New Jersey Court of Errors and Appeals

ROSE HANSEN, *Administratrix*, &c., *Plaitniff-Respondent*, *vs.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-Appellant.*	On Appeal.

SUPPLEMENTAL MEMORANDUM FOR APPELLANT.

At the close of the oral argument, counsel for the Respondent obtained permission to submit a further memorandum of law on the subject of the admissibility in evidence of the declarations of Mr. Hansen to his wife and to Engineer Kathan. Counsel was directed to serve this memorandum upon Counsel for Appellant. This memorandum has not yet been served.

Counsel for Appellant, having been served with Respondent's digest of the testimony and citation of cases only a short time prior to the argument, permission was granted to reply to the cases cited by Respondent, both on his original and supplemental briefs.

Respondent having failed thus far to serve any additional memorandum, it is assumed that the intention so to do has been abandoned. This

memorandum is now submitted without waiting further for service of Respondent's memorandum.

Copies of this memorandum have been served on Counsel for Respondent.

In considering this case and the cases cited by Respondent and claimed to be applicable thereto, there are certain essential facts, fully established by the evidence, which should be constantly kept in mind.

1. Mr. Hansen was not on duty at the time of the accident.

2. No duty which he owed to the defendant called him to any place in the Granton Yards after 6:30 P. M., Saturday, when he registered off duty, until 3:30 o'clock Monday morning when he was due at the round house to register for his outgoing run. He was not called for any special duty on the day of the accident.

3. *No duty to defendant ever called him to the place on engine track No. 2, where he was killed, except when he was riding over that place on his engine.*

4. His declared intention (to take tools from the pony engine and place them on the pickup engine) was not in the line of his duty;

a. Since January 1st, 1909, outgoing engines at the Granton Yards had been equipped with tools by tool men, employed by defendant for that purpose. This was done from 15 to 30 minutes before the engine started on its run.

b. Tool men took tools from the tool car or storehouse and placed them on the engines.

c. The sole duty of engineers and firemen with respect to equipping engines with tools was to see that their respective tools were on the engine when they took charge of it, 15 minutes before leaving on their run. If tools were lacking they reported to the tool men or to the roundhouse foreman.

d. Not an instance was shown where either an engineer or fireman had ever taken tools from one engine and put them on another, either immediately prior to starting on a run or at a more remote time.

e. There was no shortage of tools on the pickup engine on August 4th.

5. At the time of the accident, Hansen's declared intention was incapable of accomplishment;

a. There were no tools on the pony engine.

b. At the time of the accident the pickup engine had not been designated and would not be for many hours thereafter.

c. At the time of the accident the engine which went out on the pickup train on August 4th, was not in the Yards and did not come in until 2.20 P. M.

6. Hansen was killed, *not while he was on a path leading through the yards,* but when and because he left the path, where he was entirely safe, and went onto a very active railroad track, a place of great danger.

7. His going onto this dangerous track did not and was not intended in the slightest degree to further his declared purpose to take tools from the pony engine and put them on the pickup engine. He went solely for the purpose of talking with Kathan, and the subject of tools was not mentioned.

In his "Digest of Evidence", counsel for Respondent says (p. 4);

"At all or any times the getting of tools for and the use of tools on locomotives was the duty of firemen."

There is no justification in the evidence for the statement that the getting of tools for use on

locomotives was the duty of firemen. Since January 1st 1909, it had not been the duty of firemen to place tools on engines. The evidence is conclusive that the only duty of firemen was to see that proper tools for his use were on the engine before starting out, and to report any shortage to the tool man or the roundhouse foreman.

(See citations of evidence on pp. 33-34 of our principal brief.)

True, the witness Holt testifies that when he failed to put proper tools on an engine, the engineer or fireman would come to him for them and would sometimes get the tools from the tool man and carry them to the engine. He also testified that when he was temporarily absent from the tool car, he would sometimes, on his return, find that some tools had been taken. But in the whole case, there is not any evidence of an engineer or fireman ever going anywhere to report a lack of tools except to the tool man or orundhouse foreman, nor is there any evidence that they ever got any tools from any other place than the tool car or storehouse,—much less that the ever took tools from one engine and put them on another.

Respondent alleges a duty and also a custom in this yard, to keep a lookout and to give warning of approaching engines. Of course, whatever duty of this nature existed, either from rule or custom, was owed only to those rightfully on the premises, and at the particular time and place, engaged in the performance of duties owed to defendant.

There was no admission on the part of any witness, as alleged in Respondent's brief (Digest of Evidence p. 6), that Clearwater's engine gave no warnings. Fireman Smith was not on Clearwater's engine, and was not asked on direct examination anything about signals by Clearwater. On cross-examination, against defendant's objections, this witness was asked if he had not

made certain statements as to Clearwater's failure to give signals. Defendant's objections were overruled, and the witness denied that he had made such statements. On rebuttal, plaintiff called a witness who testified, also against defendant's objections, that Smith had made the statements he denied having made. The testimony was improperly admitted and certainly constitutes no evidence of failure to give signals. There is no other evidence in the case tending to show failure to give signals. (Smith, pp. 162-164; Tucker, pp. 249-250.)

On the facts as established by the evidence, every case cited by Respondent is readily distinguishable from the Hansen case.

