NOTICE OF APPEAL.

(Filed April 2, 1917)

NEW JERSEY SUPREME COURT.

THIRZA ANN FOLEY, *Prosecutor-Appellee,*	ON CERTIORARI.
vs.	NOTICE AND GROUNDS
HOME RUBBER COMPANY, *Respondent-Appellant.*	OF APPEAL.

To F. W. Gnichtel, Esq., Attorney of Prosecutor-Appellee:

Take Notice that the respondent in certiorari appeals to the New Jersey Court of Errors and Appeals from the whole of the order or judgment entered in this cause on the following grounds:

First. Because the New Jersey Supreme Court ordered that the proceedings brought up by the writ of certiorari be reversed, whereas the said proceedings should have been affirmed.

Second. Because the New Jersey Supreme Court ordered that the said proceedings brought up by the said writ of certiorari should be reversed whereas the said proceedings should have been affirmed for one or more of the following reasons:

(A) Because the said defendant, Home Rubber Company, is not, nor was in any wise liable, to pay to the said Thirza Ann Foley any compensation under or by reason of an act entitled, "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of his employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the acts amendatory thereof and supplement thereto, for the following reasons:

1. Because the accident which resulted in the death of Arthur R. Foley, the husband of said Thirza Ann Foley, did not arise out of or in the course of his employment with the said Home Rubber Company.

2. Because the accident which resulted in the death of the said Arthur R. Foley did not arise out of or in the course of his employment but arose out of an accident, the risk of which could not have been contemplated by the said Arthur R. Foley or the said Home Rubber Company, when the said Arthur R. Foley entered the employment of the said Home Rubber Company, as incidental to it.

3. Because the accident which caused the death of the said Arthur R. Foley was not reasonably incidental to the employment.

4. Because the accident which resulted in the death of the said Arthur R. Foley was the result of the tortious, unlawful and unprecedented act of a third party which act had no relation to the employment and did not arise out of the employment.

5. Because the accident which resulted in the death of the said Arthur R. Foley was the result of an additional risk or added peril voluntarily assumed by the said Arthur R. Foley.

6. Because the employment of the said Arthur R. Foley did not require him to expose himself to the danger of sailing on a ship which he knew had been threatened with destruction.

7. Because the said Arthur R. Foley in pursuit of his purpose to cross the Atlantic, selected the ship in which to make the voyage, without any direction, dictation or even suggestion from his employer.

8. Because the said Arthur R. Foley in full, free and independent control of his own traveling arrangements took passage upon the ship of a nation at war which he knew had been threatened with destruction by a belligerent power when he might on the same day have sailed on a neutral ship that he knew was safe from deliberate attack at sea.

(B) Because the said Common Pleas Judge, correctly and properly found and determined the facts from the evidence taken in said proceedings.

(C) Because the said Common Pleas Judge correctly and properly applied the laws to the facts found and determined from the evidence taken in said proceedings.

Respectfully yours,

JESS & ROGERS,

Attorneys of Respondent-Appellant.

[ENDORSED]

New Jersey Supreme Court.
Thirza Ann Foley,
Prosecutor-Appellee,
vs.
Home Rubber Company,
Respondent-Appellant.
On Certiorari.

Notice and Grounds of Appeal.

Due and legal service of a copy of the within notice and grounds of appeal is hereby acknowledged this thirtieth day of March, 1917.

F. W. Gnichtel,
Atty. for Prosecutor-Appellee.

WRIT OF CERTIORARI.

NEW JERSEY, *ss.*

The State of New Jersey to Honorable Erwin E. Marshall, Judge of the Court of Common Pleas of Mercer County, GREETING:

We being willing for divers causes to be certified of a certain order, judgment (Seal) and determination lately made and given before you in the matter of the death of Arthur R. Foley, an employee of The Home Rubber Company, a corporation of the state of New Jersey, upon the petition of Thirza Ann Foley, widow of said Arthur R. Foley, for a determination of the amount of compensation to which

said petitioner was entitled under the provisions of chapter 95 of the laws of 1911, and the various supplements and amendments thereto, by reason of the death of the said Arthur R. Foley while alleged to be in the employ of the said Home Rubber Company, together with all proceedings had therein and thereon,

Do command you that the said order, judgment and determination, together with all things touching and concerning the same, as fully and entirely before you remain, distinctly and openly, under your seal, you send to our Justices of our Supreme Court at Trenton, on the thirty-first day of January, A. D. nineteen hundred and sixteen, together with this writ, that we may further cause to be done what of right and according to law ought to be done.

Witness, William S. Gummere, Esquire, Chief Justice of our said Supreme Court, at Trenton, this eleventh day of January, A. D. nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

F. W. GNICHTEL,
Attorney for Prosecutor.

[ENDORSED]

Mercer County Court of Common Pleas.
Thirza Ann Foley,
Petitioner,
vs.
The Home Rubber Company, a Corporation of the State of New Jersey,
Respondent.

On Petition for Compensation under the Workmen's Compensation Act, etc.
Writ of Certiorari.
F. W. Gnichtel, Attorney, 709 Broad St. Bank Bldg., Trenton, N. J.

I allow this writ. Let it be sealed.
Thomas W. Trenchard,
J. S. C.

Due and legal service of the within writ acknowledged, this eleventh day of January, 1916.

Jess & Rogers,
Attys. for Respondent.

RETURN.

MERCER COUNTY COURT OF COMMON PLEAS.

THIRZA ANN FOLEY,
Petitioner,

vs.

HOME RUBBER COMPANY, a Corporation of the State of New Jersey,
Respondent.

ON PETITION FOR COMPENSATION, ETC.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of New Jersey:

The determination and statement of facts and judgment, together with all proceedings for the mak-

ing of the same, and all things touching and concerning the same, as fully and entirely as before us they remain, or are in our possession or control whereof mention is within made, we hereby certify and send under our seal in the schedule hereto annexed, as within we are commanded.

ERWIN E. MARSHALL,
Judge of the Mercer County Court of Common Pleas.

(Seal)

GEO. R. ROBBINS,
Clerk of the Mercer County Court of Common Pleas.

PETITION.

(Filed June 15, 1915)

MERCER COUNTY COURT OF COMMON PLEAS.

THIRZA ANN FOLEY, *Petitioner,* vs. HOME RUBBER COMPANY, a Corporation of the State of New Jersey, *Respondent.*	ON PETITION FOR COMPENSATION UNDER THE EMPLOYERS' LIABILITY ACT.

To His Honor, Erwin E. Marshall, Judge of the Court of Common Pleas of the County of Mercer and State of New Jersey:

Your petitioner, Thirza Ann Foley, respectfully shows:

1. That she is the widow of Arthur R. Foley, deceased, and that she resides at No. 713 Hamilton Avenue, in the city of Trenton, in the county of Mercer and state of New Jersey; that the said Arthur R. Foley, deceased, was in his lifetime employed by the respondent, the Home Rubber Company, a corporation of the state of New Jersey, whose place of business is in the city of Trenton, in the county of Mercer and state of New Jersey; that the said Arthur R. Foley was employed by the said respondent as a traveling salesman.

2. That on the seventh day of May, nineteen hundred and fifteen, while employed by the said Home Rubber Company, and engaged in his employment as a traveling salesman, it was necessary for him to visit the London office of the said respondent. That he engaged passage, and sailed from the port of New York on board the Cunard steamship, the Lusitania, bound to Liverpool; that while said steamship was on its way across the Atlantic Ocean, and while passing near the coast of Ireland, the said vessel was sunk, and the said Arthur R. Foley was thrown into the ocean and became exhausted and was drowned.

3. That as a result of the sinking of the said vessel, the said Arthur R. Foley died on the seventh day of May, nineteen hundred and fifteen, and that his death was the result of an accident, which accident arose out of and in the course of his said employment.

4. That the said Arthur R. Foley died, leaving a last will and testament, under and by virtue of which your petitioner was appointed executrix, and

has taken upon herself the burden of the administration of the estate of the said Arthur R. Foley.

5. That the said respondent, the Home Rubber Company, had due notice of the said death, and had actual knowledge of it.

6. That your petitioner was dependent upon the said Arthur R. Foley; and that there is one child, under the age of eighteen, who was also dependent upon him; Ruth W. Foley, aged fourteen.

7. That at the time of the said injury, and prior thereto, the said Arthur R. Foley received wages from the respondent above named, at the rate of sixty dollars per week.

8. That your petitioner and the said respondent have failed to agree upon the amount of compensation due to your petitioner for the death of the said Arthur R. Foley; but on the contrary said respondent disputes the claim of your petitioner.

9. Your petitioner therefore prays that your Honor will determine the amount of compensation due to your petitioner from the said respondent, under the act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of 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 acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded her costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

THIRZA ANN FOLEY,
Petitioner.

F. W. GNICHTEL,
Solicitor.

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

THIRZA ANN FOLEY, of full age, being duly sworn according to law, on her oath deposes and says: That she is the petitioner named in the foregoing petition; that she has read the same, and is familiar with the contents thereof; and that the matters and things therein set forth are true, according to the best of her knowledge and belief.

THIRZA ANN FOLEY.

Sworn and subscribed to before me this fourteenth day of June, 1915.

F. W. GNICHTEL,
M. C. C. of N. J.

ORDER FOR HEARING.

MERCER COUNTY COURT OF COMMON PLEAS.

THIRZA ANN FOLEY, *Petitioner,* vs. HOME RUBBER COMPANY, a Corporation of the State of New Jersey, *Respondent.*	ON PETITION FOR COMPENSATION UNDER THE EMPLOYERS' LIABILITY ACT.

A petition having been filed in this cause by Thirza Ann Foley, petitioner, praying for the compensation payable by the Home Rubber Company, a corporation of the state of New Jersey, the respondent, it is on this fourteenth day of June, nineteen hundred and fifteen, on motion of Frederick W. Gnichtel, attorney for the petitioner:

Ordered, that the hearing of said matter be and hereby is set down for Friday, the ninth day of July, nineteen hundred and fifteen, at the Court House, in the city of Trenton, 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.

ERWIN E. MARSHALL,
Judge of the Mercer County Court of Common Pleas.

ANSWER.

(Filed July 9th, 1915)

MERCER COUNTY COURT OF COMMON PLEAS.

THIRZA ANN FOLEY, *Petitioner,* vs. HOME RUBBER COMPANY, a Corporation of the State of New Jersey, *Respondent.*	ON PETITION FOR COMPENSATION UNDER THE WORKMENS' COMPENSATION ACT.

The answer of the respondent, Home Rubber Company, a corporation of the state of New Jersey, to the petition of Thirza Ann Foley, heretofore filed herein, says:

1. The respondent admits the averments of paragraph one of said petition.

2. The respondent admits the averments of paragraph 2, except the averment concerning the manner of death of the said Arthur R. Foley, as to which the respondent has no knowledge; and further except the averment that it was necessary for the said Arthur R. Foley, on the seventh day of May, 1915, to visit the London office of respondent.

3. The respondent denies that the death of the said Arthur R. Foley was the result of an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act.

