New Jersey Court of Errors and Appeals

ANNIE C. WALTHER, Executrix of the Estate of Louis R. Walther, deceased, *Petitioner-Appellee,* *vs.* AMERICAN PAPER COMPANY, Bankrupt, WALTER P. GARDNER, Trustee, *Defendant-Appellant.*	On Appeal from Supreme Court.

BRIEF FOR APPELLANT.

Appellee was awarded compensation under the Workmen's Compensation Act by the Bergen County Common Pleas Court. The Supreme Court on certiorari affirmed the Pleas, and the judgment of affirmance is brought here by appeal.

On December 24, 1914, Hon. Walter P. Gardner, Trustee in Bankruptcy of the American Paper Company, Bankrupt, was operating the paper mill of the bankrupt at Bogota, under orders of the United States District Court. Louis R. Walther, petitioner's husband, was night watchman in the employ of the Trustee. That night while Walther was on his rounds through the mill property he was murdered by a fellow employe, who had gone to the mill for the sole purpose of robbing the deceased of his weekly wages, $15.00, paid to him that night to the knowledge of the murderer (Stipulation, p. 9, par. 5, and p. 12, par. 6). The facts are all agreed to.

The Trial Court held that Walther met with his death through an accident arising out of and in the course of his employment.

The reasons assigned for reversal which are relied upon are (1) that Walther did not meet his death through an accident within the meaning of the statute, and (2) that his death while happening in the course of his employment did not arise "out of" the employment.

Appellant also claims that under the facts the petition should have been dismissed.

POINT I.

The murder of Walther was not an "accident" within the meaning of the statute.

As defined by the Supreme Court in *Bryant v. Fissell,* 55 Vr., 72, an accident is "an unlooked for and untoward event which is not expected or designed."

In the Workmen's Compensation Act the word "accident" contemplates those industrial mishaps arising from defective machinery, or the careless use of the instrumentalities of industry in the ordinary and natural course of business.

It is contended by the petitioner that the word "accident" should have the construction given to it in insurance cases. It is a familiar rule that the words used in a policy of insurance are to be interpreted most strongly against the insurer. *Harris v. American Casualty Co.,* 83 N. J. L., 641. This rule, of course, has no application in construing a workmen's compensation act.

It was held in *Nesbet v. Rayne* (1910), 2 K. B., 689, that an assault is an accident. There a cashier while travelling in a railway carriage carrying his employer's money was assaulted and killed for the purpose, on the part of the assailant, of taking

the employer's money from him. It was held that this case came within the statute. The difference between this case and the one at bar is fundamental. Accident and assault are not synonymous.

When it is considered that murder is a wilful, deliberate and premeditated act, it becomes plain that it is not an accident.

POINT II.

The murder of Walther was not an occurrence "arising out of" his employment.

The purpose of the murderer in going to the mill was the robbery of Walther, and he did not attempt or contemplate any robbery whatever from the office of the mill or any destruction of mill property or any other mischief or crime (p. 12, par. 6).

The conclusion of the Trial Court "that if the decedent had not been employed in his duties as night watchman that evening, he would not have been killed," does not meet the question; rather it evades it. It would seem more accurate to say that if he had not been paid his wages that evening there would have been no robbery or murder. It was the known possession by the decedent of money upon his person, which money was his own property, and in which the master had no interest and for which the master had no responsibility, that furnished the sole incentive for the crime. It was but a circumstance that the robber chose the hour and place of labor for the perpetration of a crime, which in its essence was directed solely against the person and property of the employee. Its quality would have been the same had the robber laid in wait along the highway until Walther was returning home, or later had invaded his dwelling. If the argument of the Trial Court

is sound, then every case in which an employee is injured while in the course of his employment must necessarily arise out of the employment.

We contend that this case is controlled by the decision of this Court in *Hulley v. Moosbrugger,* 95 Atl. Rep. 1007, where it was held that an employer is not charged with the duty to see that none of his employes assaults any other one of them, either willfully or sportively. The opinion of the Court held:

> "And when one made such an assault upon another he was guilty of the doing of a negligent act as an individual tort-feasor, for which his employer was not responsible."

The employee in *Hulley v. Moosbrugger,* was injured while dodging a blow aimed at him or his hat by a fellow servant; here Walther died as the result of a blow willfully imposed by a fellow workman, who was also an individual tort-feasor.

In *Armitage v. Lancashire & Yorkshire Railway Co.,* (1902) 2 K. B. 178, an assault was committed by one employee on another. The opinion of the Court is quoted at considerable length in the *Hulley v. Moosbrugger* opinion, and the Court holds:

> "As a matter of law it cannot be said that an accident caused to a workman while engaged in his work by a fellow workman doing a willful act entirely outside of the scope of his employment, is an accident arising out of and in the course of his employment."

The argument that the Watchman was in danger of attack from persons coming to rob the mill confuses the danger incident to the employment of a watchman and the comparatively slight danger which any person runs of an attack by someone for the purpose of robbing him as an individual. It cannot be said that the risk of a personal assault and a personal robbery is any more inherent

in the employment of a night-watchman than in the employment of any person in any other employment.

In *Mutchenson v. Day Brothers* (*1913*) *W. C. Rep. 324; 6 B. W. C. C. 190,* Mutchenson was a carter in the employ of a firm for the removing of heavy machinery. On July 15, 1912, he was in charge of a horse and van which was standing in Mordock Street, Burmingham. A man named Parkes, who was the worse for drink came towards the man, and either touched or was about to touch the horse, when Mutchenson warned him that the horse might hurt him. Parkes then struck Mutchenson a heavy blow and before Mutchenson could protect himself a second blow followed, which felled him to the ground and caused his death. The assault was entirely unprovoked.

Cozens-Hardy, M. R., said (page 194) :

> "The risk of being assaulted by drunken men was not in any way specially connected with or incident to the employment of a carter, and therefore the decision in this Court and in the House of Lords in *Warner v. Couchman* (1912 A. C. 35; 5 B. W. C. C. 177, applies. * * * In *Blake v. Head* (1912) 106, L. T. 822; 5 B. W. C. C., 303; where a servant was injured by a blow struck by his master with a hatchet, it was held that the accident did not 'arise out of the employment'. It was pointed out that if the man had been employed as an attendant in a lunatic asylum and had been assaulted by one of the inmates, his employment might well have been held to have involved such an especial risk that the accident might have been held to 'arise out of the employment'. * * * It has been strenuously argued that as the driver was in charge of his master's property, any accident caused while defending or protecting that property was in his master's interests and must therefore be

> held to 'arise out of his employment'. I don't accept this view. It seems to me to draw no distinction between 'in the course of' and 'arising out of' and in fact to strike out of the statute the words—'arising out of'."

If the accident while skylarking in *Hulley v. Moosbrugger* was not an accident arising out of the employment, how can it be said that the murder in this case for the purpose of robbery of the assailed workman is an accident arising out of the employment? Here it was only an incident that Walther was murdered on the property of his employer. The inducing cause of the murder was the money in Walther's pocket. The mill at night merely gave the murderer the opportunity which would have been presented just as well along a quiet path to Walther's residence or in his home in the dead of night. Walther might just as well been murdered, so far as the merits of this case are concerned, to satisfy a personal grudge of his assailant, or for the purpose of avenging injured feelings.

We submit that the judgment below must be set aside.

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ANNIE C. WALTHER, Executrix, etc., Petitioner-Respondent. vs. AMERICAN PAPER COMPANY, Bankrupt, WALTER P. GARDNER, Trustee, Defendant-Appellant.	Appeal from Supreme Court.

BRIEF FOR RESPONDENT.

Statement.

This is an appeal from an affirmance, on certiorari, of a judgment for compensation for the death of an employe.