Citing *N. C. Railway Co.* v. *Zachary, 232 U. S. 248,* counsel states that decedent "was held engaged in interstate commerce, although on a personal errand to his boarding house when killed." This statement is quite inaccurate.

Zachary was a fireman and had prepared his engine to couple to an interstate train which was about to start on its run. Having done this, he temporarily left his engine standing on a yard track and was crossing some other yard tracks when he was killed. His destination was not shown. The Court said:

> "Again, *it is said,* that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. *Assuming* (*what is not clear*) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone

beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

In *Shanks* v. *D. L. & W. R. R. Co., 239 U. S. 556,* the Court refers to the Zachary case as that of a fireman who, "having prepared his engine for a trip in interstate commerce and was about to start on his run, is walking across adjacent tracks *on an errand consistent with his duties".*

Thus the Court found and held, *not* that Zachary was killed "while on a personal errand to his boarding house" as alleged in Respondent's brief, but that his preparation of his engine for the interstate run which was presently to begin, was engaging in interstate commerce, and that his temporary absence from his engine was on an errand consistent with the continuation of those duties.

Even if we assume (what we deny) that when on the path going in the direction of the roundhouse, Hansen was within the scope of his employment, yet when he left the path, a place of entire safety, to talk with Kathan, about a matter which in no way tended to accomplish his declared purpose, and in so doing went into a place of extreme danger, where he was killed, he was not doing that which was "consistent with his duties." *On the contrary he did that which produced the accident.*

In *B. & O. R. R. Co.* vs. *Whitacre, 242 U. S. 169,* plaintiff, a brakeman, had responded to a call to make an interstate run. On arriving at his place of work, he was asked by the fireman to hunt up the tool boy and get a tin cup for use on the engine. While so doing he was injured.

No question was raised as to plaintiff's having been engaged in the scope of his employment and in interstate commerce at the time and place of the accident.

When the case reached the U. S. Supreme Court, that Court said:

> *"It was admitted that Whitacre was engaged in interstate commerce. The defenses relied upon were assumption of risk and denial of negligence."*

Thus the Whitacre case makes no decision as to what constitutes interstate commerce, that question having been eliminated by the admission. It has no bearing on the Hansen case.

In *Padgett* v. *Seaboard Air Line, 83 So. E. 633,* deceased, an engineer, while asleep on an engine, was carried through railroad yards to a point some distance from the place where he was to take his engine for his next run. When he was wakened the time for him to start on his run was approaching. He inquired for the location of his engine and was told by the man in charge that it was at the round-house. He went to the round-house and fell into a pit beside which his engine stood. He was required to inspect his engine before leaving on his run. The defense was that deceased was not engaged in interstate commerce at the time of the accident. The So. Carolina Supreme Court said:

> "The exact question is: For what purpose did Padgett go into the roundhouse? *If he went there for any purpose of his own* or there is an utter failure of evidence to prove any circumstances from which his purpose can be inferred, then the verdict ought to have been directed."

After discussing the inferences which it thought might be drawn from the evidence, the Court said:

"If they (the jury) inferred from the circumstances *that Mr. Padgett was doing the work which was required of him,* not at the time it was required, but at a time when it was not forbidden, then they could conclude that he was engaged in interstate commerce."

Padgett was doing the work required of him, at or just before the time when he was required to do it.

Hansen had declared his intention to do *what he was not required to do,* what he had no right to do, and also what it was impossible for him to do because there were no tools on the pony engine, and the time was many hours before there was any pickup engine designated to receive them. He had declared his intention to do what was wholly unnecessary for anyone to do because there was no shortage of tools for the pickup engine on August 4. Furthermore, that which took him off the path to the place of danger was not an effort to execute his declared purpose, but his desire to talk with Kathan.

In *Prior* v. *Bishop, 234 Fed. 9* (C. C. A. 7th Circuit) deceased, a brakeman, when injured was in a caboose, which on his next run would regularly be attached to the train on which he would go out. For convenience in bringing deceased near to the place where his work was to begin, he was riding in this caboose. He had not yet been called for work, *but was subject to call at any time.* A few hours before the time for calling deceased for duty the caboose was run into and deceased was killed.

Held, on the authority of *Shanks* v. *D. L. & W. Ry. Co.,* 239 U. S. 556, that deceased was not then engaged in interstate commerce.

This case is a clear authority for defendant.

In *P. B. & W. R. R. Co.* v. *Tucker,* 35 App. Div. *District of Columbia,* affirmed in 220 U. S. 608,

without Opinion, the decedent was on his way to answer to a call to go out on an interstate train. He was going by a way customarily used by the defendant's employees for that purpose, and his death arose out of the negligence of the defendant. *At the time of the injury he was on the customary way,* hence the duty of caring for his safety rested upon defendant.

At the time Hansen was struck he was not answering any call to duty; *he was not on the path used by employees in going through the yard to the round-house,* but was on a dangerous railroad track, 30 feet away from the path. On that track neither he nor any other employee (except track-walkers and track repairers) was required to go in the performance of any duty owed to the defendant, except when passing over that track on an engine. There was nothing to call any employee to walk across that track at that point; hence the engineer had no reason to suppose that anybody would be walking on or across that track.