4. The respondent has no knowledge of the matters and things set forth in the fourth paragraph of said petition.

5. The respondent admits the averments of paragraph five.

6. The respondent has no knowledge of the matters and things set forth in the sixth paragraph.

7. The respondent admits the averments of paragraph seven.

8. The respondent admits the averments of paragraph eight.

9. The contentions of the respondent in respect of the matters alleged in the said petition are that the death of the said Arthur R. Foley resulted from his deliberate act in sailing upon a ship of a belligerent power into a zone or area which had been declared by another belligerent power to be a war zone, in which the said belligerent would seek to destroy by every means within its power, all enemy ships; and that timely warning was given by the diplomatic representatives of the Imperial German Government, by advertisement in the public press prior to the sailing of the steamship "Lusitania," that all persons taking passage on said ship would do so at their own peril. The subsequent sinking of the said "Lusitania" by a torpedo fired from a German submarine was not an accident, within the meaning of the workmen's compensation act, but was a deliberately planned act of war, committed by one belligerent power upon the ship of an enemy. In sailing upon the "Lusitania," the petitioner's de-

cedent subjected himself to a risk or peril of his own making, a peril which his contract of service did not oblige him to encounter.

Wherefore the respondent prays that this Court dismiss this proceeding.

HOME RUBBER CO.,
By CHAS. E. STOKES,
Respondent.
JESS & ROGERS,
Respondent's Attorneys.

I consent to the filing of the above answer out of time.

F. W. GNICHTEL,
Attorney for Petitioner.

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

CHAS. E. STOKES, of full age, being duly sworn according to law, on his oath says that he is the vice-president of the respondent corporation in the foregoing answer mentioned; that he has read the same and is familiar with the contents thereof, and that the matters and things therein set forth are true according to the best of his knowledge and belief.

CHAS. E. STOKES,
V. P.

Sworn to and subscribed before me this ninth day of July, A. D. 1915.

J. ALBERT LEINS,
A Commissioner of Deeds,
State of New Jersey.

STIPULATION.

MERCER COUNTY COURT OF COMMON PLEAS.

THIRZA ANN FOLEY,
Petitioner,
vs.
HOME RUBBER COMPANY, a Corporation, etc.,
Respondent.

ON PETITION FOR COMPENSATION.

It is hereby stipulated and agreed by and between Frederick W. Gnichtel, Esq., counsel for the petitioner, and Jess & Rogers, Esqs., counsel for the respondent in this cause, that the facts of this case are as follows:

1. Thirza Ann Foley, the petitioner, is the widow of Arthur R. Foley, deceased, and resides in the city of Trenton, in the county of Mercer and state of New Jersey; that the petitioner was dependent upon the said Arthur R. Foley, and that there is one child under the age of eighteen years who was also dependent upon him.

2. That the said Arthur R. Foley was, in his lifetime, employed as a special traveling salesman, and manager of the European trade, by the respondent, Home Rubber Company, a corporation of the state of New Jersey, whose place of business is in the city of Trenton, county of Mercer and state of New Jersey.

3. That it was necessary for the said Arthur R. Foley, in the course of his employment as aforesaid, to visit the London office, the European headquarters of the said respondent; that he engaged passage and sailed from the port of New York on board the Cunard steamship "Lusitania," bound for Liverpool, on May 1, 1915; that while the said steamship was on its way across the Atlantic Ocean, and while passing near the coast of Ireland, the said steamship was, on the seventh day of May, A. D. 1915, attacked by a submarine of the German navy; that torpedoes were fired by the said German submarine at the steamship "Lusitania"; that the torpedoes hit the steamship and caused her to sink within a few minutes; that the said Arthur R. Foley died as a result of the sinking of the said steamship.

4. That the said steamship, "Lusitania," sailed under the British flag, and was the largest and fastest passenger ship in service at the time, and carried passengers and ordinary freight, and some cartridges for war use.

5. That after the torpedo attack upon the "Lusitania," and while the said Arthur R. Foley was still upon the deck of the said steamship, and while she was in a sinking condition, he obtained life preservers for some Trenton ladies; when he returned, the ladies had been supplied, and he handed the life preservers which he had obtained to other ladies. The last seen of him, he left the party, and went in the direction from which he had obtained the life preservers; at that time he had no life preserver on him.

6. That the said Arthur R. Foley, in the regular course of his business, was due to sail for London in September, 1914, but because of depressed busi-

ness conditions, the trip was postponed; that in March of 1915, it became necessary to make the trip; that Mr. Foley put it off on account of the war conditions. That in April, the necessity became quite pressing, and Mr. Foley applied for and obtained a passport as an American citizen, to sail on the "Lusitania"; that his employers knew of the fact that he intended to sail on May 1st on the "Lusitania," and offered no objection; that he received such passport; that he was not instructed or required by his employer to sail on the "Lusitania," or on that specific date. That at the time the steamship "Lusitania" sailed there was an American steamship sailing for a British port, under the protection of the American flag; and that the said Arthur R. Foley might have sailed on that ship, so far as the duties or requirements of his employment were concerned.

7. That the respondent had due notice of the death of the said Arthur R. Foley, and that at the time of his death, and prior thereto, the said Arthur R. Foley received wages from the respondent, the said Home Rubber Company, at the rate of sixty dollars per week. That the funeral expenses incurred by Mrs. Foley for the burial of her husband, amounted to $325.

8. That the said steamship "Lusitania" was attacked, and sunk as aforesaid, within the zone or area which had theretofore been declared by the German Government to be a war zone.

F. W. Gnichtel,
Counsel for Petitioner.
Jess & Rogers,
Counsel for Respondent.

DETERMINATION OF FACTS AND RULE FOR JUDGMENT.

(Filed December 29, 1915)

MERCER COUNTY COURT OF COMMON PLEAS.

10

THIRZA ANN FOLEY,
Petitioner,
vs.
HOME RUBBER COMPANY,
Respondent.

ON PETITION FOR COMPENSATION, ETC.

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A petition having been filed in the above-stated matter, praying for compensation to which the petitioner may be entitled by virtue of the terms and provisions of the workmen's compensation act, approved April 4th, 1911, together with the supplements thereto and acts amendatory thereof; and a time and place for the hearing of said petition having been fixed, and it appearing to the Court that
30 said petition, and the order fixing the time and place of said hearing have been duly served upon the respondent on the fifteenth day of June, nineteen hundred and fifteen, and an answer having been filed by the said respondent on the ninth day of July, nineteen hundred and fifteen, the day set for the summary hearing herein, the petitioner being repre-

sented by F. W. Gnichtel, Esquire, as her attorney, and the respondent by Frank B. Jess, Esquire, as its attorney; and the case having been submitted to the Court upon a stipulation of facts agreed to by both the petitioner and respondent; and counsel having been heard,

I do find and determine from the evidence in this cause, as follows, to wit:

1. That the deceased was, on the seventh day of May, nineteen hundred and fifteen, in the employ of the respondent, in the capacity of a special traveling salesman, and manager of the European trade of the Home Rubber Company, a corporation of the state of New Jersey, and that it was necessary for the said deceased, in the course of his employment as aforesaid, to visit the London office, the European headquarters of the said respondent. That he engaged passage, and sailed from the port of New York on board the Cunard Steamship "Lusitania," bound for Liverpool, on May 1st, 1915. That although deceased had not been instructed by his employer to sail on the "Lusitania" or on that specific date, the employer did know of the fact that he intended to sail on that particular steamship, and offered no objection.

2. That Thirza Ann Foley, the petitioner, is the widow of Arthur R. Foley, deceased, and resides in the city of Trenton, in the county of Mercer and state of New Jersey; that the petitioner was dependent upon the said Arthur R. Foley, and that there is one child under the age of eighteen years who was also dependent upon him.

3. That at the time of the accident the said Arthur R. Foley received as wages in said employment the sum of sixty dollars per week, payable each week.

4. That while the said steamship "Lusitania" was on its way across the Atlantic Ocean, and while passing the coast of Ireland, and in the zone of waters theretofore publicly declared by the German Government to be a "war zone" in which all enemy ships would be liable to destruction by German naval forces, the said steamship was, on the seventh day of May, A. D. 1915, attacked by a German submarine; that torpedoes were fired by the said German submarine at the steamship "Lusitania"; that the torpedoes hit the steamship, and caused her to sink within a few minutes. That the said Arthur R. Foley died as a result of the sinking of the said steamship, and I find that the said accident occurred in the course of his said employment.

5. That the respondent herein had knowledge of the said accident, and received proper notice of the same.

6. That as a result of the said accident, the said Arthur R. Foley was drowned, and died on the seventh day of May, nineteen hundred and fifteen.

7. That the petitioner herein did not expend anything for medical attendance during the first two weeks, but did expend for funeral expenses the sum of three hundred and twenty-five dollars.

8. I find that the said accident did not arise out of the employment of the said deceased, of which the

actual or lawfully imputed negligence of the employer is the natural and proximate cause, and that the petition filed in this cause must be dismissed, but without costs to the petitioner.

It is thereupon, on this eighth day of January, nineteen hundred and sixteen, on motion of Jess & Rogers, attorneys of respondent, ordered that the said petition be dismissed, and that judgment be entered for the respondent, without costs.

ERWIN E. MARSHALL,
Judge.

Filed January 12, 1916.

GEORGE R. ROBBINS,
Clerk.

REASONS.

NEW JERSEY SUPREME COURT.

THIRZA ANN FOLEY,
Plaintiff in Certiorari,

vs.

HOME RUBBER CO.,
Defendant in Certiorari.

ON WRIT OF CERTIORARI.

The plaintiff in certiorari, by her attorney, F. W. Gnichtel, presents the following reasons for setting aside the determination and judgment brought before this Honorable Court in the writ of certiorari in the above-entitled cause:

First. Because the Judge of the Mercer County Court of Common Pleas erroneously found and determined that the injury which resulted in the death of Arthur R. Foley "did not arise out of the employment of the said deceased, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause."

Second. Because the Judge of the Mercer County Court of Common Pleas erroneously found and determined that the said Thirza Ann Foley is not entitled to compensation to be paid to her by the defendant in certiorari.

Third. Because the Judge of the Mercer County Court of Common Pleas erroneously found from the evidence that the injury which resulted in the death of Arthur R. Foley did not arise out of the employment of the said Arthur R. Foley.

Fourth. Because the plaintiff in certiorari, Thirza Ann Foley, under the evidence submitted is entitled to compensation on account of the death of her husband, Arthur R. Foley, under and by reason of an act of the legislature of New Jersey, known as the Workmen's Compensation Act, approved April 4, 1911, and the acts amendatory and supplemental thereto, because

The injury which resulted in the death of Arthur R. Foley arose out of and in the course of his employment with the defendant, the Home Rubber Company.

Fifth. Because the said Judge erroneously and improperly found the law and facts from the evidence in said proceeding.

Sixth. Because the Judge erroneously ordered the petition to be dismissed and judgment entered in favor of the defendant against the plaintiff in certiorari.

Seventh. Because the judgment in said matter is in other respects illegal, irregular and oppressive to the plaintiff in certiorari, the said Thirza Ann Foley.

F. W. GNICHTEL,
Attorney of Plaintiff in Certiorari, Thirza Ann Foley.

OPINION OF THE SUPREME COURT.

NEW JERSEY SUPREME COURT.

February Term, 1916.

THIRZA ANN FOLEY,
Prosecutrix,

vs.

HOME RUBBER CO.,
Respondent.

ON CERTIORARI.

Submitted February Term, 1916—Decided.

Before JUSTICES PARKER, MINTURN and KALISCH.

For the prosecutrix, F. W. GNICHTEL.
For the respondent, JESS and ROGERS.