On and prior to December 24, 1914, Louis R. Walther was employed by Walter P. Gardner as trustee in bankruptcy of American Paper Company as a night watchman at the plant of the said Company at Bogota.

It was his work and duty to go at regular intervals during the night from place to place in and through the mill and the yard adjoining it, and to record his passage by watchman's clocks, fixed

at various places in and about said mill, and it was also his work to guard said premises against loss or damage. He was employed only during the night and was not engaged in any way in the operation of the mill or plant.

On the 24th day of December, 1914, at about nine o'clock at night, Walther was making a tour through the mill "ringing in" on the watchman's clock, and while going from one station to another, he stopped to close a sliding exterior door hung on wheels or pulleys, and opening from the mill to a loading platform adjacent to a railroad switch. As he leaned down against the handle of the door to roll it shut, he was struck upon the head with a club by a person who had entered the mill and hidden himself behind some rolls of paper near the said door and near an interior door through which Walther was accustomed to pass in making a tour of the mill. Walther died almost immediately and the assailant took from Walther's vest pocket his pay envelope containing about $15.

The assailant was also an employee and had been paid off earlier in the day and had lost all of his pay except fifty cents in a crap game and he knew that Walther had been paid off that day and would probably have the money in his pocket. The assailant did not commit any mischief or crime in the mill other than the robbery of Walther.

Walther's wages were $15 per week. His widow and two children, one formally adopted by them, and one placed with them for future adoption, were living with him and dependent upon him, at the time of his decease.

The Bergen Common Pleas, on the petition of the executrix, awarded compensation at $6.00 per week for 300 weeks, $100 for burial, and costs.

The employer brought certiorari and the Supreme Court affirmed the judgment. The employer appeals and contends that Walther died by reason of a wilful, deliberate and premeditated assault, that his death was not the result of an accident arising out of his employment, and that therefore his dependents are not entitled to compensation.

I.

Walther's death resulted from an accident within the meaning of the statute.

In Bryant vs. Fissel, 84 N. J. L., 72, the Supreme Court construed the Workmen's Compensation Act, and defined an accident as "an unlooked for and untoward event which is not expected or designed." At page 76, however, the Court stated that it left undecided the question now raised, i. e., whether the death of an employe killed by another person who acts intentionally, is an accident.

In Hutchcraft vs. Travelers Insurance Co., 87 Ky., 300; 8 S. W., 570; 10 Ky. L., 260; 12 Am. S. R., 484, in which one waylaid and assassinated for the purpose of robbery was held to have met an accidental death, the Court of Appeals of Kentucky classified accidents as events happening unexpectedly, (1) from the uncontrollable operation of nature alone and without human agency, (2) from human agency alone, and (3) from the joint operation of both.

The second class was further subdivided as follows:

(a) Accident to person by own agency as where one is walking or running and accidentally falls

and hurts himself. Here he falls by reason of his agency in walking or running, but he did not intend to fall; he did not foresee that he would fall in time to avoid it; the fall was therefore accidental.

(b) Accident through involuntary agency of third persons as where one, standing on a scaffold, unintentionally lets a brick fall from his hand, and it strikes a person below. Here the dropping of the brick, as it was not foreseen by the latter, is, in the broadest sense, an accident.

(c) Accident through intentional agency of third person, as where one intentionally fires a gun in the air and accidentally shoots another person. Here the act of firing the gun was intentional, but the shooting of the person was unintentional. Therefore, on the part of the person firing the gun, the shooting of the other would be accidental, although not in as broad a sense as in the former case, because some part of his act was intentional, but as to the person shot, it was by purely accidental means.

(d) Accident through intentional injury by third person, as where one person intentionally injures another, which was not the result of a rencounter or the misconduct of the latter, but was unforeseen by him. Such injury as to the latter, although intentionally inflicted by the former, would be accidental. When the injury is not the result of the misconduct or the participation of the injured party, but is unforeseen, it is, as to him, accidental, although inflicted intentionally by the other party.

The same thought is expressed more tersely in Biddle on Insurance, Vol. 2, Ch. 10, page 780:

"An injury may be said objectively, to be accidental, though subjectively it is not; and

> if it occur without the agency of the insured, it may logically be termed accidental, though it was brought about designedly by another person."

The definition given by the New Jersey Supreme Court in Bryant vs. Fissel, supra, construed "objectively" would read: An accident is an unlooked for and untoward event which is neither expected nor designed, and which occurs without the agency of the employe even though it is brought about designedly by another person. This definition of the word "accident" is in keeping with the words of the Statute, for in Section II, paragraph 7 (P. L., 1911, page 134, at page 136) it is provided that compensation shall be made "in all cases except when the injury or death is intentionally self inflicted." If we substitute for the word "accident" the suggested definition, the provision will read:

> "Compensation shall be made by the employer, without regard to the negligence of the employer, according to the schedule, etc., for the death of an employe by an unlooked for and untoward event which is neither expected nor designed, and which occurs without the agency of the employe even though it is brought about designedly by another person, and arising out of and in the course of his employment."

Which is the same meaning as is expressed by the words of the Statute, "Accident arising out of and in the course of his employment * * * in all cases except where the injury is intentionally self inflicted."

The well known rule of construction is that all of the words in a statute should be given effect, if such a construction can be made, and this rule would have to be disregarded in order to construe the word "accident" so as to exclude an injury by the intentional act of another, because it would be necessary to disregard the words "in all cases except where the injury is intentionally self inflicted." There is no reason to depart from this well established rule, for by construing the word "accident" as an unexpected and untoward event which occurs without the agency of the employe, even though it is brought about designedly by another person, force and meaning is given not only to the words "death by accident" but also to the words "in all cases except where the injury is intentionally self inflicted."

While this question is novel in this State, the decisions in other jurisdictions support the contention of this respondent. In England it is settled that there may be an accident within the British Workmen's Compensation Act, although the accident is due to a felonious act of another. In a case in which a cashier who, while traveling in a railway carriage to a colliery with a large sum of money for the payment of the employes and workmen, was murdered, it was held that the murder was an accident from the standpoint of the person who suffered from it and within the British Act. Nisbet vs. Rayne and Burn, L. R. (1910), 2 K. B., 689. And in another case in which an engine driver, while driving a train under a bridge, was injured by a stone wilfully dropped on the train by a boy from the bridge, it was held that his injuries were caused by an accident. Challis vs. London & S. W. Ry. Co., L. R. (1905), 2 K. B., 154.

And the decisions in several recent cases in the United States support the respondent's contention that the fact that the injury was the result of a wilful or even criminal assault by another does not exclude the possibility that the injury was caused by accident.

Western Indemnity Co. vs. Pillsbury (Cal.), 151 Pac., 398;
Re McNichol, 215 Mass., 497, 102 N. E., 697;
Re Reithel (Mass.), 109 N. E., 951.

In Fenton vs. Thorley & Co. in the House of Lords (1903, A. C., 443), one of the English cases cited and applied by Justice Kalish in Bryant vs. Fissel (supra), Lord Macnaghten defined "accident" as "an unlooked for and untoward event which is not expected or designed," this definition being adopted by Justice Kalish in Bryant vs. Fissel. In Trim Joint School vs. Kelly (1914), A. C., 667, Viscount Haldane said, referring to Lord Macnaghten's definition in Fenton vs. Thorley, "I think the context shows that in using the word 'designed' he was referring to 'designed by the sufferer,' " and in the Trim Joint School case it was held that the death of a schoolmaster resulting from an assault by pupils in pursuance of a pre-arranged plan, was due to an accident. In the Fenton case, Lord Macnaghten said:

> "It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the act some injuries ordinarily described as 'accidents' which be-

yond all others merit favorable consideration in the interest of workmen and employers alike."