In *Seaboard Air Line Rwy. Co.* v. *Koennecke, 239 U. S. 352,* deceased was employed in distributing cars from an interstate train and clearing the track for another interstate train. He was in the performance of his duties and was clearly engaged in interstate commerce.

In *Pa. R. R. Co.* v. *Donat, 230 U. S. 40,* the injured employee was engaged in removing empty cars from defendant's track in order to place interstate cars thereon,—a clear case of interstate employment.

In *Willever* vs. *D. L. & W. Ry. Co., 99 Atl. 321,* a long freight train was backing through the yards without any lookout on the rear. This was in violation of the defendant's rule on which the injured man was entitled to rely. He was engaged in the performance of his duties in the yards. In every

essential particular the case differs from the Hansen case.

The Willever case divided this Court; a strong minority voted to affirm the judgment of the Supreme Court in favor of defendant, and in its progress through the Courts a majority of all the Judges who sat on the case held the defendant free from negligence.

In what way did Hansen serve defendant or further his declared purpose by leaving the path and going into the dangerous track where he was struck? How did he further interstate commerce by that act?

Respondent argues that if Hansen *thought* there were tools on the pony engine, and *thought* they should be transferred to the pickup engine, even though there were no tools on the pony engine, and even though there was no shortage of tools on the pickup engine, still he was engaged in interstate commerce. But the U. S. Supreme Court holds that the true test is whether *at the time of the injury the employe was engaged in interstate transportation,* or in work so closely related to it as to be practically a part of it. Interstate Commerce then *consists in acts,* not in thoughts. The employe *cannot think* himself into interstate commerce.

Nor is an employe within the protection of the Federal Act when doing what is not within the line of his duty, what he has no right to do, or what is unnecessary to be done. Where doing such acts voluntarily and in the absence of any request by defendant, the defendant is charged with no duty to care for his safety.

On respondent's theory a railroad company would be liable to a fireman, who might be injured while engaged voluntarily and without orders, in any kind of railroad operations, at any place or at any time he might see fit to engage therein, provided *he thought* such operations would be bene-

ficial to the company in its capacity as an Interstate carrier. The Act, however, charges liability upon the railroad carrier only to "Any person suffering injury while he is employed by such carrier in such (interstate) commerce". Liability then follows only in connection with *an act authorized or required by the carrier.*

We respectfully submit that the judgment should be reversed.

VREDENBURGH, WALL & CAREY,
Attorneys for Appellant.

Dated, August 1, 1917.

New Jersey Court of Errors and Appeals

ROSE HANSEN, Administratrix, Plaintiff-Respondent, vs. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant-Appellant.	On Appeal.

BRIEF OF PLAINTIFF-RESPONDENT.

This action was brought under the Federal Employers' Liability Act of April 22, 1908 (a copy of which is annexed to this brief), governing the relation of carriers and employees engaged in interstate commerce.

Decedent was a locomotive fireman on an engine which throughout the testimony has been called a "pick-up," engaged in interstate commerce between the states of New York and New Jersey. There is no dispute that both the deceased, Hansen, and the defendant Railroad Company were engaged in interstate commerce in the operation of this train, the dispute in the case, among other things, being whether deceased was engaged in interstate commerce at the time and place of the accident causing his death.

He was killed on Sunday, August 3, 1913, at about noon, under the following circumstances: On Saturday evening, August 2nd, he returned

from his regular run, went home, and shortly after eleven o'clock on Sunday morning took certain keys which he had in his working trousers, and informed his wife just before leaving the house, that he was going to the round-house where an engine called a "pony engine" was standing, for the purpose of taking his tools therefrom and placing them on the "pick-up" engine, which was scheduled to leave with him in interstate commerce the following morning at 3:45 o'clock, and also to get his dirty overalls to bring home to be washed. He had worked on this "pony engine" for some time before it was sent to a repair shop, and thereafter was put to work on the "pick-up" engine. Hansen took these keys to go to the "pony engine" to get his tools, it appearing that at that time there was a scarcity of firemen's tools in the yard. While walking through the railroad yards on his way to the round-house, he was struck by an engine, which ran him down, without any signal or warning, and without having a look-out thereon.

A verdict was rendered in his favor for $20,000, which was reduced by the Trial Court to $16,500.

POINT 1.

VARIANCE.

Error is assigned and insisited on as being reversible error, in that the defendant railroad says, there is a variance in the facts proven before the jury and the allegations of the complainant.

The complaint is at *pages* 1-6 of the State of Case. The criticism of the complaint as being insufficient to allow the facts proven to go to the jury

is found on pages 24 to 29 inclusive of the defendant railroad's brief, especially at pages 24 and 25 thereof.

By a perusal of the complaint it will be found to contain as a minimum, so far as is necessary to be set out to argue this point, the following allegations, which are virtually omnibus in character.

Paragraph 1. On August 3rd, 1913, prior thereto and since then, at Granton, in Hudson County, and elsewhere in the State of New Jersey and in the State of New York, the defendant company was a common carrier by railway engaged in interstate commerce.

Paragraph 2. That among other servants and operatives, the decedent, Hansen, was employed by the defendant railroad as a locomotive fireman to fire a locomotive on a freight train between points in the States of New Jersey and New York, and as such he was engaged in interstate commerce, and the injuries suffered by Hansen were received by him while he was so employed in interstate commerce.