The opinion of the Court was delivered by KALISCH, *J.*

The prosecutrix's husband, Arthur F. Foley, deceased was, in his lifetime, in the employ of the respondent as a special traveling salesman and manager of its European trade. In the course of his employment it was necessary to visit the respondent's London office which was its European headquarters. The deceased engaged passage on the Lusitania which steamship was listed to steam from the port of New York to Liverpool, on May 1, 1915, under the British flag. The steamer carried passengers and ordinary freight and some cartridges for war use. There was an American steamer scheduled to steam for a British port, under the protection of the American flag on the same day that the Lusitania was due to leave, on which American steamer the deceased might have procured passage, so far as his duties or requirements of his employment were concerned. The respondent did not instruct the deceased on what particular steamer to make the journey but knew of the fact that the deceased had engaged passage on the Lusitania and offered no objection. On the 7th day of May 1915, while the Lusitania was within the zone or area which had theretofore been declared the war zone by the German Government, she was attacked and torpedoed by a German submarine which caused the steamship to sink within a few minutes, and the death of the deceased was the result of the sinking of the steamship.

In the Court of Common Pleas of Mercer County, counsel for the respective parties stipulated in writing as to the facts as above related and it was on this stipulation that the trial Judge made his findings and rule for judgment, for the respondent.

The trial Judge found that the deceased came to his death as a result of an accident in the course of his employment.

The finding made by the trial Judge, which gives rise to the vital question under discussion and which is the turning point of the case is, as follows: "I find that the said accident did not arise out of the employment of the said deceased, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, and that the petition filed in the case must be dismissed, but without costs to the petitioner."

Whether or not an accident arose out of an employment is invariably a mixed question of law and fact. It is well settled by the decisions of our courts that if there is any testimony to support the determination of fact it will not be reviewed.

Here, however, it is apparent that the determination of fact was founded upon a misconception by the trial Judge of the legal principle applicable thereto, and therefore, the legal propriety of such finding is reviewable.

The trial Judge appears to have disposed of the facts involved in this case upon the mistaken notion that in order to hold a master responsible for any injury to his employe, as the result of an accident, the accident must be one of which the actual or lawfully imputed negligence is the natural and proximate cause, whereas it is clear from a plain reading of the statute that the question of negligence does not enter into the consideration of the case at all, where compensation is sought, as in this case under section two of the Workmen's Compensation Act, P. L. 1911, p. 136.

The legal principle which was applied by the trial Judge to the facts of the present case, is solely ap-

plicable to actions at law commenced under section one of the act above recited.

The question presented for our decision is whether the destruction of the Lusitania by a submarine and the death of the deceased in consequence, was an accident arising out of the employment. The facts in this case are undisputed, and therefore, the same situation in that respect is present, as existed in Walther Executrix vs. American Paper Co., decided at the November Term, 1916, of the Court of Errors and Appeals where the Court reviewed the finding of the Court of Common Pleas, affirmed by the Supreme Court, in 98 Atl. Rep. 264, that the accident, established by the evidence, arose out of the employment, and reversed the judgment.

For the respondent it is contended that the accident did not arise out of the employment in that the destruction of the Lusitania by being torpedoed was something that was not reasonably to have been anticipated. In Hulley vs. Moosbrugger, 95 Atl. Rep. 1007, the Court of Errors and Appeals decided that where an accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment. In that case it was held that skylarking among employees, whereby a co-employe who neither instigated nor took part in it was injured, was not a risk reasonably to be anticipated by the employer and, therefore, the injury was not the result of an accident arising out of the employment. Following the rule laid down in that case it was held by this Court, in Schmoll vs. Weisbrod & Hess Brewing Co., 97 Atl. Rep. 723, where the agent and collector of the brewing company while on his employer's business in a district of bad repute was shot by some person unknown, that in the absence of any proof that the motive of the assailant was robbery

or that the employer had notice or knowledge of the dangerous character of the locality, it could not properly be said that the shooting of the agent was an accident arising out of the employment. In Walther vs. American Paper Co., *supra*, the decedent was a night watchman in a mill and while engaged in such employment was struck down with a club and killed by his assailant who took from the vest pocket of the deceased fifteen dollars. The assailant knew that the deceased had been paid his wages that day and went to the mill in the night-time on purpose to rob the deceased. He made no attempt at any robbery from the office of the mill or any destruction of the mill property or any mischief or crime other than the robbery of Walther.

The Court of Errors and Appeals held that the death of the deceased was not the result of an accident arising out of his employment and that the case could not be distinguished from Hulley vs. Moosbrugger, *supra*. From this it is plainly inferable that it was the view of the Court that since the design of Walther's assailant was directed against Walther, personally and not against the property of the master, and, therefore, might have been carried out at any other time or place, it was an act so unrelated to the employment that it could not be reasonably said to be an accident arising out of the employment. We think the present case is clearly distinguishable from the cases cited. The agreed facts disclose that the Home Rubber Company knew that its agent was booked for a passage on the Lusitania; it knew that the Lusitania was a ship steaming under the flag of Great Britain, a nation at war with Germany; it knew (according to the stipulation) that a war zone had been declared by the German Government in which all enemy ships would

be liable to destruction by German naval forces, thus endangering the lives of passengers. The stipulation from which the inference of such knowledge of the respondent is drawn reads as follows: "That while the said steamship Lusitania was on its way across the Atlantic Ocean and while passing the coast of Ireland and in the zone of waters *theretofore publicly declared* by the German Government to be a war zone in which all enemy ships would be liable to destruction by German naval forces," etc.

But if it can be fairly said that the respondent had no notice of this declaration of the German Government and was not, therefore, legally bound to take notice of it, nevertheless it was bound to take notice that a condition of war existed between Great Britain and Germany and that ships of the enemy were subject to be captured or destroyed by such warring nations. This was a danger, reasonably, to be apprehended. This danger attached itself to every traveler or an enemy ship whether engaged in the pursuit of pleasure or in the course of his or her employment.

The extraordinary risk in the present case arose from the fact that Foley was on an enemy ship in the course of his employment. His employer knew of this risk. If the Lusitania had been lost through a collision, fire or storm at sea resulting in the death of Foley, it would, under the principle enunciated in all the cases bearing on this subject, be held to have been an accident arising out of his employment.

Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the Lusitania was lost through none of the common perils of the sea but by an extraordinary peril does not make the extraordinary peril less a cause of accident arising out of Foley's employment.

Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag, carrying contraband of war subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of nations, not only the loss of the vessel attacked but the loss of lives of those upon her might result. The fact that the attack in this instance was not executed in a way that might have been anticipated but in a manner said to be contrary to the law of nations may operate to qualify the degree or nature of the danger and risk to such a peril but does not eliminate the essential factor in the case that the voyage was one pregnant with risk which the employer must have contemplated, as arising out of and in the course of such employment, such appears to have been the reasoning in Zabriskie vs. Erie R. Co., 86 N. J. L. 266, holding, that where the employe left the shop and crossed a danger zone of two railroad tracks of the main line of the Erie Railroad, laid at grade, upon a much traveled public highway, in order to reach a toilet and was killed, that the danger and risk of the journey must have been within the contemplation of the employer. It becomes, at once, apparent that the fact whether or not the automobile which killed the employe was operated in a lawful manner or was lawfully upon the highway was not regarded as an essential factor in the case.

In the present case if the Lusitania had struck a mine instead of being torpedoed, resulting in Foley's death, could it be reasonably contended that his death was not due to an accident arising out of his employment? We think not. It may be well said that those whose employments require them to travel

by land or sea are known by their employers to be subject to the common perils that such traveling incurs. The risk is inherent in the employment itself. The manner in which the accident is brought about is not, at all, of the essence of the matter, the vital question, always being was the accident connected with the employment. If it was, then it arose out of the employment, provided it occurred in the course of the employment.

Let us test the soundness of the proposition just stated. Suppose the Lusitania had not been torpedoed but captured and in transferring the passengers to life-boats Foley lost his life; or after the passengers had been transferred to life-boats a storm had arisen sinking the life-boat in which Foley was, could there be any doubt whatever that Foley would have been considered to have lost his life by an accident arising out of his employment. This is the underlying doctrine of Zabriskie vs. Erie R. Co., *supra,* and Terlacki vs. Straus, 85 N. J. L. 454, 86 Id. 708.

It is a matter of common knowledge that thousands of traveling salesmen travel daily in the course of their employment in cars propelled by steam, electricity and other propelling power and, therefore, are subject to the risk of being injured or killed by reason of a collision or derailment; or by the cars going through an open draw or falling from a defective trestle, *etc.* The fact that the collision or derailment was caused by some malicious person with the design to injure a railroad company or some person in its employ would not operate to make an injury received by a salesman traveling on the car collided with or derailed, any the less an injury, the result of an accident arising out of the employment of such salesman than if such injury had been received by

him as a result of the cars going through an open draw or falling from a defective trestle.

It must be borne in mind that the denial of a right of compensation in the Walther case was put upon the ground that the design of the assailant was to rob Walther and not Walther's master and hence the attack made on Walther was not connected with Walther's employment; and that the denial of compensation in the Schmoll case was rested upon the fact that though the brewery collector was shot, but whether out of revenge for some personal wrong done to his assailant or by mistake or accident did not appear and there was no fact or circumstance from which it could be reasonably inferred that the shooting had some connection with the collector's employment.

The present case is clearly distinguishable from the cases referred to in which compensation was denied, in that it cannot be properly said here that there was any malicious design on the part of the German naval forces against Foley or any other passenger, and it may be safely assumed that the prime object of the German naval forces was to destroy the enemy's ship and not the lives of its passengers.

It is said that the attack made on the Lusitania, from a humane and civilized standpoint was barbarous and cruel and in violation of the law of the nations and that, therefore, the act of torpedoing the steamer was not within the contemplation of the employer when the risk of going by such steamer was undertaken by its agent Foley.

We do not think that the lawfulness or unlawfulness of the conduct of the German naval officers affects the matter at all. If the Lusitania had been attacked by a German cruiser and instead of surren-

dering offered resistance or attempted to run away and thereupon the German cruiser by a well directed shot struck the steamer in a vital part causing her to sink, and Foley to lose his life, it would hardly have been contended by respondent that the death of Foley was not due to an accident arising out of his employment, Foley's employer knew that the former had taken passage on a British ship and that such ship was subject to the risk of capture by the German naval forces, in what manner that might be accomplished was unimportant, so long as the employer was aware of the risk, whether the ship was destroyed by lawful or unlawful means is immaterial.

We think, therefore, that Foley's death was due to an accident while in the course of his employment and that such accident arose out of his employment.

The judgment of the Court of Common Pleas is reversed and the case is remanded to that court to be proceeded with, according to law.

RULE OF REVERSAL AND REMITTITUR.

THIRZA ANN FOLEY, *Prosecutrix,* vs. THE HOME RUBBER COMPANY, *Respondent.*	ON CERTIORARI.

This cause having been duly submitted at the present term of this court, by Frederick W. Gnichtel, of counsel for the prosecutrix, and Jess & Rogers, of counsel for the respondent, and the Court having considered the transcript of the proceedings of the Court of Common Pleas of Mercer County, returned with a certiorari in this cause, the reasons for error assigned, and the briefs and arguments of the respective counsel, and having duly considered the same;

It is thereupon Ordered, that the judgment of the said Court of Common Pleas of the County of Mercer be in all things reversed, set aside and for nothing holden, with costs of this court to be taxed; and that the said prosecutrix, in error, do recover her costs in the Supreme Court to be taxed; and that the record and proceedings be remanded to the said Court of Common Pleas of the County of Mercer, to be proceeded with according to law.