If we apply that view to this particular case, and treat the claim as an action brought upon a policy of insurance against accidents arising out of the employment of the assured, there can be no question that such a policy would cover this case. The scheme of compensation provided by the New Jersey statute is, as suggested by Lord Macnaghten referring to the British Act in Fenton vs. Thorley & Co. (supra), similar to that offered by the insurance companies in what are called "accident policies." These policies commonly contain an agreement to pay a sum stated in a schedule upon the insured being injured or killed by "external, violent and accidental means," and it has been held repeatedly in cases arising on such policies that an injury occurring without the agency of the insured is accidental even though it is brought about designedly by another person. In the following cases selected from the many cases on this point, the circumstances are similar to the Walther case:

"An assault made upon the assured by persons who have waylaid him for purposes of robbery or otherwise is within the risks of an accident policy. Ripley vs. Railway Passengers' Assur. Co., Fed. Cas. No. 11,854 (affirmed on other grounds in Same vs. Railway Passengers' Ins. Co. (1872), 83 U. S. (16 Wall.), 336, 21 L. Ed., 469). In this case Ripley, while on the highway at midnight, was set upon by highwaymen, rendered insensible, and then robbed of his watch and money.

"Where one insured in an accident policy was killed by a shot from a pistol in the hands of another, and deceased did nothing to provoke the shooting, the killing was accidental, within the meaning of the policy, though the persons shooting intended to kill deceased. Jones vs. United States Mut. Acc. Assn. of City of New York, 92 Iowa, 652; 61 N. W., 485.

"A person who is unexpectedly shot by another, without cause or provocation, is injured by 'external, violent and accidental means' within a policy insuring against such injuries." American Acc. Co. of Louisville vs. Carson, 99 Ky., 411; 36 S. W., 169; 34 L. R. A., 301.

"An intentional homicide is an accident within the meaning of an accident policy, if insured himself is in no way responsible for his death." Furbush vs. Maryland Casualty Co., 91 N. W., 135; 131 Mich., 234; 9 Detroit Leg. N., 293; 100 Am. St. Rep., 605.

It is respectfully submitted that Walther's death was an accident within the meaning of the statute.

II.

Walther's death was an accident arising out of his employment.

The Common Pleas Judge found that:

"A fair conclusion of fact is that Walther was engaged in an occupation of some considerable risk and danger to himself personally. It was his duty to go in many places

throughout the grounds and buildings making up the plant during all hours of the night; these were places accessible and particularly inviting for an attack upon him, whether the purpose of that attack be to accomplish an injury to the plant, theft out of the plant, or individual bodily injury to himself. It is evident that this risk was a complement of his employment, and that he was engaged for that particular purpose and undoubtedly upon the assumption that he had courage enough to prevent fear of bodily attack in order to fulfill his duties properly for the benefit of his employer. This element of the risk of personal bodily injury, is a well known factor in the job of night-watchman in any large plant.

"The facts in the case indicate that the tort feasor, the man who killed Walther, was an employee of the same concern, and as such employee he knew the customs of the plant as to the time of payment of the wages of Walther, of the route necessary for him to take upon his inspection, and also from his familiarity with the plant, the most available place to make the attack. I think it is plain that the employment of Walther was one of the contributing causes without which his death would not have happened. The peculiarity and the nature of the employment provided means by which the assailant could and actually did perform his dastardly act."

By Section 18 of the Workmen's Compensation Act (P. L., 1911, page 134) these findings of fact are conclusive, and these findings, being supported by the facts as stipulated or reasonably inferred from these facts, should be accepted by this Court

on appeal. Ryker vs. Turkel, 75 N. J. L., 677, Sexton vs. Newark Dist. Tel. Co., 84 N. J. L., 85. The law arising upon these ascertained facts is a question for the Court reviewing the decision, Hulley vs. Moosbrugger (95 Atl. Rep., 1007). The following precedents support the decision of the Trial Court that Walther met his death by an accident arising out of and in the course of his employment.

In the very recent decision of the Court of Errors and Appeals in Hulley vs. Moosbrugger (95 Atl. Rep., 1007), Chancellor Walker said, at page 1008:

> "The Supreme Court in its opinion properly held that the principle to be deduced from the adjudications in this state is that, when an accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment."

He cites with approval McNichol's case, 215 Mass., 497, in which it was held that to sustain a claim for compensation under the Massachusetts Act providing compensation for injury "arising out of and in the course of his employment" it must appear that "the injury had its origin in a risk connected with the employment and that it flowed from that source as a natural consequence." In Bryant vs. Fissel, supra, the Supreme Court held 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.

Any reasonable person entering employment as a night-watchman must contemplate that, while passing through the empty darkened mill at regular intervals and by the same route during each

night, there is a risk of attack and injury by persons who are in the mill at that hour for some unlawful purpose. This risk is incidental to the employment, for one of the reasons for having the watchman go through the mill and ring up at the clock stations is to compel the watchman to confront any person in the mill at night. Paraphrasing the language of Justice Trenchard in Bryant vs. Fissel, the risk is incidental to the employment because it belongs to or is connected with what the watchman has to do in guarding the mill at night, and it is an extraordinary risk owing to the special nature of the employment, requiring the watchman to go through the mill at regular times and by the regular routes laid out for him by placing the watchman's clocks in the various parts of the mill, so as to make him meet and deal with any intruders. And in the words of the Chancellor in Hulley vs. Moosbrugger (supra), Walther's death was "the result of a risk reasonably incident to the employment," because no one could make the watchman's trip without a feeling of caution, if not of fear, lest they be attacked just as Walther was attacked, and this caution, this fear, demonstrates the risk which would be contemplated by a reasonable person, when entering employment as a night-watchman as incidental to it.

The seed from which the assailant's plan to attack Walther was developed, was his knowledge of the places through which Walther was obliged to pass, and the times when he would pass, and of the places in which an assailant could best enter the mill and hide himself, so as to surprise and attack the watchman. Had the watchman not been obliged to go where he did go, the assailant's plan would never have been consummated. Or to express it as it was stated in the McNichol case, the

injury had its origin in the opportunity to attack the watchman while he was passing through the mill, a risk connected with the employment, and it flowed from that source as a natural consequence, for but for the employment of deceased, the assailant would have had no such information upon which to base his plan and no such favorable opportunity to consummate his plan at any other time or place.

That accidents arising out of the dangerous nature of the business are within the statute, is the principle applied by the Court of Errors and Appeals in Hulley vs. Moosbrugger (95 Atl. Rep., 1007, reversing the Supreme Court decision in 87 N. J. L., 103), in holding that an injury resulting from skylarking does not arise out of the employment.

The distinction between accidents which arise out of the employment, and those which do not, is developed and made clear by two later English opinions which dealt with cases in which it was necessary to differentiate accidents arising out of the employment from other accidents.

In Andrew vs. Failsworth Industrial Society, L. R. (1904), 2 K. B., 32, a case in which a bricklayer who was killed by lightning while working on a high scaffold, was held to have sustained an injury by an accident arising out of his employment, within the British Workmen's Compensation Act, Collins, M. R., adopted the words of the Trial Judge, who said:

> "If there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run and which is a necessary concomitant of the occupation the

man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment and if, in consequence of that extra danger, a fatality occur, I am entitled to say that the applicant is entitled to recover under the British Compensation Act."