Paragraphs 3 *and* 4, read respectively as follows:

Paragraph 3. "The employment of the plaintiff's intestate as such fireman was exceedingly dangerous and hazardous, if he was not provided with a reasonably safe place in which to perform his said work, and such place was not carefully and properly inspected, protected and guarded * * * if the cars and engines of said defendant were not properly manned, and a man was not kept on the rear end of engines and tenders while they were running backwards, if cars and engines were not run at a moderate rate of speed in the yards of said defendant and if the plaintiff's intestate was not warned of the approach of such

cars and engines and it * * * was the duty of the defendant to * * * provide and maintain a reasonably safe place for its employees, and more especially the plaintiff's intestate to perform the duties required of him by the said defendant, and when he was employed upon the tracks of said defendant company, to warn him of the approach of all cars and engines on said track so that he might not be subjected and exposed to unnecessary risks, dangers and hazards of life and bodily peril, not contemplated by his employment, to properly man said cars and engines, and at all times to keep a man on the rear end of such cars and engines and ring a bell when they were running backwards, and not to run backwards in the yard of said company at a greater rate of speed than 6 miles an hour."

Paragraph 4. "Defendant * * * did not provide sound, safe and indefective engines, cars, tracks, rails, road-beds, tools and appliances; did not provide a reasonable safe place for its employees and more especially the plaintiff's intestate to perform the work required of him as such fireman; did not keep the cars and engines of said defendant properly manned, did not keep a man on the rear end of its engines and cars while running backwards, did not ring a bell when running backwards in accordance with the rules of said company, did not warn the plaintiff's intestate of the approach of cars and engines, and thereby the plaintiff's intestate was subjected and exposed to extreme and unnecessary dangers of life and bodily peril, not required nor contemplated by his said employment, and there, while he was so employed in such commerce as such fireman at the place aforesaid, and while said defendant was such common carrier and engaged in commerce between the

aforesaid States, and while the plaintiff's intestate was engaged in such work of firing and caring for his engine over the tracks and road-bed of the defendant used in such commerce as aforesaid, and while he was engaged in removing tools from one engine to another, to be used in caring for his engine used in such commerce, and by reason of the unsound, unsafe and defective condition of the engines, cars, tracks, road-beds, tools and appliances, which had been allowed to be and remain out of order for a long space of time, and by reason of the unsafe place furnished by the defendant in which the plaintiff's intestate was required to perform his work, and by reason of the defendant failing and neglecting to guard said plaintiff's intestate, and warn him of the approach of all trains and engines that might pass over said track while he was lawfully employed thereon, and just after the plaintiff's intestate had stepped from an engine to one of the tracks of said defendant, an engine running backwards in a northerly direction over one of said tracks at a high and dangerous rate of speed, without ringing any bell, and improperly manned, there being only one of the crew thereon, and no man on the rear of said engine and tender, ran foul of and struck against said plaintiff's intestate, whereby he was knocked down to and upon the ground, and run over and killed by said engine, on said 3rd day of August, 1913. * * *"

Defendant contends (brief, page 25) that the case attempted to be made by the proofs is "*radically* different from that set out in the complaint, both in place and circumstances," because:

1. Plaintiff's intestate was not firing or caring for his engine.

2. He was not removing the tools from one engine to another.

3. He had not just stepped from the engine to the tracks of the defendant.

The complaint did not limit the place of the accident to any particular spot in the yard. The only conceivable variance between the proof and the allegations of the complaint is that, at the time of his death he was not actually firing his engine and did not have some tools in his hands or upon his person, and that he did not actually *alight from* a locomotive to the tracks of the defendant. Using words in their strictest sense, this is the only microscopic difference which can be charged against the complaint. Plaintiff attempts to give the language of the complaint, a very strict construction and disregards the general form and allegations of the complaint. The language of the complaint does not bear out the construction that it was intended to charge, that plaintiff, at the time of his death, was actually firing an engine or in the act of handling tools, but rather that at the time of the accident plaintiff was in the general employ of the defendant, charged with the duty of firing and caring for one of its engines, and to remove tools from one engine to another. Nor does it bear out the construction that when the complaint charged plaintiff stepped from an engine to the track that the term "stepped" was used in the sense that plaintiff alighted from an engine to the track.

In Paragraph 4 of the complaint the words "so," "such," "and while" and "in" clearly show that the dereliction of duty charged to the railroad covers Hansen's rights as to his entire course of employment and gives notice of it.

Nor can it be said that the Railroad Company in making their defense was surprised. At the time of the accident every witness called by the plaintiff (save the widow and Miss Tucker) were railroad employees, and with the exception of Holt, continued to be and were still the employees of the Railroad Company at the time of the trial. Clearwater, the engineer of the locomotive which ran Hansen down, had died before the trial.

At page 276 of the State of Case, during the argument as to whether the case should go to the jury, or a verdict directed in favor of the defendant Railroad Company, an offer was made to file an amended complaint, to which the Counsel for the Railroad Company objected.

In making his objections and taking his exceptions because of this alleged variance, at no time and place in this three day trial did Counsel for the Defendant Company claim that either he or it was surprised at the facts as proven. *All the witnesses as to the facts and circumstances of the accident were railroad* men in the Company's employ. The facts of the case were brought out in their entirety and with completeness full to overflowing. It is respectfully submitted that there was no surprise occasioned to the defendant by this microscopic difference; there was no occasion for surprise; the company according to Kathan's testimony made no effort to produce a bunch of keys to the pony engine, which, when produced, it was claimed would have entirely destroyed the efficiency of Hansen's declaration to his wife as to why he was going this Sunday to the railroad yard (page 273).