SAMUEL KALISCH,
J. S. C.

Entered January 23, 1917.
On motion of

F. W. GNICHTEL,
Atty. of Respondent.

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APPENDIX

MERCER COUNTY COURT OF COMMON PLEAS.

THIRZA ANN FOLEY, *Petitioner,* vs. HOME RUBBER COMPANY, *Respondent.*	ON PETITION FOR COMPENSATION. CONCLUSIONS.

FREDERICK W. GNICHTEL, for petitioner.
MESSRS. JESS & ROGERS, for respondent.

MARSHALL, *J.*

This case comes before the Court for determination upon a stipulation of facts agreed to by both petitioner and respondent, the issue raised between the parties being solely on questions of law.

The uncontroverted facts as detailed in the written stipulation are as follows:

(Here follows copy of stipulation as found on page 15 of the State of the Case.)

"In order to entitle her to recover compensation under the act, petitioner must show:

1. That Foley's death was caused by accident.
2. That the accident arose out of the employment.
3. That the accident arose in the course of employment.

Bryant vs. Fissell, 86 Atl. 458.

"The question whether or not an injury is an 'accident' within the purview of the act is a mixed one of law and facts. When applied to ascertained facts, it is a question of law. Bryant vs. Fissell, 86 Atl. 458.

"An 'accident' is an unlooked-for mishap or untoward event which is not expected or designed. Fenton vs. Thornley & Co. (1903) A. C. 443, 19 T. L. R. 684; Bryant vs. Fissell, 86 Atl. 458.

"This occurrence seems to come within that definition. Foley's death was certainly unlooked for, and it was an untoward event, not expected and not designed by him or by anyone else, at least so far as Foley himself was concerned.

"The next question to be considered is whether the accident arose 'out of and in the course of his employment.' In the case of Hulley vs. Moosbrugger, recently decided by the Court of Errors and Appeals, Chancellor Walker writing the opinion, it was held 'the words "arising out of and in the course of his employment" in the Workmen's Compensation Act P. L. 1911, p. 134' are conjunctive and recovery can only be had under that act when the given injury arises not only 'in the course of' but also 'out of' an employment.

"An accident arises 'in the course of the em-

ployment' if it occur while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.

"The deceased was on a journey in the interest of his employer and it is admitted in the stipulation that it was necessary for him, in the course of his employment to visit the London office, the European headquarters of the respondent. It was necessary therefore for him to cross the Atlantic Ocean, which he undertook to do by engaging passage and sailing from the port of New York on board the Cunard Steamship Lusitania, bound for Liverpool. The Lusitania was the largest and fastest passenger ship in service at the time, and notwithstanding the war zone proclamation of the German Government, issued on February 4th, 1915, a thousand or more passengers undertook the same voyage on this ship. Although deceased had not been instructed by his employer to sail on the Lusitania or on that specific date, the employer did know of the fact that he intended to sail on that particular steamship and offered no objection.

"From all the facts in this case, I conclude that the accident occurred while the deceased was doing what a man so employed might reasonably do, within a time during which he is employed, and at a place where he may reasonably be during that time, from which it follows that the accident occurred 'in the course of his employment.'

"It remains to be considered whether the accident arose 'out of' his employment. An accident

arises 'out of' the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment as incidental to it. Bryant vs. Fissell, supra.

"In Muchinson vs. Day Bros. (1913) W. C. & Ins. Rep. p. 324, the Court said 'to entitle an applicant to compensation under the act, the occurrence must be one in which there is personal injury by something arising in a manner unexpected and unforeseen from a risk reasonably incidental to the employment.'

"The case of Trim Joint District School vs. Kelley W. C. & Ins. Rep. p. 359 cited in petitioner's brief, was undoubtedly decided favorably to the petitioner on the doctrine of reasonable incidental risk. In that case, the deceased was in charge of a group of incorrigible boys and the danger of attack by them upon their instructor was one of the normal risks of his employment. Likewise, in the case of Nisbet vs. Rayne and Burn, 2 K. B. p. 689, where a cashier was robbed and murdered in a railway carriage while carrying money to pay the wages of his employer's workmen. It was held that his death was caused by accident arising 'out of' and in the course of his employment, on the ground that the risk of being robbed and murdered is a risk incidental to the employment of those who are known to carry considerable sums in cash on regular days, over the same route and the same places.

"The case of Schmoll vs. Weisbrod & Hess Brewing Co., was decided by Judge Shinn in the Atlantic County Court of Common Pleas upon the same grounds.

"The destruction of an unarmed passenger ship by a belligerent power, without warning and without affording an opportunity for the passengers to escape, was, at that time, an unheard of act. The United States as well as other neutral countries denounced the act as contrary to international law and it is now a historical fact that the German Government has given assurance to the President of the United States, through the state department, against the occurrence of such an act in the future, in so far as the German Government is concerned.

"The destruction of the Lusitania by a German submarine resulting in the death not only of Foley, but of hundreds of other passengers and members of the crew, does not appear to the Court to have been a risk reasonably incident to the employment of the deceased or one which might have been contemplated by a reasonable person when entering the employment as incidental to it.

"My conclusion is that the accident which resulted in Mr. Foley's death was clearly not one arising 'out of' his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause.

"The petition will be dismissed but without costs."

NEW JERSEY COURT OF ERRORS AND APPEALS.

THIRZA ANN FOLEY,
Prosecutrix-Appellee,

vs.

HOME RUBBER COMPANY,
Respondent-Appellant.

ON APPEAL.

APPELLANT'S BRIEF.

This is an appeal from a judgment of the Supreme Court in proceedings under the Workmen's Compensation Act, reversing a judgment of the Mercer County Court of Common Pleas in favor of the respondent. The facts as stipulated in writing and upon which the Judge of the Common Pleas Court made his findings are as follows:

Arthur R. Foley, deceased, was in his lifetime, in the employ of the Home Rubber Company, a corporation of New Jersey, whose place of business is in the city of Trenton, New Jersey. Foley, in the course of his employment as a special traveling salesman for the Rubber Company, and manager of its European trade, was obliged to visit the London office of his employer. He engaged passage and sailed on May 1, 1915, from New York, on the Cunard Steamship Lusitania, bound for Liverpool. While

on its way across the Atlantic Ocean and while within the zone or area of the sea which the German Government had theretofore declared to be a war zone, the said steamship Lusitania, was on May 7th, 1915, attacked and torpedoed by a German submarine, and sunk. The death of Foley resulted from the sinking of the ship. The Lusitania sailed under the British flag and carried passengers, ordinary freight and munitions. An American steamer was scheduled to sail for a British port under the protection of the American flag, on the same day the Lusitania was due to leave. Foley might have procured passage on the American ship so far as the duties or requirements of his position were concerned. His employer did not instruct him to sail on the Lusitania but knew that he had engaged passage on that ship and offered no objection.

The trial judge found that Foley came to his death as the result of an accident which did not arise out of his employment. The judgment resulting from this finding was, on certiorari, reversed by the Supreme Court.

> "Whether or not an accident arose out of an employment is invariably a mixed question of law and fact. It is well settled by the decisions of our courts that if there is any testimony to support the determination of fact, it will not be reviewed." Opinion of Supreme Court, Case, page 25, line 12.

In this case, however, the Supreme Court held that the determination of fact was founded upon a misconception by the trial judge of the legal principle applicable thereto and therefore the legal propriety of such finding was reviewable. Case, page 25, line 19.

This conclusion of the Supreme Court was based upon the formal finding made by the trial judge, to wit:

> "I find that the said accident did not arise out of the employment of the said deceased, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, and that the petition filed in the case must be dismissed but without costs to the petitioner."

It is respectfully suggested that the trial judge in his finding, merely by inadvertence used the cited language as to negligence without intending to base his determination in any degree upon that element. This conclusion is supported by a reading of the reasoning which leads to the result announced. For example, the trial judge said in his opinion, which is printed in part as an appendix to the State of the Case:

> "The destruction of the Lusitania by a German submarine resulting in the death, not only of Foley, but of hundreds of other passengers and members of the crew, does not appear to the Court to have been a risk reasonably incident to the employment of the deceased or one which might have been contemplated by a reasonable person when entering the employment as incidental to it."

It is submitted that there is no misconception evident in this language by the trial judge of the legal principle applicable to the situation with which he was dealing.

The judgment of reversal in the Supreme Court is believed by the appellant to be erroneous, for the following reasons:

The accident involved in this case did not arise "out of the employment."

To warrant recovery for the death of an employee under section 2 of the Workmen's Compensation Act, it must not only appear that it was the result of an accident which occurred "in the course of his employment," but also that it arose "out of the employment." *Hulley vs. Moosbrugger,* 95 Atl., page 1007, citing *Bryant vs. Fissell,* 86 Atl. 458.

> "The injury must both arise out of and also be received in the course of the employment. Neither alone is enough." In re Employer's Liability Assurance Corp., 102 N. E. 697.

In the case under review, the Judge of the Common Pleas Court found that the accident occurred in the course of the employment but did not arise out of the employment. The appellant here insists that this was a correct finding based upon both the facts and the law.

An accident arises "out of" the employment when it is something the risk of which might have been contemplated by a reasonable person when entering the employment as incidental to it. *Bryant vs. Fissell, supra.*

The words "out of" point to the origin or cause of the accident. *Fitzgerald vs. Clarke & Son,* L. R. 1908. 2 King's Bench 796.

These words used in the act are restrictive. They indicate plainly the purpose of the legislature, not to insure the workman against every accident happening to him while he is engaged in the employment of his master, but only against accidents arising out of and in the course of that employment. *Armitage vs. L. & Y. Ry. Co.* L. R. 1902. 2 King's Bench, 178.

The test prescribed by the Supreme Court in the

Bryant—Fissell case, to determine whether an accident arises "out of" the employment is three fold.

(a) It must be incidental to the employment.

(b) It must have been contemplated as a reasonable risk.

(c) It must have been contemplated by the employee when entering the employment.

By force of the statute the contract of employment imposes upon the employer a liability to compensate the employee for any injury and his dependents for death provided that either results from an accident to the risk of which the employee knowingly subjected himself when he entered into the contract.

The accident under review fails to meet two essential elements of the test: (a) It could not have been contemplated by a reasonable person, (b) when entering the employment.

Foley's contract of employment required him to act as a traveling salesman for his employer and, as an incident to that duty, occasionally to go to London. What were the risks which a reasonable person would contemplate on entering into such a contract? Surely, they were only the risks ordinarily incident to travel by land and sea. It will be conceded that he contemplated such risks as collisions with ice bergs or with other ships, and the perils incidental to storms and fogs and fire.

But neither Foley nor his employer can be presumed to have contemplated such a risk as developed in this case. Reasonable minds would contemplate the ordinary and, perhaps, even the extraordinary hazards of the sea. But the hazard that resulted in the death of Foley was neither an ordinary nor an extraordinary hazard of the sea. It was a specially and artifically created hazard, incident to travel in

a particularly circumscribed area of the sea. The conditions under which it was created were without precedent.

In dealing with the contemplation of risk, it is respectfully submitted that the Supreme Court set up a test vitally at variance with the rule laid down in the Bryant—Fissell case. The test they applied was this: Was the accident one, the risk of which might have been contemplated by the employer at the time the employee was called upon to perform a particular act incidental to the employment?