It is upon the ground of the extra danger beyond the risk that ordinary people run that the case *sub judice* is distinguished from Schmoll, adx. vs. Weisbrod & Hess Brewing Company, decided by the Supreme Court just before this case was decided. In the Schmoll case, the deceased made a delivery of beer at some dwelling house in Atlantic City, leaving his wagon in the street, a little distance away, and while returning to his wagon he was assaulted and shot by some person unknown. The Trial Judge found that the territory in which the deceased was called upon to deliver beer and make collections was known to the police department as one where drunkenness, assaults with intent to kill and murders occurred with greater frequency than in any other part of Atlantic City, and where persons who commit robbery resort. The Supreme Court reversed a judgment for compensation because (as stated in the opinion by Mr. Justice Kalish):

"We do not think that the character of the place where the attack was made upon the deceased under the testimony of this case is of any particular significance, since it does not appear that the employer had any notice or knowledge of the danger of the locality. The proof in the case went no farther than to tend to establish that the police department had such knowledge." * * * "The employer

ought not to be chargeable with any risk which the place where the work was to be performed entailed by reason of some peculiar and extraordinary situation existing there, unless it was made to further appear that he was aware of such added risk."

In the Walther case, the Supreme Court affirmed a judgment for compensation for the reasons stated by Judge Seufert, in the Common Pleas, which were:

"A fair conclusion of fact is that Walther was engaged in an occupation of some considerable risk and danger to himself personally. It was his duty to go in many places throughout the grounds and buildings making up the plant, during all hours of the night; these were places accessible and particularly inviting for an attack upon him, whether the purpose of that attack be to accomplish an injury to the plant, theft out of the plant, or individual bodily injury to himself. It is evident that this risk was a complement of his employment, and that he was engaged for that particular purpose and undoubtedly upon the assumption that he had courage enough to prevent fear of bodily attack in order to fulfill his duties properly for the benefit of his employer. * * * This element of the risk of personal bodily injury is a well known factor in the job of night-watchmen in any large plant. * * * I think it is plain that the employment of Walther was one of the contributing causes without which his death would not have happened. The peculiarity and the nature of the employment provided means by which the assailant could and actually did perform his dastardly

> act. * * * When it is considered that the attack was made by a co-employee as a result of information gathered during the course of his employment and consummated in a manner rendered feasable by the assailant's accessibility to the building and the necessity of Walther traveling through places which made the perpetration of the crime easy, the conclusion cannot be avoided, to put it negatively, that if the decedent had not been employed in his duties as night watchman that evening, he would not have been killed."

It is clear that the point on which these two cases are different, is that in the Schmoll case there was no risk incident to the employment, beyond the ordinary normal risk which ordinary people run; while in the Walther case there was an extra danger, something appreciably and substantially beyond the ordinary normal risk, which was a necessary concomitant of Walther's occupation as night watchman, and that he was employed to take this risk. It is for this reason that compensation was denied in the one case and allowed in the other.

Like the risk of being struck by lightning while working in an elevated place, the risk of assault taken by night-watchmen while going alone at regular intervals by regular routes through dark, empty buildings is appreciably and substantially beyond the normal risk taken by ordinary people who stay at home nights or move about at irregular intervals and with or among other persons, upon streets and in places which are lighted and guarded, and this risk is necessarily connected with the watchman's work. A fatality, therefore, resulting from this risk is one arising out of his employment. This will appear more clearly if we inquire what

would have happened had Walther not been killed by the assailant's first blow. If the first blow had not incapacitated him, the watchman's duty would have been to attempt to take the intruder into his custody or eject him from the mill. Had this been the case, could it be conceived that Walther should stop, as the assailant struck him, to ask him or even to consider in his own mind whether the intruder intended to rob him of his pay, or to rob or damage the mill? Surely the only thing the watchman could be expected to do would be to counter-attack with such weapons as he may have had, without stopping to ascertain or even to think what might be the purpose which actuated the attack then being made upon him. Had the watchman been killed in such a fight, it could not be said that his dependents should not have compensation, even though the assailant after killing him, had taken his pay from his pocket. And surely the fact that the assailant was enabled, by the very nature of the work the watchman had to perform, to select a hiding place from which he could set upon Walther by surprise and kill him before he had an opportunity to resist, does not change the case at all.

This is emphasized by Cozen-Hardy, M. R., in Nisbet vs. Rayne and Burn, L. R. (1910), 2 K. B., 689, where, referring to Andrew vs. Failsworth Industrial Society (supra), he says (at page 693): "Any man may be struck by lightning, and in many circumstances this would not entitle him to compensation. If, however, the nature of his employment exposes him to more than the ordinary normal risk, the extra danger to which the man is exposed is somthing arising out of his employment." Hulley vs. Moosbrugger (supra) is, therefore, distinguished from the present case. While the risk of injury by the horse-play or skylarking

of one's associates is an ordinary normal risk taken by any man, and the risk of injury by felonious attack is a normal risk taken by all of us in ordinary circumstances, the risk of attack taken by night watchmen has added thereto the extra danger to which he is exposed by the requirement of his employment that he go alone at night at regular intervals, and by a regular route, through dark empty buildings, for the purpose of confronting and dealing with intruders, thus affording an unusual opportunity for, if not directly inviting, injury by an attack upon him by one seeking to commit some crime, either upon himself or in or upon his employer's property. This extra danger to which a watchman is exposed is something arising out of his employment within the meaning of our statute, and is not within the decision in Hulley vs. Moosbrugger.

This case is similar, in principle, to two cases heretofore decided by this Court. In Zabriskie vs. Erie Railroad Co. (86 N. J. L., 266) a workman was run down and killed while crossing a street. No doubt all of us are exposed to injury by being run down while crossing a street as often or more often than we are to injury by robber's assault, but it was held that the injury in the Zabriskie case arose out of the employment. Justice Parker, delivering the opinion of the Court of Errors and Appeals, said (at page 268):

> "The Trial Court was also justified in finding upon the evidence adduced that the accident arose out of the employment. The difficulty in the case 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 to be 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 injury by outside agencies. It is only necessary to cite the case of Klotz vs. Newark Paving Co., 91 Atl. Rep., 91, recently affirmed here on the opinion of the Supreme Court, where the place of work of the deceased was in a public street; and during working hours, while waiting for his work to begin, or attending to some incidental matters in the interim, Klotz was struck by a trolley car and killed. It was there held that the accident arose out of and in the course of his employment."

And at page 270 he said:

"The fact that the accident 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 case *sub judice,* like the Zabriskie and Klotz cases, is one in which the watchman was required to do his work under conditions which rendered him liable to injury by outside agencies, and was also required in the performance of his work in the

night time to go into dangerous places, the dark corners of the empty mill, and incur the dangers connected with those places, one of which was the danger of sudden attack by interlopers. The Massachusetts Court In re Employers' Liability Corporation (102 N. E. Rep., 697), in the opinion of Rugg, C. J., said:

> "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,"

and in paraphrase of the language quoted from this Massachusetts case by Justice Parker in the Zabriskie case, the act of the assailant and the conditions of employment that required the deceased to go alone at regular intervals during the night by a regular route, into the darkest parts of the empty mill, thus furnishing the assailant an opportunity to attack the watchman by surprise, were contributing proximate causes, the latter of which was an actual risk of employment, and an injury resulting from that risk is, therefore, one arising out of the employment.

It is respectfully submitted that Walther's death resulted from an incident arising out of his employment.

III.

Walther's death resulted from an accident which arose out of and in the course of his employment.

In Bryant vs. Fissel, the Supreme Court held that an accident arises "in the course of the em-

ployment" 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.

What was Walther doing? Going through the mill, ringing up on his watchman's clock, and stopping to close an open exterior door. He might reasonably do these things. What time was it? It was about nine o'clock at night, within the time during which he was employed. Where was he? Inside the mill, between a station on which he had just "rung in" and the next station to which he was going to "ring in," unquestionably at a place where he might reasonably be during that time.

It is respectfully submitted that Walther's death resulted from an accident arising out of and in the course of his employment.

IV.

The respondent should, therefore, make compensation.

V.

The compensation was correctly computed.