Surely, under all these circumstances, there is not the slightest hint even that the railroad was surprised, or as to the slightest circumstance that the Railroad Company was put in a position,

where it could not with ease produce every detail of evidence to substantiate every defense available to it to meet the case proved by the plaintiff, on the contrary the case was fully tried on the theory of plaintiff's case as made out by her.

In addition to the authorities cited on the Defendant Railroad Company's brief, the following authorities sustain the principle that there can be no reversal on this ground of alleged error.

Hallock vs. The Insurance Co., 26 N. J. Law, 268.

Belleville Stone Co. vs. Mooney, 60 N. J. Law, 323.

Jordan vs. Moore, 77 N. J. Law, 584.

Price vs. The N. J. R. R. & Transportation Co., 2 Vroom, 229.

Ware vs. Millville Fire Insurance Co., 16 Vroom, 177.

American Life Ins. Co. vs. Day, 39 N. J. L., 89.

"The power of amendment extends to this Court, and, where the issue has been fairly tried and no injury has been done to the party complaining, it is incumbent on this court in the interest of justice to exercise the power."

Van Houton vs. Van Houton, 98 Atl., 251.

POINT 2.

The admissibility of Hansen's declarations.

Grounds of Appeal Numbers 2 and 5, on pages 17, 18 and 19 of the State of Case, raise the question as to the admissibility of the declaration made

by the decedent at the time he left his house Sunday morning, the last time before his death, as to where he was going and why he was going there. His words to his wife (pages 110, 111, 112 to 116 inclusive) were as follows:

> "I am going up to the Round House and take the tools off of Number 25 to put on the pick-up—and to get my dirty overalls off—out of the locker, to bring home."

On pages 109, ll. 32 and 33, the testimony fixing the time of Declaration is as follows:

> "Q. What did he say as he left the house?
> A. He was going up to the Round House."

The declaration as to his intentions as to where he was going and the purpose of his trip were made when he left the house, and immediately following this statement to his wife he went away. The next that his wife knew of him was that, within about an hour, he had been killed in the railroad yard. On page 18 of the Defendant Railroad's brief, the statement is made that, "the trial court erred in admitting in evidence Mr. Hansen's statement to Mr. Kathan and to Mrs. Hansen. Defendant's motion to strike out these statements should have been allowed and the request to charge with respect thereto should have been granted."

Then follows in the Defendant Railroad's brief several pages of discussion of the Railroad's contention in this regard.

The leading case in New Jersey as to the admissibility and the clear legal right to offer in evidence such a statement made by decedent prior to his death as to his intentions, of the destination

of his journey, and the purpose of it, is *Hunter* vs. *The State,* 40 N. J. Law, 495. *Wigmore on Evidence,* Sec. 1725, also sustains the proposition that such a declaration is part of the *res gestae* as does also Fromme vs. Dennis, 45 N. J. L., 515. In *Padgett* vs. *The Seaboard Air Line Railway Co.,* in 83 Southeastern Reporter, 632, it was urged as error before the Supreme Court of South Carolina that there was no such declaration from the decedent Padgett in the testimony. The Supreme Court of South Carolina, however, said that it was unfair to raise the question on appeal in that court, inasmuch as it had not been admitted in evidence at the trial of the case before the jury because the Railroad Company itself had objected to its admission. This case of *Padgett* vs. *The Seaboard Air Line Railway* was sustained by the Supreme Court of the United States in 236 U. S., 668. In this case it was assumed by the attorneys in all the Courts, except the attorneys of the railroad, that such a declaration was legal, and all the courts impliedly held the same way. In a note in L. R. A., 1915-d, at page 504, there are cited the following decisions sustaining the admission into evidence by the trial court, in Hansen's case now *sub judice,* of this declaration as to where Hansen was going and why Hansen was leaving his house that Sunday morning.

Chicago & Eastern Illinois Railroad Co. vs. *Chancellor,* 165 Ill., 438; s. c. 46 North Eastern Reporter, 269.

Lake Shore & Michigan Southern Railway Co. vs. *Herrick,* 49 Ohio State, 25; s. c. 29 North Eastern Reporter, 1052.

Central of Georgia Railway Co. vs. *Bell* (Supreme Court of Alabama), 65 Southern, 835,

which last case quotes from *Kilgore* vs. *Stanley,* 90 Ala., 523, s. c. 8 Southern, 130, wherein the Court said:

> "What a person says on setting out on a journey, or to go to a particular place, explanatory of the object he has in view in so setting out, is res gestae evidence, and may be proven; and the jury may give it such weight as they think it entitled to."

Baltimore & Ohio Railroad Co. vs. *The State,* 81 Maryland, 371, s. c., 32 Atlantic Reporter, 201.

This case from Maryland quotes *Greenleaf on Evidence,* Vol. 1, Sec. 108.