The rule clearly refers to the employee as the party to the contract whose contemplation of risk is to be controlling. The purpose of the rule is plainly to give the benefit, in cases of doubt, to the employee.

The rule also fixes, as the time when the question of risk is to be considered, the time when the contract of employment is made.

> "The extraordinary risk in the present case arose from the fact that Foley was on an enemy ship in the course of his employment. His employer knew of the risk." Case, page 28, line 22.

No such extraordinary risk existed or could have been contemplated when Foley entered the employ of the appellant. At that time there were no "enemy ships" or no prospect that there would be "enemy ships."

It may be conceded, however, for the sake of the argument, that the employee, as the Supreme Court insists, was bound to take notice that a state of war existed between Great Britain and Germany and that enemy ships were subject to be captured or destroyed and that this was a danger reasonably to be

apprehended. Such an apprehension would have been based upon the history and practices of warfare, but the dangers contemplated could only have been such dangers as were incidental to the capture and destruction of merchant ships in accordance with the established practices in civilized warfare. Only omniscience could have contemplated an absolute violation of the rules heretofore observed by all civilized nations in warfare upon the seas. This point may be emphasized by the following illustration used by the Supreme Court in its opinion:

"Let us test the soundness of the proposition just stated. Suppose the Lusitania had not been torpedoed but captured and in transferring the passengers to life boats Foley lost his life; or after the passengers had been transferred to life boats a storm had arisen sinking the life boat in which Foley was, could there be any doubt whatever that Foley would have been considered to have lost his life by an accident arising out of his employment? This is the underlying doctrine of *Zabriskie vs. Erie R. Co., supra,* and *Terlacki vs. Straus* 85 N. J. L., 454, 86 Id. 708."

The case supposed in this illustration leaves out of consideration an element which completely differentiates it from the case under review. In the hypothetical case the Court sets up a situation in which the act of war is conducted with a strict regard for the laws and usages of belligerent nations. The death there resulting would not have been caused by an unprecedented or unheard of act but would have been the result of a lawful proceeding which might reasonably have been anticipated. The danger of transferring passengers from wrecked ships to life boats and the perils menancing life boats upon the high seas are well known. They may

have been within the contemplation of Foley and his employer when he set out upon his journey. It may be admitted that an accident happening under such circumstances would have rendered the employer liable without in the least affecting the position maintained by the appellant in this case. This must be true if the rule in Bryant—Fissell *supra,* means what it plainly says with reference to the contemplation of risk. Foley and his employer might be held to have contemplated an attack upon, or the capture of, the ship in which he sailed, but they must also be held to have contemplated that in such an event the usual measures would be adopted to insure the safety of passengers. They could not contemplate that the German Government would, for the first time in the history of civilized warfare, resort to piracy and destroy not only the ship but its passengers and crew. They could hardly be presumed to have had a higher degree of prescience in this respect than the president of the United States and those associated with him in the government of this nation. Until the sinking of the Lusitania it was unthinkable that unarmed merchant ships, pursuing their lawful errands upon the high seas, would be destroyed ruthlessly and with utter disregard for the lives of those on board. This nation now is at war with Germany because the government of that country has pursued in its maritime warfare a policy of piracy and slaughter which was without precedent until the Lusitania was destroyed.

The Supreme Court holds that, "Foley's employer knew that the former had taken passage on a British ship and that such ship was subject to the risk of capture by the German naval forces, in what manner that might be accomplished was unimportant, so long as the employer was aware of the risk. Whether the

ship was destroyed by lawful or unlawful means is immaterial."

In support of this reasoning the learned justice who spoke for the Court uses this illustration: "It is a matter of common knowledge that thousands of traveling salesmen travel daily in the course of their employment in cars propelled by steam, electricity and other propelling power and, therefore, are subject to the risk of being injured or killed by reason of a collision or derailment; or by the cars going through an open draw or falling from a defective trestle etc. The fact that the collision or derailment was caused by some malicious person with the design to injure a railroad company or some person in its employ would not operate to make an injury received by a salesman traveling on the car collided with or derailed, any the less an injury, the result of an accident arising out of the employment of such salesman, than if such injury had been received by him as a result of the cars going through an open draw or falling from a defective trestle."

In the case supposed the Court below again omits what, it is respectfully insisted, is an essential factor, namely the doing not only of an unlawful act but an act without precedent and therefore an act that could hardly have been contemplated.

Foley's employer may have known that the ship in which Foley sailed was subject to capture by the German naval forces, as the Supreme Court says, but the employer must also have anticipated that the risks of such capture were limited to the ordinary hazards of such proceedings so far as passengers were concerned.

The accident which resulted in the death of Foley was the result of an additional risk or added peril

voluntarily assumed by the said Arthur R. Foley and not necessarily incidental to his employment.

The German Government issued on February 4th, 1915, the following proclamation:

> "The waters around Great Britain and Ireland, including the whole English Channel, are declared a war zone from and after February 18, 1915.
>
> "Every enemy merchant ship found in this war zone will be destroyed, even if it is impossible to avert dangers which threaten the crew and passengers.
>
> "Also neutral ships in the war zone are in danger, as in consequence of the misuse of neutral flags ordered by the British Government on Jan. 31, and in view of the hazards of naval warfare, it cannot always be avoided that attacks meant for enemy ships endanger neutral ships.
>
> "Shipping northward, around the Shetland Islands in the eastern basin of the North Sea, and in a strip of at least thirty neutral miles in breadth along the Dutch coast is endangered in the same way."

This is a governmental proclamation and a fact of history of which the Court will take judicial notice. 16th, Cyc. 864. *Underhill vs. Hernandez,* 168 U. S. 256; *United States vs. Reynes* 9 How. 127; *Neeley vs. Henkel* 180 U. S. 109.

It is a stipulated fact in this case that the Lusitania was sunk in the war zone proclaimed by the German Government.

The Supreme Court points out that even if Foley's employer had no notice of the proclamation of a war zone, it was nevertheless bound to take notice that

a condition of war existed between Great Britain and Germany and that ships of the enemy were subject to be captured or destroyed by such warring nations. If this be true as to Foley's employer it certainly must be true as to Foley himself. He therefore, knowing the dangers to his life from sailing on the Lusitania, of his own free will, without any necessity growing out of his employment but purely as a matter of personal preference sailed upon that ship rather than upon a ship against which no threats had been made. The stipulation shows that Foley's employer knew he intended to sail on May 1st, on the Lusitania and offered no objection but that he was not instructed or required by his employer to sail on that date or on that ship so far as the requirements of his employment were concerned. He might have sailed, on the same day, on an American ship flying the flag of a neutral country. This ship, it is a fact of history, reached her British port in safety.

Foley's employer, or his duty to his employer, did not require him to sail on the Lusitania. His employment required him to cross the Atlantic ocean. It left to him the time of sailing and the choice of ships without dictation or even suggestion from his employer. The risk he assumed, therefore, was one growing out of the exercise of his own will as a free agent and was not reasonably incidental to his employment.

The decedent had two routes of travel from which to select, one known to be safe, except for the ordinary perils of the sea, and the other known to be unsafe, being subject to the ordinary perils of the sea, and in addition, the perils of attack and destruction as an act of war. In choosing the dangerous route, the decedent placed himself without the protection of the Workmen's Compensation Act.

The case of *Zabriskie vs. Erie R. Co.* 86 N. J. L. 266 is fairly in point. The Court there held that, where the deceased, while crossing a public street in working hours to reach a toilet, was struck by a passing automobile, the accident arose out of and in the course of his employment. But the opinion shows that the result is based upon the fact that the employee was "required in the performance of his work to go into a dangerous place and incur the dangers connected with that place." The lack of proper facilities in the building where he worked made it necessary to assume the added risk.

If such facilities had been furnished by his employer and the employee had as a matter of personal preference crossed the street to use other facilities he would have taken a risk not made necessary by his employment and the accident would not have arisen out of his employment. The careful reasoning of the opinion leaves no other conclusion possible.

The rule plainly deducible from this case is that the master is responsible for all risks necessarily taken by the workman in the performance of his duty but is not answerable for any risk which his duties do not require the workman to assume.

The precise question to be determined in this case has not been passed upon in this court and the only adjudication thereof is that which is here the subject of appeal. If we resort to the English cases we find a little more light upon the subject. As was pointed out by the Chancellor in *Hulley vs. Moosbrugger,* 95 Atl. 1008, the Supreme Court said in *Bryant vs. Fissell* that the language of the British Workmen's Compensation Act with reference to an accident arising out of and in the course of employ-

ment is identical with that of our own. Therefore, cases in that jurisdiction construing that language will be useful in construing the same language in our own act.

English cases which may be helpful to this court in disposing of the questions here involved are found in (1915) Workmen's Compensation & Ins. reports—*Hadwin vs. Shepherd,* page 503; *Herbert vs. Samuel Fox & Co.* page 154; *Jibb vs. Chadwick,* page 342; *Russell vs. A. & G. Murray Lim.,* page 532; *Whitefield vs. Lambert,* page 48; *Slade vs. Taylor,* page 53, *Symmonds vs. King,* page 282; *Cooper vs. Northeastern Rwy., Co.* page 572.

In the case of *Hadwin vs. Shepherd,* (1915) W. C. & Ins., Rep., page 503, a woman employee of a cafe was required by her duties, daily to cross a railroad line. The shortest route for this purpose was by a crossing at grade. There was a somewhat longer route over a bridge. The applicant habitually used the level crossing. While crossing the tracks at grade, she was knocked down and injured. It was held that the accident did not arise "out of" her employment.

The same conclusion was reached by the Court of Appeal in *Jibb vs. Chadwick,* (1915) W. C. & Ins., Rep., page 342.

In that case, a workman was employed to work for his employers at Sheffield and was given a railway season ticket between that place and Rotherham where his employer lived. He was expected to return to Rotherham and report at the office at 6 P. M., each day. Arriving late one day at the station at Sheffield for the last train that would reach Rotherham before 6 P. M., he attempted to enter the train while it was in motion. He fell and suffered injuries from which he died. It was held that by at-

tempting to enter the train while in motion, the workman exposed himself to an additional risk by doing an unauthorized and illegal act which was not in any way incidental to his employment, and that, therefore, the accident did not arise out of and in the course of his employment.

In his opinion in this case, Lord Cozens Hardy said: "This was not a railway accident, and even assuming that death due to a railway collision between Sheffield and Rotherham might have made the employers liable to pay compensation, wholly different considerations apply to the present case. He exposed himself to an additional risk by doing an unauthorized and illegal act. To say that the act was done in his master's service and not for his own pleasure, is not sufficient."

It is not contended in the case under review that the petitioner's decedent did an unauthorized or illegal act but that he exposed himself to an additional risk in no way necessary to his duty to his employer.

Two of the English decisions are in cases which, in some respects, are similar to the case under review. These are *Cooper vs. Northeastern Rwy.*, (1915) W. C. & Ins., Rep., page 572, and *Risdale vs. Kilmarnock*, Id., page 141.

The facts in the Cooper case were as follows: An engine driver was attending to his duties on his engine near the Hartlepools when a bombardment of those places by German warships commenced, whereupon he left his engine and got under a truck attached to the engine. Two or three minutes afterwards, he left the truck and returned to the engine to attend to the injector in order to prevent the boiler tubes from getting burnt. Having done this, he was returning to the truck when he was struck by a

shell and severely injured. Many people were killed and injured by the bombardment. It was held that the accident did not arise out of his employment.

This finding affirmed the decision of the county Judge that the accident arose "in the course of" but that it did not "arise out of" it.