This is not disputed by the appellant.

VI.

It is respectfully submitted that there is no error in the determination of the Common Pleas in this case, and that the Supreme Court properly affirmed the judgment.

WILLIAM J. MORRISON, JR.,
Attorney for Respondent.

21095.

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Notice of Appeal.

(Served June 10, 1916.)
(Filed June 14, 1916.)

New Jersey Supreme Court

ANNIE C. WALTHER, Executrix of the Estate of Louis R. Walther, deceased,

Petitioner-Respondent,

vs.

AMERICAN PAPER COMPANY, Bankrupt, Walter P. Gardner, Trustee,

Defendant-Prosecutor.

To WILLIAM J. MORRISON, JR.,

Attorney of Petitioner.

Please take notice that the above named defendant-prosecutor hereby appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from the judgment of the New Jersey Supreme Court, entered June 9, 1916, affirming the judgment of the Bergen County Court of Common Pleas.

The following are appellant's grounds of appeal:

First: Because the Supreme Court refused and failed to find that Louis R. Walther, deceased, did not meet with an accident arising out of his employment.

Second: Because the Supreme Court did not reverse the judgment of the Common Pleas Court

and ordered judgment to be entered in favor of the prosecutor-defendant.

Third: Because the said Louis R. Walther met his death because of matters which did not arise out of his employment.

Fourth: Because the said Louis R. Walther's death was not occasioned by an "accident" within the meaning of the Workmen's Compensation Act.

Respectfully yours,

McDermott & Enright,
Attorneys of Appellant.

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

February Term 1916.

Annie C. Walther, Exc., *Defendant,* v. American Paper Co., *Prosecutor.*	On Certiorari to Bergen County Court of Common Pleas.

Argued Feb. 16, 1916; Decided June 6, 1916.
On Certiorari to the Bergen County Court of Common Pleas.

Before Justices Garrison, Trenchard and Black.

For the Prosecutor McDermott & Enright, Esqs.

For Defendant, William J. Morrison, Esq.

Per Curiam:

The judgment of the Pleas is affirmed for the reasons stated in the memorandum filed therein by Judge Seufert.

The facts of the case differentiate it from the recently decided case of Schmoll Admx &c. v. Weisbrod & Hess Brewing Co. where the employee was not on the public street.

Rule affirming judgment of the Bergen Common Pleas.

NEW JERSEY SUPREME COURT.

Between ANNIE C. WALTHER, *Petitioner-Respondent,* *and* AMERICAN PAPER COMPANY, Bankrupt, Walter P. Gardner, Trustee, *Defendant-Prosecutor.*	On Certiorari to Bergen Common Pleas.

The Court having inspected the transcript and proceedings of the Court of Common Pleas of the County of Bergen returned with the certiorari in this cause and the reasons for reversing the judgment on appeal and having heard the argument of counsel therein and having duly considered the same, it is on this ninth day of June, 1916, Ordered that the judgment of the Court of Common Pleas of the County of Bergen be in all things confirmed with costs. And said record be and the same is hereby remitted to the Court below to be proceeded with according to law.

Entered June 9, 1916.

WM. J. MORRISON, Jr.,
Attorney for the Respondent.

A true copy,
Wm. C. Gebhardt,
Clerk.

Writ of Certiorari.

NEW JERSEY, SS:
(Seal.)

THE STATE OF NEW JERSEY To Honorable WILLIAM M. SUEFERT, Judge of the Bergen County Court of Common Pleas, and George Van Buskirk, Clerk of said Court, GREETING:

We being willing, for certain reasons, to be certified of and concerning a certain order, proceedings and determination made and rendered by Honorable William M. Seufert, Judge of the Court of Common Pleas in and for the County of Bergen, which determination was filed with the Clerk of said Court on the fourteenth day of December, 1915, in certain proceedings brought on behalf of Annie C. Walther, Executrix of the Estate of Louis R. Walther, deceased, petitioner, against American Paper Company, Bankrupt, Walter P. Gardner, Trustee, respondents, to recover compensation under an Act of the Legislature of the State of New Jersey, entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder", approved April 4, 1911, do command you that the said order, proceedings, determination and judgment, together with all things touching and concerning the same, as fully as before you they remain or

are in your custody or control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the third day of January, 1916, that therein may be done what of right and according to law ought to be done.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of our Supreme Court, at Trenton, aforesaid, this eighteenth day of December, 1915.

WM. C. GEBHARDT,
Clerk.
McDERMOTT & ENRIGHT,
Attorneys

Allocator.

I allow this writ—let it be sealed.
Dated, December 18, 1915.

C. W. PARKER,
J. S. C.

Return.

STATE OF NEW JERSEY,
County of Bergen. } SS.:

I, WILLIAM M. SEUFERT, Judge of the Court of Common Pleas of the County of Bergen, do hereby in the schedule hereto annexed, send to our Justices of our Supreme Court of Judicature at Trenton, the order, proceedings, determination and judgment mentioned in the within writ of certiorari, together with all things touching and concerning the same, as I am within commanded.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, at Hackensack, this 24th day of December, A. D. Nineteen Hundred and

(Seal.)

WILLIAM M. SEUFERT,
Judge

Petition.

(Filed Feb. 15, 1915.)

BERGEN COUNTY COURT OF COMMON PLEAS.

ANNIE C. WALTHER, Executrix of the Estate of Louis R. Walther, deceased, *Petitioner,* *vs.* THE AMERICAN PAPER COMPANY, Bankrupt; Walther P. Gardner, Trustee.	Petition for Watchman's Compensation.

To the Honorable William M. Seufert, Judge of the Court of Common Pleas of Bergen County.

The petition of Annie C. Walther, executrix of the Estate of Louis R. Walther, deceased, respectfully shows:

1. That Louis R. Walther, your petitioner's testator resided in his lifetime in the Village of Ridgefield Park, Bergen County, New Jersey, and that your petitioner Annie C. Walther has been duly appointed executrix of the estate of said Louis R. Walther, by the Surrogate of Bergen County.

2. That the American Paper Company is a corporation having an office and mill or factory, in the Borough of Bogota, Bergen County, New Jersey; that said American Paper Company has been duly adjudicated a bankrupt and that Walter P. Gardner was duly appointed Trustee, for said bankrupt on the thirtieth day of July, 1914, and was duly authorized to continue the business of said bankrupt, and on December 24th, 1914, was carrying on the business of said American Paper Company at said Bogota mill.

3. That on and prior to December 24th, 1914, the said Louis R. Walther was employed by the said American Paper Company, bankrupt, Walter P. Gardner, Trustee as a watchman at the said Bogota mill.

4. That as such watchman it was his work and duty to go at regular intervals from place to place in and through said mill and the yard adjoining it, and to record his passage in and through said premises by a device or devices commonly called watchmans' clocks, by actuating said clocks by a key or other mechanism fixed at various places in and about said mill, and that it was also his work and duty while so passing in and through said premises to guard said premises against loss or damage.

5. That on the 24th day of December, 1914, at about nine o'clock at night while going from place to place in and through said mill, recording his passage on said watchmans' clocks, and guarding said premises against loss or damage, the said Louis R. Walther was killed by being struck in the head by a club or other weapon in the hands of some unknown person, who had intruded into said mill, which was not at that time in operation

6. That the amount of wages received at the time of the injury as aforesaid by the said Louis R. Walther was $15.00 per week.

7. That the said employer of said Louis R Walther had actual knowledge of the occurrence of said injury within thirty days from the occurrence of the injury.