In *Denver & Rio Grande Railroad Co.* vs. *Spencer,* 25 Colorado, page 9; s. c. 52 Pacific Reporter, 211, the declaration that deceased was going to meet his daughter in law at a depot at the time he was killed by a train, was admitted, it having been made several days previously. The Colorado case quotes *Wharton on Evidence,* Sec. 259. See also, *Inness* vs. *The Boston, etc., Railway Co.,* 168 Mass., 433; s. c. 47 North Eastern 193; *Cincinnati, etc., Railroad Co.* vs. *Howard,* 124 Ind., 280; s. c. 24 North Eastern 892. Quotations from the above cases will be found in this note to the L. R. A. 1915d., at page 504, etc.

Declaration of Decedent.

Sustained as legal to prove intent, viz., that it had been his purpose to contribute to his mother's support.

Boyle, Admr. vs. *Columbia Fire Proofing Co.,* 182 Mass., 93; s. c. 64 N. E. Rep., 726.

In *Lloyd* vs. *Powell-Duffryn Steam Coal Co.* (1914), 7 B. W. C., 330, the House of Lords held that it was not hearsay evidence, but primary evidence, where the witnesses testified to the fact that the decedent had said he intended to marry a certain woman, whom he had made pregnant, and to support her unborn illegitimate child. In these last two decisions there was no possibility of following up the saying by any doing—the declaration by any subsequent conduct prior to the death of the maker of the declaration. Hansen *followed through* his declared intention to within several hundred feet of his destination, viz., the pony engine stalled near the round house, and at no time did he turn back or turn away from his intended destination, or do or say anything inconsistent with what he said to his wife. He had the keys to the tool box with him, at the time of his death (page 207, line 32). The Railroad produced no evidence —whether other keys, the lock of the tool box, or testimony to disprove that Hansen's bunch of keys would not have unlocked the cabin or tool box on the pony engine.

On the morning of his death Hansen took the keys in question from his working clothes, and said to his wife where and why he was going away from his home Sunday morning (pages 108-110). The next we hear of Hansen was that he was at the Railroad Y. M. C. A. at the Railroad Yards, that he there talked to Smith (page 68) and walked down the path and across the track with Smith. Then he had a conversation with Kathan (page 43), saying that he was going to the round house for his overalls. Kathan's statement as to Hansen's declaration is entirely consistent with the statement which Hansen made to his wife. Kathan had been the engineer on the pony engine to which

Hansen was going for tools (page 34) and in all probabilities he intended to talk with his superior regarding the engine tools and his taking them away. Hansen then continued his journey in the direction of the round house and pony engine and was killed by Clearwater's engine coming toward him from the rear. When on the porch of the Y. M. C. A. (page 149) Hansen asked Smith if he was going up to the round house, and Smith told him yes, and Hansen said wait a minute, "I'll go with you," and they walked off together in the direction of the round house (page 149). There cannot be any doubt that Hansen *followed through* his declared intention of going to the railroad yards, the round house and pony engine, and he accomplished that intention, so far as he could. When killed he was walking to the round house and he was nearly there. No wish of his prevented the accomplishment of his declared purpose. He talked to Kathan a couple of minutes and when Kathan's engine started up with Smith as fireman again on it, *Hansen continued on in the direction of the round house.* Assuredly, as far as Hansen had it in his power to do, he accomplished his determination of going to the round house, except by only a few hundred feet, and the testimony of Holt certainly shows that his declared purpose of getting tools from the pony engine besides getting his overalls at the round house was something that was not only at that time in the yard a purpose generally pursued and many times accomplished by engineers and firemen in general, but was a most natural one for Hansen, especially as he had had a quarrel with Holt, about a week before his death, over the poor quality of the tools, there being an insufficiency at that time in this yard of good tools, which was not remedied until after the death of Hansen.

The witness, Holt, who was the tool boy in the round house, testified, among other things, that it was the custom of the firemen on occasions to help themselves in getting small tools (page 251); that at the time of Hansen's death there was a shortage of small tools and they had very few good ones (page 252); that about a week before Hansen's death witness had a quarrel with Hansen relative to the quality of a hammer which he had given to Hansen and which Hansen refused to take (page 254, line 10); that it was the practice of engineers and firemen to try to keep possession of their small tools by locking them up (page 254); that there was a shortage of tools on August 3, 1913—the date of Hansen's death—(page 259, line 35; page 260; line 1), and that the shortage of proper tools was not made good until after the death of Hansen (page 263, line 35; 264, line 21).

On page 19 of defendant Railroad Company's brief, it is admitted that it is the law of this state that provable acts material to the issue, which tend to explain or give legal character to the acts, are admissible. Some of the provable acts material to the issue were that Hansen took the keys the morning of his death from his own clothes just prior to his leaving the house; that he left the house immediately after making the alleged erroneously admitted statement to his wife; that he went to the Railroad Y. M. C. A. building, at which place one of the accustomed paths to the round house and pony engine began; that he proceeded along this path in the direction of the round house with Kathan's fireman, who was also going to the round house for the purpose of picking up his engine; that Hansen stopped and talked to Engineer Kathan, who was the engineer on the pony engine with Hansen before it was laid up and on which engine it was contended that Hansen had small tools and that the jury might in-

fer from this fact that Hansen's purpose or intention was to speak to Kathan about the pony engine and his tools, in view of the fact that Kathan testified that he had removed certain tools from the pony engine (page 248); that after speaking to Kathan, Hansen started back in the direction of the path and round house.

