v. American Paper Co.
98 Atl. 264

Even if the accident herein is viewed as arising out of an emergency, it has been held that an employee injured under such circumstances in attempting to protect his master's interests, is entitled to compensation.

Rees v. Thomas
1 Q.B. (1899) 1015
Hapelman v. Poole
25 T.L.R. 155
Harrison v. Whitaker Bros.
16 T.L.R. 108
L & E Shipping Co. v. Brown
7 F. 488
Matthews v. Bedford
1 W.C.C. 124

Respondent may contend that the "skylarking" cases are authority against petitioner, on the theory that if a master cannot be held to reasonably anticipate a risk due to wilful or sportive act of a fellow-servant, he cannot be held responsible for the deliberate wrongful act of a third person, and will argue Hulley v. Moosbrugger, 88 N.J.L. 161 is such authority. But it is contended these cases do not apply to the circumstances in this case, where it appears that the surrounding conditions were known to the master, through his alter ego, the foreman in charge of the work, who was present all the time and observed the interference by strangers in upsetting and carrying off the water barrel and who still remained near the barrel, when the petitioner was explicitly directed to bring the barrel back.

The skylarking cases all deal with circumstances where the master had no previous knowledge of conditions actually existing, from which risk of danger could reasonably be anticipated, and hence the master was not obliged to anticipate such risks. But where the deliberate interference was seen by the foreman and caused the emergency condition which led to the order to recover the barrel, and the continued presence of such interfering strangers was visible, the risk in recovering the barrel while the danger of further interference still remained, was apparent to the knowledge of the master, and does not call for any anticipation on behalf of the master, but the situation was one of existing, visible conditions attendant upon the special employment, which the petitioner was ordered to undertake. This present case, therefore, comes within the distinction laid down in Schmoll v. Weisbrod & Hess Brewing Co., 39 N.J.L.J. 212, by the Supreme Court, at page 214, that an employer is liable where the extraordinary risks are known to him. Also McNichol's case, 215 Mass. 497., and Weekes v. Stead & Co., supra.

Point II.

The trial court did substantially find that the petitioner was injured while in an attempt to protect his employer's property from theft.

In the third paragraph of the trial court's determination (case page 12) it finds the barrel was emptied and carried off by two strangers, and petitioner recovered the barrel and while returning to the yards was set upon and attacked by the two men and injured. The trial court did not use the term "theft", but detailed the facts found to have existed at the time from which the only rational inference is that, the two men were about to steal the barrel and petitioner prevented them from accomplishing their purpose. And the Supreme Court properly characterized petitioner's act as an "endeavor to protect his employer's property from theft".

now than at first.

After hearing the medical testimony and observing the petitioner in court, both on and off the stand, the court had no hesitation in finding a total and permanent disability.

There being evidence to justify such a finding of fact, it cannot be reviewed on appeal.

Section 18 of act.
Sexton v. Newark Dist. Tel. Co.
84 N.J.L. 85, Aff. 86 N.J.L. 701
Bryant v. Fissell, supra.

It is respectfully urged therefore, that it appears in this case that the master had knowledge of the risk attendant upon the work petitioner was ordered to do, and therefore is liable to compensate petitioner for injuries received, arising out of and in the course of the special employment.

Wherefore, petitioner respectfully insists that the judgment and award of the Hudson County Court of Common Pleas should be in all things affirmed, and the Supreme Court reversed as to the question of total and permanent disability, with costs.

Respectfully submitted

William Parkis

Attorney for and of Counsel
with petitioner.

New Jersey Court of Errors
and Appeals.

Stephen Nevich,

Petitioner-Appellee
and Cross-Appellant,

-vs-

The Delaware, Lackawanna &
Western Railroad Co.,

Respondent-Appellant
and Cross-Appellee.

On Appeal &c.
Brief for Petitioner.

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from, which present the basis for this petition. It is contended that the accident was not one arising out of the employment. We think it arose out of the employment, and that the injuries were received by petitioner in his endeavor to protect his employer's property from theft.

Manifestly his act was commendably rather than questionably in his employer's interest, and arose out of the employment and under the orders of the defendant's alter ego. The trial court so concluded, and we think the testimony supports the conclusion.

But we think there was no evidence adduced to support the finding of total permanent disability.

The medical testimony as we read it, does not seem to support that conclusion. We think therefore the judgment should be reversed for the purpose only of correcting the finding as to the extent of the petitioner's injuries. If necessary further testimony may be taken upon that subject. In other respects the judgment is affirmed.

Rule on Reversal.

(Entered 1916.)

NEW JERSEY SUPREME COURT.

STEPHEN NEVICH, *Respondent,* *against* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Appellant.*	On Appeal to Supreme Court.

This cause having been duly submitted on briefs to this Court at the Feburary Term, 1916, by William Perlis, counsel for the respondent, and Frederic B. Scott, counsel for appellant, and the Court having inspected the record and the judgment below and having considered the cause assigned for error and the grounds of appeal,

IT IS THEREUPON ORDERED, that the judgment of the Hudson County Court of Common Pleas be reversed for the purpose only of correcting the findings as to the extent of the petitioner respondent's injuries and that the record and proceedings be remitted to the said Hudson County Court of Common Pleas to be proceeded with in accordance with this judgment and the practice of said Court.

FREDERIC B. SCOTT,
Attorney of Appellant.

Rule entered on motion of
FREDERIC B. SCOTT,
Attorney of Appellant.