8. That your petitioner is the widow of said Louis R. Walther, that Naomi A. V. Walther is a minor child, eight years of age, duly adopted, by your petitioner and said Louis R. Walther, by decree of the Bergen County Orphans' Court, made on May 17th, 1911, that Elmer Storms is a

minor child, twelve years of age, placed for the purposes of adoption with your petitioner and said Louis R. Walther by the New Jersey Childrens' Home Society, but not yet formally adopted by them; and that your petitioner and the said Naomi A. V. Walther and Elmer Storms, were supported by said Louis R. Walther until his death as aforesaid and that none of them had any other means of support.

9. That the matter in dispute is whether compensation should be made for the death of said Louis R. Walther by the American Paper Company, Bankrupt, Walter P. Gardner, Trustee, and the contention of your petitioner is that compensation should be made for the death of said Louis R. Walther by the said American Paper Company, Bankrupt, Walter P. Gardner, Trustee, in accordance with the requirements of An Act prescribing the Liability of an Employer to make compensation for injuries received by an employe in the course of 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 supplemental thereto.

10. That an order dated February 10th, 1915, made by Hon. George R. Beach, Referee in Bankruptcy, it was consented that this matter be adjudicated by the Judge of the Bergen Common Pleas.

Your petitioner therefore prays your Honor to, in a summary manner, in accordance with said Statute, decide the merits of the controversy.

WM. J. MORRISON, JR.,
Attorney for Petitioner.

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

ANNIE C. WALTHER, of full age being duly sworn according to law on her oath says that she has read the foregoing petition and that the facts stated therein are true.

ANNIE C. WALTHER.

Sworn to and subscribed before me this 6th day of February, 1915.

Arthur V. Morrison,
Notary Public, N. J.

Order Fixing Time and Place for Hearing.

BERGEN COUNTY COURT OF COMMON PLEAS.

ANNIE C. WALTHER, Executrix of the Estate of Louis R. Walther, deceased,

Petitioner,

vs.

THE AMERICAN PAPER CAMPANY, Bankrupt; Walter T. Gardner, Trustee.

On Petition.

Application having been made by William J. Morrison, Jr., attorney for the petitioner to fix a time and place for hearing the above entitled matter, it is on this 11th day of February, 1915, ORDERED, that the hearing of the above entitled matter be had before the undersigned, Judge of the Court of Common Pleas of the County of Bergen, at the Court House, Hackensack, Bergen County, New Jersey on Friday, the 12th day of March, 1915 at ten o'clock in the forenoon.

WM. M. SEUFERT,
Judge of the Court of Common Pleas

Acknowledgment of Service.

BERGEN COUNTY COURT OF COMMON PLEAS.
COUNTY OF BERGEN.

ANNIE C. WALTHER, Executrix, *Petitioner*, *vs.* THE AMERICAN PAPER COMPANY, WALTER T. GARDNER, Trustee, *Respondents*	On Petition.

Service of a copy of the petition and order fixing the time and place for hearing the above entitled matter, is hereby acknowledged this 12th day of February, Nineteen Hundred and Fifteen.

McDERMOTT & ENRIGHT,
Attorneys for Respondent.

Answer.

(Filed Feb. 19, 1915.)

The answer of American Paper Company and Walther P. Gardner, Trustee in Bankruptcy of American Paper Company, to the petition of Annie C. Walther, executrix &c., respectfully shows as follows.

1. They admit that Louis R. Walther, the petitioner's testator, resided in his lifetime in the Village of Ridgefield Park, Bergen County, New Jersey, and have no information sufficient to form a belief as to the statement that the petitioner has been duly appointed Executrix of the estate of the said Louis R. Walther by the Surrogate of Bergen County, and, therefore, denies the same.

Answer.

2. They admit the allegations contained in the second paragraph of the petition.

3. They deny the allegations of the third paragraph as alleged therein, but admit that on and prior to December 24, 1914, the said Louis R. Walther was employed by Walter P. Gardner as Trustee in Bankruptcy of American Paper Company, in connection with the continuance of the business of the bankrupt, under orders of the United States District Court for the District of New Jersey, to which reference is hereby made.

4. They admit the allegations of paragraph 4 of the petition.

5. They deny the allegations of paragraph 5 of the petition, except that they admit that on the night of December 24, 1914, Louis R. Walther was killed by being struck on the head while in the mill building and admit that said mill was not at that time in operation.

6. They admit the allegations of paragraph 6 of the petition.

7. They admit the allegations of paragraph 7 of the petition.

8. They deny any information sufficient to form a belief as to the allegations of paragraph 8 of the petition, and, therefore, deny same.

9. They admit that an order dated February 10, 1915, was made by the Hon. George R. Beach, Referee in Bankruptcy, permitting suit to be brought in this matter but refer to the said order for the particulars and contents thereof.

These respondents deny that the death of the said Louis R. Walther arose from an accident arising out of and in the course of his employment.

WHEREFORE, the respondents pray that this

Court dismiss this proceeding, with the costs by them most wrongfully sustained.

AMERICAN PAPER CO.,
Walter P. Gardner, Trustee.
By Henry Dimse,
Respondents.

McDERMOTT & ENRIGHT,
Attorneys of Respondents.

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

HENRY DIMSE, of full age, being duly sworn, according to law on his oath says:

That he is the assistant of Walter P. Gardner, Trustee in Bankruptcy of American Paper Company in the foregoing answer mentioned; that he signed the said answer; that he has read the same and knows the contents thereof and that the matters and things therein set forth are true.

HENRY DIMSE.

Sworn and subscribed to before me }
this 19th day of February, A. D. 1915. }

Henry A. Oetjen,
Notary Public of New Jersey.

AGREED STATEMENT OF FACTS.

Stipulation.

(Filed, Apr. 26, 1915.)

BERGEN COUNTY COMMON PLEAS COURT.

ANNIE C. WALTHER, Executrix, etc., *Petitioner,* *vs.* AMERICAN PAPER COMPANY, Bankrupt, WALTER P. GARDNER, Trustee, *Respondents.*	On Petition etc.

It is hereby stipulated that the following is a statement of facts in this matter and shall be presented to and taken by the Honorable William M. Seufert, Judge of the Bergen County Court of Common Pleas, in lieu of hearing such witnesses as might be presented by each party.

1. That the American Paper Company is a corporation having an office and mill or factory in the Borough of Bogota, Bergen County, New Jersey.

2. That said American Paper Company was duly adjudicated a bankrupt by the United States District Court for the District of New Jersey on July 10, 1914; that Walter P. Gardner was duly appointed trustee of said bankrupt on July 30, 1914, and immediately thereafter duly qualified as such trustee by filing the required bond, and that the said Walter P. Gardner as trustee has been duly authorized to continue the business of the bankrupt and under the order authorizing the continuance of said business, has operated said mill.

3. That on and prior to December 24, 1914

Stipulation.

Louis R. Walther was employed by the said Walter P. Gardner as trustee in bankruptcy of American Paper Company as a night watchman at the plant of the said American Paper Company, Bogota.

4. That it was the work and duty of the said Walther in such employment to go at regular intervals during the night from place to place in and through said mill and the yard adjoining it, and to record his passage in and through said premises by a device or devices commonly called watchman's clocks, by actuating said clocks by a key or other mechanism fixed at various places in and about said mill, and that it was also his work while so passing in and through said premises to guard said premises against loss or damage. That the said Walther was employed only during the night and was not engaged in any way in the operation of the mill or plant.

5. That on the 24th day of December, 1914 at about nine o'clock at night Walther was making a tour through the mill recording his passage by "ringing in" or registering on the watchman's clock, and while going from one station to another stopped to close a door opening from the mill to a loading platform adjacent to a railroad switch. This was a sliding exterior door hung on wheels or pulleys. As Walther leaned down against the handle of the door to roll it shut, he was struck upon the head with a club by a person who had entered the mill and hidden himself behind some rolls of papers near the said door and near an interior door through which Walther was accustomed to pass in making a tour of the mill. Walther died almost immediately and the assailant took from Walther's vest pocket his pay envelope containing about $15.