Risdale vs. Kilmarnock, supra, was another compensation case resulting from the war.

The master of a steam trawler proceeding upon a fishing voyage was warned by the admiralty of the enemy's mine field and directed to stear a roundabout course which would avoid it. He disregarded this warning and the ship was blown up. The chief engineer was injured. It was held that the injury was caused by accident and that as it happened while the engineer was carrying out the lawful orders of the master, it arose out of and in the course of the employment.

The Judges who decided this case plainly imply that a different conclusion would have been reached if the warning to the ship's master had been brought home to the engineer. The Master of the Rolls said: "It is not suggested that the applicant, the chief engineer, was informed of any warning which was given by the admiralty officer. It is not suggested that the Kilmarnock was engaged in anything else but a fishing voyage. And it cannot be said that there was any such total breach of the contract of employment between the ship owner and the master as would involve consequences which would justify the owner in saying, 'this is altogether outside of anything that I have agreed to.' "

Swinfen Eady L. J., added this comment: "The navigation of the ship, or the course which the ship was to stear was not in any way under his (the engineer's) control. It is not suggested that anybody

had given him information with regard to the existence of the mine field."

It is submitted that if it had appeared that the chief engineer had had warning of the danger and had had control of the ship's course, compensation would have been denied. To put it another way, if the master or his dependents had applied for compensation, the claim would not have been allowed.

It is respectfully submitted that the accident in the case under review did not arise out of the employment of the deceased within the meaning of the Workmen's Compensation Act and that, therefore, the judgment of the Supreme Court should be reversed.

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NEW JERSEY
Court of Errors and Appeals

THIRZA ANN FOLEY,
Prosecutor-Appellee,
vs.
HOME RUBBER COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY,
Respondent-Appellant.
} On Certiorari.

Brief of Prosecutor-Appellee.

The appellee, Thirza Ann Foley, filed a petition in the Mercer County Court of Common Pleas for compensation under the Workmen's Compensation Act for the death of her husband, Arthur R. Foley.

Arthur R. Foley in his lifetime was in the employ of the Home Rubber Company as a special traveling salesman and manager of its European trade. In the course of his employment it was necessary to visit the office of the company in London, its European headquarters. He was due to sail for London in September, 1914, and the trip was postponed on account of war conditions. In April the necessity became quite pressing, and Mr. Foley engaged passage on the Lusitania, which steamship, under the British flag, was listed to sail from the port of New York to London on May 1, 1915. The

steamship was the largest and fastest passenger ship in service at the time, and carried passengers, ordinary freight, and some cartridges for war use.

The Home Rubber Company did not instruct the deceased on what particular steamship to make the journey, but knew of the fact that he had engaged passage on the Lusitania, and offered no objection.

On the 7th day of May, 1915, while the Lusitania was within the zone or area which had theretofore been declared the war zone by the German government, she was attacked and torpedoed by a German torpedo, which caused the steamship to sink within a few minutes, and the death of the deceased was the result of the sinking of the ship.

The facts, as stipulated by the respective parties in writing, will be found on page 1 of the State of the Case.

The trial judge found, 1st, that the death was the result of an accident; 2d, that it occurred in the course of his employment; and, 3d, "that the said accident did not arise out of the employment of the said deceased, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause, and that the petition in the case must be dismissed, but without costs to the petitioner."

The Supreme Court concurred in findings 1 and 2, but found error in the 3d finding, reversed the judgment of the Court of Common Pleas, and remanded the case to that court, to be proceeded with according to law. From this finding the respondent has appealed.

The Judge of the Court of Common Pleas apparently disposed of the case under the impression that in order to hold the employer responsible the accident must be one of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause.

In this we contend that the Court erred. The petition was filed under Section 2, which provides for compensation without regard to the employer's negligence,

and grants compensation, except where the injury or death is intentionally self-inflicted, or where intoxication is the proximate cause of the injury.

The words "actual or lawfully imputed negligence of the employer is the natural and proximate cause" are found only in the first section of the law, and have no relation to the present proceeding.

The legal principle which was applied by the trial judge to the facts of the present case is solely applicable to actions at law commenced under Section 1 of the Workmen's Compensation Act.

The Prosecutor-Appellee contends that the death of Foley was (1) an accident; (2) that it arose in the course of the employment; (3) that it arose out of the employment.

The Death Was an Accident.

The question of whether or not an injury is an accident within the purview of the Act is a mixed one of law and fact. When applied to certain facts it is a question of law. Within the purview of the Act an accident is an unlooked for mishap, or an untoward event which is not expected or designed. *Bryant* v. *Fissel,* 84 *N. J. L.* 72.

Justice Trenchard, in his opinion in that case, accepts the definition of an accident formulated by Lord McNaghten in *Fenton* v. *Thorley* (72 *L. J. K. B.* 787 (1903), *A. C.* 443), of which Lord Haldane, in *Trim Joint District School* v. *Kelly, L. J.* 1914, *p.* 220, said, "I think that the context shows that in using the word 'designed', he meant 'designed by the sufferer.'"

Lord Lindsey, in *Fenton* v. *Thorley* (72 *L. J. K. B.* 787), holds that the word is often used to denote any unintended and unexpected loss or hurt, apart from its cause.

The title of the New Jersey Workmen's Compensation Act, which must be regarded as part of the Act, does not mention the word "accident," but is an act

"prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment." Paragraph 7 of sec. II of the Act provides compensation for all injuries by accidents arising out of and in the course of the employment, except injuries or death intentionally self-inflicted or due to intoxication. Those are the only exceptions. For all other injuries compensation is provided within the limitation stated, and that the words "accident" and "injury" are practically used as synonymous terms. Our statute, of course, does not include occupational diseases.

This is in harmony with the English decisions which are very ably reviewed in *Trim Joint District School v. Kelly (House of Lords Law Journal, 1914, page 220)*. In that case Lord Haldane said "accident" is a word the meaning of which may vary according as the text varies, and after considering the language and context in which it is used holds that the fundamental conception of the Act is that of insurance against an event that is unlooked for and sudden, and causes personal injury, and is only limited by the words that it must arise out of and in the course of the employment. "If, so far as the workmen is concerned, unexpected misfortune happens and injury is caused, he is to be indemnified. The important limitation which the statute seems to me to impose in the interest of the employer (he cannot escape from being a statutory insurer), is that the risk should have arisen out of and in the course of the employment."

Foley suffered an injury which was not expected, and which was certainly not designed by him. It was an accident, as distinguished from an intentional act, so far as he was concerned. The commander of the submarine had no intention of killing Foley. His attack was directed against the steamship and the cargo; his intent probably was to disable the ship, have the passengers take to the boats, and then sink the vessel.

There was no malice toward Foley, and no intent to kill him.

The facts show that Foley was not killed by the torpedo; that after the torpedo had been fired he was still upon the deck of the steamship and was seen bringing life preservers to some Trenton women, and when he found they had been supplied he handed the life preservers to other women. When last seen he was going in the direction from which he obtained the life preservers, evidently to get one for himself. The inference is that in trying to get into a lifeboat, or in some other way, he fell into the water and was drowned.

It is true that the torpedo was fired by design, but if it is held that injuries from such acts and arising out of crimes are not covered by the act, then we must exclude all accidents of railroads, steamships, automobiles, fires, etc., which arise out of criminal carelessness or negligence. Such holding might exclude a large class of employees, such as traveling salesmen, night watchmen, prison keepers, trainmen, and all persons whose employments may be said to have some element of hazard or danger from outside agencies. *It is held that the nature of the employment must be considered in order to determine the question.*

There are numerous cases both in England and in this country on this point, and also on the question of whether injuries arising out of crimes are covered by the Workmen's Compensation Act, which are cited later in this brief in dealing with the question whether this injury arose out of the employment.

In the Course of the Employment.

An accident arises "in the course of the employment" if it occurs while the employee is doing what a man so employed may reasonably do, within a time during which he is employed, and at a place where he may reasonably be during that time. *Bryant* v. *Fissel,* 84 *N. J. L.* 72.

The accident which resulted in the death of Foley certainly arose in the course of the employment. Foley was doing the work he had been employed to do. He was a traveling salesman, and was on his way to the European field, which he visited twice each year, and at the time of the accident he was doing what a man so employed *might reasonably do within the time during which he was employed, and he was at the place where he might reasonably be during that time.*

This is not a case of a workman going to his work. Traveling on steamships was part of his employment. He was in the course of his employment when he left his home and began his journey to London. As a rule, commercial travelers may be regarded as acting in the course of their employment so long as they are traveling on their employer's business, including the whole period of time between their starting from and returning to their place of business or home. *Dickinson* v. *Barmak* (1908), 124 *Law Times Newspaper* 403.

An injury occurring to a salesman while he was on his way to the home of a prospective customer was held to arise out of and in the course of his employment. *Gaffney* v. *Travelers Ins. Co., Mass. Indus. Acc. Bd.*

It Arose Out of the Employment.

The real question in this case is whether the destruction of the Lusitania by a submarine, and the death of Foley in consequence, was an accident arising out of his employment.

Bryant v. *Fissel, supra,* also holds that an accident arises out of the employment when it is something, the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it.

In other words, was it a risk which Foley contemplated when he sailed on the Lusitania to attend to the business of the employer. Was it contemplated by his employers?

In order to carry out the terms of the contract of his employment, under ordinary conditions, he would have sailed in September, 1914, but because of the war and depressed conditions, and because of the attendant dangers, the trip was postponed, and when, in March, 1915, it became necessary to make the trip, Foley put it off on account of war conditions. In April the necessity became pressing, and Foley applied for and obtained a passport as an American citizen to sail on the Lusitania. His employers knew of the fact that he intended to sail on May 1st on the Lusitania of the Cunard Line, and offered no objection.

The stipulation of counsel shows that Foley selected the largest and safest steamship afloat at the time. There can be no doubt but that he sailed on a ship flying a flag recognized by the entire world as the most powerful protector on the high sea.

A risk is incidental to and arises out of the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.

A risk may be incidental to the employment when it is either an ordinary risk, directly connected with the employment, or an extraordinary risk which is one only indirectly connected with the employment owing to the special nature of the employment. *Bryant* v. *Fissel, supra.*

Where the accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment. *Hulley* v. *Mossebrugger,* 88 *N. J. Law* 161.

The risk in Foley's case was directly connected with what he had to do in fulfilling his contract of service. His business what that of traveling for his firm, and all risks of travel were directly connected with his employment. His injury had its origin in the risk connected with the employment, and it flowed from that source as a natural consequence. When Foley sailed on the Lusitania an extraordinary risk was added—

the risk incident to war. His employers knew of this additional risk. They permitted him to postpone his trip from September, 1914, until May 1, 1915, because of the danger. *They could have avoided all liability by countermanding the trip or by giving notice that they would accept the provisions of Section I.* They knew their employee would take an extraordinary risk in carrying out the terms of his contract of employment, and notwithstanding that knowledge they permitted him to undertake the journey and accepted liability under Section II. Can they now come in and say the accident did not arise out of the employment after they sent him into danger which resulted in his death?

The employee was sent on this dangerous mission by the employer, who had full knowledge of the danger.

Counsel argued below that the decedent placed himself in a position of added peril, and assumed an extraordinary risk not incident to his employment when he took passage on the Lusitania in view of the war risks. If he had gone on an English vessel of war there might have been some foundation for the contention of counsel. At it is, he did what a thousand of others did, and selected what was then thought to be the safest transportation obtainable. Furthermore, he had the approval of his employers in what he did. His employers could have postponed the trip until the end of the war if they were willing to stand the loss that would have resulted.