All of these acts were not only material to the issue, but tended to explain and give legal character to these acts.

The communications by Hansen to his wife and by Hansen to Kathan were directly connected with the acts of the deceased from the time he took the keys from his pocket until the time of his death, and as was said by Chief Justice Beasley in the Hunter case, the declaration is to be "in a reasonable sense part of such acts" (page 536) and "the declaration and act must make up one transaction. The theory justifying this cause is that, when such declarations are thus coupled with a provable act, they receive confirmation from it * * *" (page 537).

Defendant Railroad argues (page 20, brief), not so much that these acts are not provable in support of the declaration, but rather that inasmuch as Hansen was on his way to the round house by way of the path instead of the turnpike there was "a departure" from his declaration.

It is also stated in this connection (page 21) that "the only way to reach the round house was by way of the turnpike." This statement is incorrect.

The witness Smith, Kathan's fireman (page 56, line 40), as well as other witnesses, testified that there were two ways to get to the round house, habitually used by the employees, one by way of the Plankroad and the other by way of the Y. M. C. A. Building by way of the path over which he

and Hansen were proceeding just before Hansen's death.

> "The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of that fact, as his own testimony that he then had that intention would be. After his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

Mutual Life Ins. Co. vs. Hillmon, 145 U. S. Sup. Ct. Rep., 295.

Again it is said by defendant (page 21, Brief) that when Hansen left the path to talk to Kathan he departed from the intention expressed in his declaration and that it was not an act performed pursuant to his declaration and, therefore, the declarations could in no way characterize the act or the act support the declaration.

It is impossible to conceive how it can be said that merely because he walked a few paces from the beaten path that thereby he departed from the intention expressed in his declaration, that he was going to get his tools from the pony engine, etc., nor can it be said, *as a matter of law*, that his speaking to Kathan was not an act performed pursuant to his declaration. This would be a jury question if it were necessary to be considered at all.

As already stated, Kathan had been the engineer on the pony engine when Hansen was his fireman thereon. Hansen had, *or claimed to have,* tools on this pony engine which were used by him in his interstate runs. He wanted these tools to be used on his pick-up engine, because it was the custom of some, presumably careful firemen, to provide themselves with tools, and inasmuch as there was frequently a scarcity of tools, some firemen, therefore kept a set permanently rather than turn them over to the tool boy at the end of each run, thus avoiding the risk of getting no tools, improper tools, or tools in time for the train to start. It was a perfectly natural thing for him to speak to the former engineer of the very train from which he was going to get his tools, particularly in view of the fact that the engineer is the person in charge of the train, and Kathan claimed to have been on the engine after it was returned from the repair shop and removed his tools (page 248). It would be a question for the jury to say, if it was necessary so to do, whether Hansen, in talking to Kathan, rather than having temporarily diverted or deviated from the beaten path, did not actually speak or intend to talk to his former superior relative to his tools on the pony engine.

Defendant further says (page 21, Brief) that the act of crossing the track resulted in Hansen's death and that this act was not performed pursuant to his declaration and hence the declaration could not characterize the act. At the time he was struck he had left Kathan and was on his way, *walking in the direction of the pony engine and round house,* and would have come back to the beaten path before getting there. His walking, therefore, towards the beaten path, the round house and pony engine was, therefore, in fact, an act performed pursuant to his declaration and incidental to interstate commerce,

which declaration did characterize the act, in which he was engaged, at the time he was killed, and his act in so walking does support the declaration in the light of the cases cited.

In Bumsted vs. Mo. Pac. R. R. Co., 162 Pac. Rep., 347, which is cited on page 51 of defendant's brief, plaintiff, a freight conductor, after his run was completed, went to bed in a caboose. Before his work began and while he was dressing, the caboose was run into by a train of cars. At the time he was injured he had *not as yet commenced to do any work for his master* and a recovery was not allowed. The Court said:

> "The collision occurred, not while he was *momentarily or temporarily diverted* from the duties of his employment, but *before* the performance of such duties had begun."

It will be seen in this case the Court recognizes the principle of law that if a person momentarily or temporarily diverts from the duties of his employment it does not follow that he is not entitled to recovery.

In Graber vs. Duluth, etc., R. Co., 150 N. W., 489 (Wis.), a brakeman had finished his regular duties after a run between two State points on a train which had some interstate cars. He had then gone to a saloon and from there started to cross over a train to go to the station in order to see if the conductor had any further orders for him. He was injured while crossing the track. Held, that he was employed in interstate commerce.

In the Zackary cases, 232 U. S., at page 260, Justice Pitney said:

> "Again, it is said that because deceased had left his engine and was going to his boarding

house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri, K. & T. R. Co. vs. United States, 231 U. S., 112, 119, ante, 144, 147, 34 Sup. Ct. Rep., 26.

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

In the Bumsted case a recovery was not allowed because plaintiff had not commenced to do his master's work while dressing in the caboose; the facts in that case put Bumsted in the same position that Hansen would be in if he had been injured while dressing in his own home after he had made up his mind to go to work.

In the Graber case plaintiff was held to be employed in interstate commerce upon the theory that although he had finished his regular duties and had diverted by going to a saloon, still inasmuch as he was *on his way* from the saloon to defendant's sta-

tion, for the purpose of doing an act in furtherance of interstate commerce, he was entitled to recover.