6. The assailant was an employee of the trustee in bankruptcy at the plant of the American Paper Company at Bogota, and had been paid off on the said 24th of December, 1914, earlier in the day. After being paid off, he had lost all of his money except fifty cents in a crap game. He knew that Walther had been paid off that day and would probably have the money in his pocket. The assailant's purpose in going to the mill and hiding in it was to rob Walther and he did not contemplate or prepare for 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.

7. Walther's wages as night watchman were $15 per week.

8. The employer had actual knowledge of Walther's death on the following day.

9. Annie C. Walther, the petitioner is the widow of the said Louis R. Walther and has been duly appointed his executrix by the Surrogate of Bergen County.

Naomi A. V. Walther, eight years of age is an adopted daughter of the said Louis R. Walther and Annie C. Walther by decree of the Bergen County Orphans' Court made on May 17, 1911.

10. Elmer Storms, twelve years of age, is a brother of said Naomi A. V. Walther placed for the purpose of adoption with the said Louis R. Walther and Annie C. Walther by the New Jersey Children's Home Society, but not yet formally adopted by them.

Said widow and the two children were living with the said Louis R. Walther in the Village of Ridgefield Park, Bergen County, New Jersey, at the time of his decease.

11. That by an order dated February 10, 1915 made by Honorable George R. Beach, Referee in Bankruptcy, it was consented that this matter be adjudicated by the Judge of the Bergen County Common Pleas Court, a copy of which order is hereto annexed.

WM. J. MORRISON, JR.,
Attorney for Petitioner.

McDERMOTT & ENRIGHT,
Attorneys for Respondents.

Memorandum.

(Filed, Nov. 27, 1915.)

BERGEN COUNTY COMMON PLEAS.

ANNIE C. WALTHER, Executrix, etc.,
Petitioner,
vs.
AMERICAN PAPER COMPANY, Bankrupt, WALTER P. GARDNER, Trustee,
Respondents

On Petition etc.

The above entitled cause was submitted upon an agreed state of facts, and beyond the formal admissions the facts pertinent to the present inquiry in the words of the stipulation are as follows:

That on and prior to December 24th, 1914, Louis R. Walther was employed by the said Walter P. Gardner as Trustee in Bankruptcy of American Paper Company, as a nightwatchman at the plant of the said American Paper Company, Bogota.

That it was the work and duty of the said Walther in such employment to go at regular

intervals during the night from place to place in and through said mill and the yard adjoining it, and to record his passage in and through said premises by a device or devices commonly called watchman's clocks, by actuating said clocks by a key or other mehanism fixed at various places in and about said mill and that it was also his work while so passing in and through said premises to guard said premises against loss or damage. That the said Walther was employed only during the night and was not otherwise engaged in any way in the operation of the mill or plant.

That on the 24th day of December, 1914, at about nine o'clock at night Walther was making a tour through the mill recording his passage by "ringing in" or registering on the watchman's clock, and while going from one station to another stopped to close a door opening from the mill to a loading platform adjacent to a railroad switch. This was a sliding exterior door hung on wheels or pulleys. As Walther leaned down against the handle of the door to roll it shut, he was struck upon the head with a club by a person who had entered the mill and hidden himself behind some rolls of paper near the said door, and near an interior door through which Walther was accustomed to pass in making a tour of the mill. Walther died immediately and the assailant took from Walther's vest pocket his pay envelope containing about $15.00.

The assailant was an employee of the trustee in bankruptcy at the plant of the American Paper Company at Bogota, and had been paid off on the said 24th of December, 1914, earlier in the day. After being paid off, he had lost all of his money except fifty cents in a crap game. He knew that Walther had been paid off that day and would

probably have the money in his pocket. The assailant's purpose in going to the mill at night and hiding in it, was to rob Walther and he did not attempt 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.

Respondents admit that Walter's death occurred in the course of his employment, but deny that it was the result of "an accident," and that it arose "out of his employment." A fair conclusion of fact is that Walther was engaged in an occupation of some considerable risk and danger to himself personally. It was his duty to go in many places throughout the grounds and buildings making up the plant, during all hours of the night; these were places accessible and particularly inviting for an attack upon him, whether the purpose of that attack be to accomplish an injury to the plant, theft out of the plant, or individual bodily injury to himself. It is evident that this risk was a complement of his employment, and that he was engaged for that particular purpose and undoubtedly upon the assumption that he had courage enough to prevent fear of bodily attack in order to fulfill his duties properly for the benefit of his employer.

This element of the risk of personal bodily injury, is a well known factor in the job of night-watchman in any large plant.

The case to which all our opinions go back for the fundamental principles concerning the liability of the employers is *Bryant vs. Fissel* 86 Atl. 458, where Judge Trenchard in his opinion outlined the following:

To warrant a recovery it must appear that death was caused by (A) and "accident," (B) received out of and (C) "in the course of his em-

ployment." Even though the injury arose out of and in the course of the employment, if it be not an "accident" within the purview of the act, there can be no recovery. Even if there be an accident which occurred "in the course of" the employment, if it did not arise "out of the employment," there can be no recovery, and even though there be an accident which arose "out of the employment." if it did not arise "in the course of the employment," there can be no recovery.

In this case there are two contested elements. 1st, "was the injury caused by an 'accident", and 2nd, did that acident arise "out of his employment?"

The Bryant case states "The question whether or not an injury is an accident," within the purview of the act is a mixed one of law and fact. Within the purview of the act, an "accident is an unlooked-for mishap or untoward event which is not expected or designed."

My examination of the decisions indicate that in cases of assult upon and death of employees at the hands of third persons intentionally inflicted, the term "accident" within the meaning of the Liability Laws, cannot be separated from the terms "out of" and in the course of his employment but must be read in connection with these terms. When the act as far as the injured employee is concerned is an unforeseen, unlooked for mishap, unprovoked and uninvited and when it can be ascertained that the assult was invited by, or was the result of a risk reasonably incident to the employment, the resultant injury is occasioned by an "accident" within the meaning of the law.

Hulley v. Moosbrugger, 93 Atl. 79;
Misbet v. Rayne & Burn, 2 K. B. 689;

Memorandum.

Challis v. London & Southwestern Ry. Co., 2 K. B. 154;
Kelly v. Trim Joint School W. C. & Ins. Rep., 401.

Continuing as in the Bryant case pg. 460, it remains to be considered whether the accident arose "out of and in the course of his employment." For an accident to arise out of and in the course of his employment it must result from a risk reasonably incident to the employment. As was said of Buckley L. J. in *Fritzgerald v. Clark & Son*, 2 K. B. 796, 77 L. J. K. B. 1018. The words 'out of' all point, I think, to the origin and cause of the accident; the words "in the course of" to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words "out of," involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment." We conclude therefore that an accident arose "in the course of the employment" if it occurs while the employee is doing what a man so employed may reasonably do within the time during which he is employed and at a place where he may reasonably be during that time.

The facts in the case indicate that the tort feasor the man who killed Walther was an employee of the same concern, and as such employee he knew the customs of the plant as to the time of payment of the wages of Walther, of the route necessary for him to take upon his inspection,

and also from his familiarity with the plant, the most available place to make the attack. I think it is plain that the employment of Walther was one of the contributing causes without which his death would not have happened. The peculiarity and the nature of the employment provided means by which the assailant could and actually did perform his dastardly act.

In *Hurley v. Moosbrugger,* 93 Atl. 79, Judge Kalisch says that the principle to be extracted from the adjudicated cases in this State appears to be that where the accident is a result of a risk reasonably incident to the employment, it is an accident arising out of the employment.