In *Gare* v. *Horton Hill Collier's Co.*, 1909, 2 *K. B.* 539, a collier was injured while leaving his work and crossing the lines of rail controlled by his employers. He had three ways to go home, but the one used was the shortest, and was commonly used by the workmen, with the knowledge and consent of the employers. The Court of Appeals held that the accident arose out of and in the course of the employment.

Counsel in his argument looks at the matter from the viewpoint of the present. To get a correct view

of the situation one must go back to the period before the accident. The proclamation of the German government was not taken seriously—no passenger ship had been attacked up to that time, and the state of public feeling is accurately shown by the fact that the Cunard Company did not hesitate to send the Lusitania to England with its large passenger list and valuable freight.

The fact is that it was the general belief that the Lusitania, being the largest steamer afloat, was perfectly safe from any submarine attack; that her great speed would save her, and that even if struck she was thought to be unsinkable because of her water-tight apartments.

To hold that this man had no right to sail on the Lusitania would be to deny the soundness of the representations which the United States Government made to the Imperial German Government, and would be a denial of well-established principles of International Law. Under these principles it was contended by our President that all Americans who sailed on that vessel were within their rights, and there is nothing to support a contrary view.

Foley was not killed by the design of the commander of the submarine; the torpedo was not directed against Foley, and did not kill him. It was not the firing of the torpedo that was the accident; the drowning was the accident. The firing of the torpedo was the cause of the accident. It was while leaving the ship that Foley was injured. He was drowned, and drowning is certainly one of the risks directly connected with the employment of a man whose contract of employment was to cross the Atlantic ocean four times each year and attend to the business of his employers in Europe. It was an injury which had its origin in the risk connected with the business.

The case of *Manson* v. *Forth & Clyde Steamship Co.* (1913), *S. C.* 921; 50 *Sc. L. R.* 687; (1913) *W. C. & I. Rep.* 399, *Ct. of Sess.* 63, *W. C.*, illustrates this point.

The *pursuer* was a ship's carpenter; while working on the deck of a vessel a laborer lighted a cigarette and threw the match down; the match, still alight, fell among shavings. The fire thus caused lighted the *pursuer's* trousers, burning him severely; the *pursuer* had previously been shifting a barrel of kerosene, from which some of the oil leaked on his trousers, and he was injured by the fire. It was held that he was injured by an accident which arose out of and in the course of his employment. The Lord President in his judgment said:

> "It was not the throwing down of the match that was the accident—the fire was the accident; but the throwing down of the match was the cause of the accident. It was through the accident, namely, fire, that the *pursuer* was injured. Well, I think that was a risk to which he was exposed to a greater extent that other people because of his employment. Other people were not exposed to the risks of that fire because they had not to work among the shavings, and to work in oily trousers."

In *Terlecki* v. *Strauss,* 85 *N. J. L.* 454, an employee left her machine shortly before noon and was preparing to go home. She was combing particles of wool out of her hair, as was the custom of the girl employees. For this purpose she went to a passageway where a piece of looking glass had been placed against a post, thirty-two feet from her machine. While the petitioner was combing her hair it was caught in the still moving machinery, and she suffered serious injury.

Justice Swayze, speaking for the Supreme Court, found no trouble in declaring it to be an accident arising in the course of the employment, but said that whether it arose "out of" the employment was more doubtful. "The employment was not indeed the proximate cause of the accident, but it was a cause in the sense that but for the employment the accident would

not have happened. The employment was one of the necessary antecedents to the accident." Affirmed by the Court of Errors and Appeals, 92 *A.* 1087.

Another case that has a strong bearing is the *McNichols Case,* 215 *Mass.* 497; 102 *N. E. Rep.* 697, which has been cited with approval by the Court of Errors and Appeals in *Hulley* v. *Moosbrugger,* 95 *A.* 1007, and in *Zabriskie* v. *Erie R. R. Co.,* 92 *At.* 385. McNichols received injuries which resulted in his death, while in the employ of a firm of importers, from blows and kicks given him by a fellow workman in an intoxicated frenzy and passion, where such fellow workman was known to the superintendent in charge of the work to have the habit of drinking to intoxication and when in that condition to be quarrelsome, dangerous and unsafe to work with, and knowingly was permitted by such superintendent to continue to work on the day of the injury, while in such condition of intoxication. It was held that the injuries arose out of and in the course of the employment. Rugg, C. J., in delivering the opinion of the Court, said:

> "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, *a casual connection between the conditions under which the work is required to be performed and the resulting injury.* Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. * * * It need not have been foreseen or expected, but after the event it must appear to have

> had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In *Armitage* v. *L. Y. R. R. Co.* (1902), 2 *K. B.* 178, Cozen-Hardy, L. J., on page 183, said:

> "I think that same meaning must be given to the words 'out of' in the section. They appear to point to accidents arising from such causes as the negligence of fellow workmen in the course of the employment, or some natural cause incidental to the character of a business. An accident arising out of the dangerous character of a business carried on, and not involving any human agency, such, for instance, as spontaneous combustion of some material, might be said to arise out of the employment."

It is clear that in the present case, if the deceased had not been in the employ of the defendant, the accident which resulted in his death would not have happened to him, and would have happened to the employer himself if he had personally attended to the part of the business which he employed Foley to perform. At the time of the injury he was attending to the duty which he owed to his employer, and in the performance of which he was exposed to a risk which resulted in his death. It required him to be just where he was at the time. He was on board of a ship with the knowledge and consent of his employer, engaged in the employer's service.

Justice Kalisch, in his very able opinion in this case, which is found in full on page 23 of the State of the Case, clearly shows that the death of Foley occurred from a danger reasonably to be apprehended, and that it arose out of his employment. He says:

> "But if it can be fairly said that the respondent had no notice of this declaration of the German Government, and was not, therefore, legally bound to take notice of it, nevertheless

it was bound to take notice that a condition of war existed between Great Britain and Germany, and that ships of the enemy were subject to be captured or destroyed by such warring nations. This was a danger, reasonably, to be apprehended. * * *

* * * * * * * *

"The extraordinary risk in the present case arose from the fact that Foley was on an enemy ship in the course of his employment. His employer knew of this risk. If the Lusitania had been lost through a collision, fire or storm at sea, resulting in the death of Foley, it would, under the principle enunciated in all the cases bearing on this subject, be held to have been an accident arising out of his employment.

"Foley's presence on the ship was connected with the very employment in which he was engaged. The fact that the Lusitania was lost through none of the common perils of the sea, but by an extraordinary peril, does not make the extraordinary peril less a cause of accident arising out of Foley's employment. Both Foley and his employer were chargeable with knowledge of the perils of war upon the high seas. They must be assumed to have known that a belligerent vessel sailing under a belligerent flag, carrying contraband of war, subjected the vessel to attack by an enemy vessel, and that as a result of such attack, under many contingencies recognized by the law of nations, not only the loss of the vessel attacked, but the loss of lives of those upon her might result. The fact that the attack in this instance was not executed in a way that might have been anticipated, but in a manner said to be contrary to the law of nations, may operate to qualify the degree or nature of the danger and risk to such a peril, but does not eliminate the essential factor in the

case that the voyage was one pregnant with risk which the employer must have contemplated, as arising out of and in the course of such employment, such appears to have been the reasoning in *Zabriskie* v. *Erie R. Co.* 86 *N. J. L.* 266, holding that where the employee left the shop and crossed a danger zone of two railroad tracks of the main line of the Erie Railroad, laid at grade, upon a much traveled public highway, in order to reach a toilet and was killed, that the danger and risk of the journey must have been within the contemplation of the employer. It becomes at once apparent that the fact whether or not the automobile which killed the employee was operated in a lawful manner or was lawfully upon the highway was not regarded as an essential factor in the case.

"In the present case, if the Lusitania had struck a mine instead of being torpedoed, resulting in Foley's death, could it be reasonably contended that his death was not due to an accident arising out of his employment? We think not. It may be well said that those whose employments require them to travel by land or sea are known by their employers to be subject to the common perils that such traveling incurs. The risk is inherent in the employment itself. The manner in which the accident is brought about is not at all of the essence of the matter, the vital question always being, Was the accident connected with the employment? If it was, then it arose out of the employment, provided it occurred in the course of the employment.

"Let us test the soundness of the proposition just stated. Suppose the Lusitania had not been torpedoed, but captured, and in transferring the passengers to lifeboats Foley lost his life; or

after the passengers had been transferred to lifeboats a storm had arisen sinking the lifeboat in which Foley was. Could there be any doubt whatever that Foley would have been considered to have lost his life by an accident arising out of his employment? This is the underlying doctrine of *Zabriskie* v. *Erie R. Co. supra, and Terlacki* v. *Strauss,* 85 *N. J. L.* 454, 86 *Id.* 708.

"It is a matter of common knowledge that thousands of traveling salesmen travel daily in the course of their employment in cars propelled by steam, electricity and other propelling power, and therefore are subject to the risk of being injured or killed by reason of a collision or derailment; or by the cars going through an open draw or falling from a defective trestle, etc. The fact that the collision or derailment was caused by some malicious person with the design to injure a railroad company or some person in its employ would not operate to make an injury received by a salesman traveling on the car collided with or derailed any the less an injury, the result of an accident arising out of the employment of such salesman than if such injury had been received by him as a result of the cars going through an open draw or falling from a defective trestle."

In distinguishing this case from *Walther* v. *American Paper Co.*, 98 *A.* 264, and *Schmoll* v. *Weisbrod & Hess*, 97 *Atl.* 723, Justice Kalisch says:

"It must be borne in mind that the denial of a right of compensation in the Walther case was put upon the ground that the design of the assailant was to rob Walther, and not Walther's master, and hence the attack made on Walther was not connected with Walther's employment;

and that the denial of compensation in the Schmoll case was rested upon the fact that though the brewery collector was shot, but whether out of revenge for some personal wrong done to his assailant or by mistake or accident did not appear, and there was no fact or circumstance from which it could be reasonably inferred that the shooting had some connection with the collector's employment.

"The present case is clearly distinguishable from the cases referred to in which compensation was denied in that it cannot be properly said here that there was any malicious design on the part of the German naval forces against Foley or any other passenger, and it may be safely assumed that the prime object of the German naval forces was to destroy the enemy's ship and not the lives of its passengers.

"It is said that the attack made on the Lusitania, from a humane and civilized standpoint, was barbarous and cruel and in violation of the law of the nations, and that, therefore, the act of torpedoing the steamer was not within the contemplation of the employer when the risk of going by such steamer was undertaken by its agent, Foley.

"We do not think the lawfulness or unlawfulness of the conduct of the German naval officers affects the matter at all. If the Lusitania had been attacked by a German cruiser, and instead of surrendering, offered resistance or attempted to run away, and thereupon the German cruiser by a well-directed shot struck the steamer in a vital part causing her to sink, and Foley to lose his life, it would hardly have been contended by respondent that the death of Foley was not due to an accident arising out of his employment. Foley's employer knew that the

former had taken passage on a British ship, and that such ship was subject to the risk of capture by the German naval forces—in what manner that might be accomplished was unimportant, so long as the employer was aware of the risk—whether the ship was destroyed by lawful or unlawful means is immaterial.