The decedent did nothing to invite the attack and it is not denied that the decedent was acting at the time within the scope of his employment. It is a matter of no consequence whether or not the workman at the time he made the attack was acting within the scope of his employment. When it is considered that the attack was made by a co-employee as a result of information gathered during the course of his employment and consummated in a manner rendered feasable by the assailant's accessibility to the building and the necessity of Walther traveling through places which made the perpetration of the crime easy, the conclusion cannot be avoided, to put it negatively, that if the decedent had not been employed in his duties as night watchman that evening, he would not have been killed. The facts are so interwoven with the question of his employment that it must be determined that the accident arose both out of and in the course of his employment.

Judgment will be for the petitioner and proper determination should be submitted.

W. M. S. J.

Determination of Facts and Rule for Judgment.

(Filed Dec. 16th, 1915).

BERGEN COUNTY COMMON PLEAS.

ANNIE C. WALTHER, Executrix &c. *Petitioner,* *vs.* AMERICAN PAPER COMPANY, Bankrupt, WALTER P. GARDNER, Trustee, *Respondents.*	On Petition, &c.

A petition having been filed in the above stated matter, praying for the compensation to which the petitioner may be entitled by virtue of the terms and provisions of an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of the employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, together with the several supplements thereto and Acts amendatory thereof, and time and place of said hearing have been duly tion having been fixed, and it appearing to the Court that said petition and the order fixing the time and place of said hearing have been duly served upon the attorney for the respondents on the eleventh day of February, 1915, and an answer having been filed by the said respondents on the twenty-fifth day of February, 1915, and the petitioner and respondents having appeared on the twenty-sixth day of April, 1915, the date set for the summary hearing herein, the petitioner being represented by William J. Morrison, Jr.,

as her attorney, and the respondents by McDermott and Enright, as their attorneys, and the Court having heard the testimony offered in behalf of the parties hereto, and counsel having been heard:

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

FIRST: That the deceased was, on the 24th day of December, 1914, in the employ of the respondent in the capacity of night watchman.

SECOND: That at the time of the injury the said decedent received as wages in said employment the sum of $15.00 per week.

THIRD: That on the 24th day of December, 1914, said Louis R. Walther met his death by an accident arising out of and in the course of his employment which occurred as follows:

On the 24th day of December, 1914, at about nine o'clock at night Walther was making a tour through the mill recording his passage by "ringing in" or registering on the watchman's clock, and while going from one station to another stopped to close a door opening from the mill to a loading platform adjacent to a railroad switch. This was a sliding exterior door hung on wheels or pulleys. As Walther leaned down against the handle of the door to roll it shut, he was struck upon the head with a club by a person who had entered the mill and hidden himself behind some rolls of paper near the said door, and near an interior door through which Walther was accustomed to pass in making a tour of the mill. Walther died immediately and the assailant took from Walther's vest pocket his pay envelope containing about $15.00. The assailant was an employee of the trustee in bankruptcy at the plant of the American Paper Company at Bogota, and had been paid off on the said 24th of December, 1914, earlier in the day. After being paid off, he had lost all of his

money except fifty cents in a crap game. He knew that Walther had been paid off that day and would probably have the money in his pocket. The assailant's purpose in going to the mill at night and hiding in it, was to rob Walther and he did not attempt 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.

FOURTH: That the respondents herein had knowledge of said accident, or that it has had proper notice of the same.

FIFTH: That as a result of said accident the said Louis R. Walther did, on the 24th day of December, 1914, depart this life.

SIXTH: That the petitioner herein had expended for expenses of burial the sum of $164 which has not been paid for by the respondent.

SEVENTH: Walther left two dependents; a widow, who was living with her husband at the time of his decease, and one legally adopted child.

EIGHTH: That the petitioner is entitled to compensation for the death of said employe computed on the basis of two dependents, that is 40% of $15.00 or $6.00 per week for 300 weeks, and also $100 for the cost of his burial.

NINTH: That the petitioner is entitled to costs in this proceeding.

It is, therefore, on this 14th day of December, 1915, on motion of William J. Morrison, Jr., the attorney of the petitioner, ORDERED, that the respondents herein pay, or cause to be paid to the said petitioner the sum of $6.00 per week, for a period of 300 weeks from the 7th day of January, 1915, and one hundred dollars cost of burial and also the costs of this proceeding.

And it is further ORDERED, that William J. Morrison Jr., the attorney for the petitioner, be and

he hereby is allowed the sum of One hundred dollars, as counsel fee herein, the same to be paid by the petitioner out of the accumulated payments now due.

WM. M. SEUFERT,
Judge.

Judgment.

BERGEN COUNTY COMMON PLEAS COURT.

ANNIE C. WALTHER, Executrix of the Estate of LOUIS R. WALTHER, dec'd.,

Petitioner,

vs.

AMERICAN PAPER COMPANY, Bankrupt, WALTER P. GARDNER, Trustee,

Respondents.

On Petition. Employers Liability.

WM. J. MORRISON,
Attorney for Petitioner.

Judgment was entered on order of the judge of the Court of Common Pleas on determination of facts in favor of Annie C. Walther, Executrix, against The American Paper Company, Bankrupt, and Walter P. Gardner, Trustee, for the sum of Six dollars per week for three hundred weeks and One hundred dollars burial, from January 7th, 1915, and also thirty-three dollars and five cents costs.

Damages	$1800.
Burial	100.
Costs	33.05
	$1,933.05

Judgment signed and entered December 16th, 1915, at 9 A. M.

Clerk's Certificate.

(Filed with return Dec. 29th, 1915).

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } ss.:

I, George Van Buskirk, Clerk of the County of Bergen and also Clerk of the Court of Common Pleas in and for said County do hereby certify that the foregoing are true copies of the original papers filed and recorded in the case and also a true copy of the record of the judgment in book J of Common Pleas Judgments for said County page 260.

(Seal.)

In Testimony Whereof I have hereunto set my hand and affixed the seal of said County and Court at Hackensack this 24th day of December, A. D. One thousand nine hundred and fifteen.

GEORGE VAN BUSKIRK,
Clerk.

WILLIAM S. DOREMUS,
Dept. Clerk.

Reasons.

NEW JERSEY SUPREME COURT.

ANNIE C. WALTHER, Executrix &c., *Petitioner-Respondent,* *vs.* THE AMERICAN PAPER COMPANY, Bankrupt, WALTER P. GARDNER, Trustee, *Defendant-Prosecutor.*	On Certiorari to Bergen Common Pleas:

The prosecutor herein assigns the following reasons upon which it will rely for a reversal of the determination and order directing payment in this cause.

(1) Judgment should have been entered dismissing the petition and denying compensation claimed by petitioner.

(2) Because the death of the said Louis R. Walther was not caused by or occasioned because of an "accident" within the meaning of an act of the Legislature of the State of New Jersey entitled, "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for determination of liability and compensation thereunder", approved April 4, 1911, and the supplements and amendments thereto and therefore compensation to the petitioner should have been denied and the petition dismissed.

(3) Because the death of the said Louis R. Walther, deceased, was not caused by an accident "arising out of", and in the course of his

employment within the meaning of the statute mentioned in the last reason, and being Chapter 95 of the Laws of 1911, and the supplements thereto and amendments thereof, and therefore compensation to the petitioner should have been denied and the petition dismissed.

(4) There is no evidence which justified the determination by the Judge of the Bergen County Court of Common Pleas that the death of the said Louis R. Walther was caused by an accident arising out of and in the course of his employment by the defendant.

(5) The evidence is that the said Louis R. Walther died by reason of a wilful, deliberate and premeditated assault, and not that his death was the result of an accident arising out of his employment.

McDermott & Enright,
Attorneys of Defendant-Prosecutor.