"We think, therefore, that Foley's death was due to an accident while in the course of his employment, and that such accident arose out of his employment." *Foley* v. *Home Rubber Co.*, 99 *A.* 624.

The Newark Hair and By-Products Company v. *Feldman*, 99 *Atl.* 602, is very much in point.

A stenographer in the employ of a corporation occupying the fourth floor of a building, and having no control over the lower floors, who, when a fire originated in one of the lower floors and shut off any escape, was so burned as to cause death. Justice Kalisch writing the opinion held that she came to her death as the result of an accident arising out of and in the course of the employment.

In the course of the opinion, he says "We think that the important question is whether there was any danger to be *reasonably anticipated by the employer to its employees* while at work on the fourth floor from the situation and condition of the premises. *For if the risk of danger is in any manner connected with the employment, an accident happening by reason of such risk is an accident arising out of such employment.*"

In *Zabriskie* v. *Erie R. R. Co.*, 92 *At.* 385, 86 *L.* 266, Justice Parker says:

"The difficulty arises from the fact that the place where the deceased was struck was a public street, and that he was struck by an independent agency, to wit, an automobile driven by a stranger and lawfully in said street. Hence it is argued

> that the deceased was not, and could not have been, injured by any cause for which the master was responsible, or to which he was subjected by the conditions of his employment. But we consider this argument also without support. It is not only conceivable, but *it is a matter of daily occurrence, that employees are required to do their work under conditions which render them liable to injuries by outside agencies.*" And cites *Newark Paving Co.* v. *Klotz,* 91 *At.* 91.

In the Klotz case, the deceased was on the public street where he had to do his work, and in the Zabriskie case, the deceased had left the place where he actually worked, and was on his way to a convenience.

Said the Court:

> "The distinction is unsubstantial. * * * Viewed in this aspect, the danger was one which, in the language of the cases, was peculiar to the employment.
>
> * * * "The fact that the accident (in the Zabriskie case) may have been, and probably was, due to the negligence of the driver of the automobile, and perhaps also to the contributory negligence of the deceased, tends to cloud the issue, but does not differentiate the situation from that of any workman who is required in the performance of his work to go into a dangerous place and incur the dangers connected with that place."

The principle here involved is upheld by the Court of Errors and Appeals in the recent case of *Nevich* v. *Delaware, Lackawanna & Western Railroad Co.,* 100 *Atl. Rep.* 234. The petitioner was using a barrel as one of the implements of his service; two strangers carried it away a short distance, and petitioner was directed by his immediate superior to recover it; when petitioner approached the strangers, they assaulted and injured him; held that it was an accident, and that it

arose out of and in the course of his employment. Justice Bergen, writing the opinion, says:

> "As there was testimony tending to show that the superior of the petitioner directed him to get the barrel while it was in the hands of the persons carrying it away, there can be no doubt that the accident happened in the course of his employment, and, also, that it arose out of his employment, for he was reclaiming his employer's property by his direction, from persons who were attempting to remove it."

In other words, he was acting for his employer when the accident occurred, just as Foley was acting for his employer when he met with the injury which caused his death.

The principle to be deduced from the cases in this State appears to be that where the accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment, and that when the injury is caused by an independent criminal agency, it does not render it non-compensable, where the danger of injury by such means was an incident to the performance of the work, as well as of the time and place of the performance. *Bryant* v. *Fissel,* 84 *N. J. L.* 72, 86 *At.* 458; *Zabriskie* v. *Erie R. R. Co.,* 85 *N. J. L.* 157, 88 *At.* 824, affirmed on appeal, 92 *At.* 385; *Terlecki* v. *Strauss et al.,* 85 *N. J. L.* 454, 89 *At.* 1023, affirmed on appeal; *Hulley* v. *Moosbrugger,* 88 *L.* 161.

In England the question has been settled by a number of cases, the most interesting and important of which is the *Trim Joint District School* v. *Kelly, Law Journal* (1914), *p.* 220, *House of Lords.*

The deceased was an assistant teacher in the employ of the school. While superintending the boys at exercise in the yard attached to the school he was assaulted by several boys and beaten with various weapons; he suffered fracture of the skull, and his death resulted therefrom. The appellants contended that the occur-

rence was not an accident, and did not arise out of the employment within the meaning of the statute, because the injury was inflicted by design. After a most thorough argument the Court (the House of Lords) held that "Accident in the Workmen's Compensation Act, 1906, includes any injury not expected or designed by the injured workman himself, and therefore a premeditated injury inflicted on a workman in the course of his employment, in pursuance of a criminal conspiracy, may be an accident within the meaning of the act." It was held that the injury arose out of the employment.

In *Anderson* v. *Balfour* (1910), 2 *Ir. R.* 497, an assault was committed on a gamekeeper who while in the discharge of his duty was attacked and beaten by poachers, as a result of which he was injured. *Held,* that this was a case of injury by accident and arose out of the employment.

In *Challis* v. *London and Southwestern Ry. Co.* (1905), 2 *K. B.* 154; 74 *L. J. K. B.* 569; 93 *L. J.* 330; 53 *W. R.* 613; 21 *T. L. R.* 486; *C. A.,* 7 *B. W. C. C.* 23, a case frequently cited, an engine driver while driving an engine under a bridge was injured by a stone thrown or dropped by a boy from the bridge under which the railway passed. It was held that the injury was due to an accident arising out of and in the course of the engine driver's employment.

In *Nisbet* v. *Rayne,* 80 *L. J. K. B.* 84 (1910), 2 *K. B.* 689, a cashier was robbed and killed. He was traveling in a railway carriage to a colliery with a large sum of money for the payment of his employer's workmen, and was robbed and murdered. *Held,* that the murder was an accident from the standpoint of the person who suffered from it, and that it arose out of and in the course of an employment which involved more than the ordinary risk, and consequently that the widow was entitled to compensation.

Injuries arising out of the danger incident to a state of war are not excepted.

In *Risdale* v. *Kilmarnock* (*Workmen's Compensasation and Insurance Reports*, 1915, *Part I, page* 141, *Court of Appeals*), a case which arose since the war began, in some features resembles the Foley case.

The master of a steam trawler proceeding upon a fishing voyage was warned by the Admiralty of an enemy's mine field, and was directed to steer a roundabout course to avoid it. In spite of these instructions he steered directly through the mine field towards his fishing ground. While the vessel was in the mine field he saw some mines, which he buoyed, and then steered southward to warn some warships, which he saw in that direction, of the mines. While on this course the vessel struck another mine and was blown up. The chief engineer was severely injured by the explosion and claimed compensation. He was unaware of the Admiralty's instructions. *Held*, that the injury was caused by an accident, and as it happened while the engineer was carrying out the lawful instructions of his master, it arose out of and in the course of the employment.

Where a taxicab driver, driving an officer from Plymouth to an outlying fort during war, did not hear the sentry's challenge, because of the noise of an engine and stormy weather, and was shot in the leg, it was held to arise out of the employment. *Thorn* v. *Humm & Co.*, 8 *B. W. C. C.* 190, *C. A.*

The American courts have followed the English decisions, and the principle that the injuries arising out of crimes or by the design of an outside agency are not necessarily excluded from compensation is well established.

In re Reithel, 109 *Northeastern Reports* 951 (*Mass.*), where a mill superintendent on ordering out a trespasser pursuant to his general duties and special instructions,

was shot and killed by him, it was held that the injury was an accident arising out of, as well as in the course of, the employment. This presents a case of wholly unprovoked murder, and the only point was whether it arose out of the employment. The Supreme Judicial Court of Massachusetts held that it did so arise.

In *Moore* v. *Lehigh Valley R. R. Co.*, 154 *N. Y. Supplement* 620, a lineman in the employ of the defendant took shelter from a storm under some standing cars on a switch, and was injured by an engine of another company moving the cars standing on the switch. *Held*, that the injury was accidental in the sense of happening by chance, unexpectedly, or as not expected, from an unforseen and unexpected unusual occurrence, and that the injury was one arising out of and in the course of his employment.

In *West Ind. Co.* v. *Pillsbury*, 151 *Pacific* 398, the foreman of a company in charge of fifteen or twenty section hands who, after remonstrating with a Greek laborer, took a shovel from him and showed him how to work, and when he failed to do the work in the right manner told him to drop the shovel, and undertook to take it way from him, and was struck with the flat side of the shovel; then got a stick and returned, and after being missed by the shovel struck the Greek on the head with a stick; the Greek then grabbed him and with his teeth inflicted severe lacerations, followed by blood poison. *Held*, that he was injured by accident arising out of his employment, something out of the usual course of events happening suddenly and unexpectedly, without any designs on the part of the injured person. The circumstance that the injury was the result of a wilful and criminal assault by another not excluding the possibilities that it was caused by an accident.

In *State* v. *Peoples Coal and Ice Co.*, 153 *No. West. Rep.* 119, the death occurred by lightning. The decedent was required to follow a fixed route, in substantial disregard to weather conditions, though permitted to seek

shelter in times of necessity. When a severe rainstorm was in progress, he left his team and went to a tall tree just within the lot line, either for protection or in performance of his duties, soliciting orders. Lightning struck the tree and we was killed. It was held that the evidence sustained a finding that the death of the decedent was the result of an accident arising out of the employment within the meaning of the Workmen's Compensation Act. It was held further that an injury to be one "arising out of employment" within the meaning of the act need not have been anticipated, nor need it ordinarily be one peculiar to the particular employment in which the injured employee was injured. "If the deceased was exposed to injury from lightning more than the normal risk to which all are subject, if his employment accentuated the natural hazard from lightning, and the accident was natural to the employment, though unexpected or unusual, then the finding is sustained that the accident from lightning was one arising out of the employment."

The Workmen's Compensation rests upon public policy, and one significant outstanding feature which runs through the decisions of the Courts, both in America and England, in regard to this act, is the liberal construction which all the Courts have given it, and the tendency is to be still more liberal. In England it is referred to as insurance. In this State the Courts have referred to is as a pension scheme.

The scope of the act has been continually widened, until in *Rounsaville* v. *Central R. R.*, Judge Swayze (94 *At.* 392) says: "The scheme is more like a pension scheme than a liability for a breach of contract or damages in tort. * * * Compensation by way of pension from the master is quite different in character from compensation by a tort-feasor.

"The difficulty under which the trained legal mind labors, in this class of cases, is to detach itself from

considering the facts of each particular case free from the influence of well-settled legal principles governing cases of negligence, and to simply keep in view that we are dealing in lieu thereof with a state of social insurance, in which the doctrine of negligence has no abiding place."

Newark Hair and Bi-Product Co. v. *Feldman,* 99 *Atl.* 602.

The Courts in all jurisdictions seem to be in accord that the act should receive a broad and liberal construction.

The contract in this case was made in this State and the fact that the accident occurred outside of this State is immaterial. *Rounsaville* v. *C. R. R. Co.,* 94 *At.* 392.

In Connecticut a claim for compensation was brought by Bertha V. Trumbull against The Trumbull Motor Car Company for the death of her husband, who, while in the employ of the defendant, lost his life by the sinking of the Lusitania. The compensation commissioner, who heard the matter, granted compensation. I obtained a copy of the finding and award, but have not been able to ascertain whether the case has been taken to a higher court.

It is respectfully submitted that the facts in this case clearly establish that the death of Arthur R. Foley was due to an accident; that it was an accident from the standpoint of the sufferer, and that it arose out of and in the course of his employment, and that the judgment of the Supreme Court should be affirmed.

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