So in the case before the Court, Hansen came into the railroad yards of the defendant for the purpose of doing an act in furtherance of interstate commerce, and the fact that he momentarily diverted, if it can be so considered, would be immaterial in view of his having again started on his mission. It would appear that the least that can be said is that it was a jury question as in the Zackary case.

Again on page 22 of defendant's brief it is said that "interstate commerce consists in acts and not in intentions." According to this standard and test of evidence no recovery would have been granted to Zachary in coming back to but not yet reaching his engine, or to Whitacre searching for a tool boy to give him a tin cup to take with him on his run from Cumberland into West Virginia, or to Tucker when he had been called by the call boy to go out on a run, and when he was hit prior to his crossing the yard to where his engine was stalled for the night; or to Padgett preparing for his run, or to Graber coming upon railroad premises from a saloon. Most of these are cases that were decided by the Supreme Court of the United States, and as such they are controlling and ultimate final authority in interpreting the Federal Act.

Graber vs. Duluth, etc., R. Co., 150 N. W., 489.

Central Vermont Railway Co. vs. White, 238 U. S., 507.

North Carolina R. R. Co. vs. Zachary, 232 U. S., 260.

B. & O. R. R. Co. vs. Whitacre, 124 Maryland, 411.

S. C., 92 Atlantic, 1060.

S. C. affirmed by U. S. Supreme Court, 242 U. S., Nov. 4, 1916.

Phila., B. & Washington R. R. Co. vs. Tucker, 35 D. C. Appeals, 123.
S. C. affirmed by U. S. Supreme Court, 220 U. S., 608.
Padgett vs. S. A. L. Ry. Co., 83 S. E., 632.
S. C., 236 U. S., 668.

POINT 3.

Plaintiff's intestate and the defendant were engaged in interstate commerce, bringing the case within the act of Congress.

For three weeks prior to Sunday, August 3rd, Hansen had been continuously employed as a fireman on one of defendant's locomotives, known as a "pick up," running between Weehawken, New Jersey, and Kingston, New York. Hansen came in on his last trip at 6:30 Saturday evening, August 2nd, and although he had a regular run the engine was likely to be changed from time to time (page 47, lines 10 to 30; page 53, line 1). It was the duty of Hansen to register not later than 3:40 on Monday morning in order to have his engine ready to leave at 4:45 from Weehawken, to go on his regular run to Kingston (Page 54, line 30). Hansen was to go out with engineer Griffin on this "pick up" run to Kingston on Monday morning (page 48, line 18).

According to the railroad system, men who were not actually working would report their whereabouts at the roundhouse so that they could be found when needed in case there was a short call, or a call during his absence from home. According to this system if a man left his home he would give notice to the Railroad where he could be found (page 121, lines 35 to 20; page 122). Hansen ob-

served this rule and after taking eight hours' rest, if he left his home, he always notified the round house where he could be found to take care of short calls. He never failed in this duty (page 112, line 20).

Small tools, such as monkey wrench, chisel and hammer, are put on engines in addition to the firing tools, such as a hook, rake and shovel. Small tools are used for the purpose of making light repairs.

> "Q. What is the monkey wrench and chisel and hammer put on the engine for? A. In case they break down, if it was a light repair they could make it and proceed" (page 206, line 15).
>
> "Q. When you say 'they could make it,' you meant the engineer? A. Engineer and *fireman.*
>
> Q. Engineer and firemen, eh? A. Yes" (page 206, line 30).

Hansen was studying to be an engineer and had passed several of his tests. After the firemen passed their examinations they became engineers (page 78, line 30).

It was the custom, among other things, for the firemen to assist the engineer in making repairs if the engine broke down and to give such assistance with tools to the engineer with reference to repairs as he, the engineer, desired (page 29, line 18), and for firemen to fill the lubricating cups on engines by the use of a monkey wrench (page 256, line 20), and tighten up joints to prevent the escape of steam (page 262, line 30, etc.).

Fireman Smith testified that a fireman had to pass an examination in mechanics, on the repair of engines and the use of tools, such as monkey wrench, hammer and chisel (page 165, line 25;

page 167, line 30) ; that these small tools were used by the engineer to fill lubricators, to tighten up nuts, etc. (page 170, line 20).

Prior to 1910 no provision or regulation was made by the Railroad for the placing of "supplies" on the engine by anyone in particular. All supplies, including tools, were placed on the engine by the engineer or fireman (page 230, line 30). Firemen were in the habit of getting small tools for the engine in order to get away on time (page 231, line 30). If the tool boy was not around he would get the tools himself (page 232, line 10); but in 1910 an agreement was entered into between the Railroad and its employees (Ex. D. 3, page 306), under which the Company agreed to "have *supplies* placed on *engines where practicable and consistent to do so,*" and it is contended by defendant that in view of this agreement no duty rested upon the firemen to provide the engine or himself with tools, and hence Hansen at the time he was killed was not acting within the scope of his employment, nor performing any duty he owed to the defendant.

No rule or regulation existed prohibiting firemen from looking after or securing the tools necessary for the proper carrying out of their duties, nor any rule specifying what the duties of the firemen were with reference to tools (page 204, line 20; page 205, line 35), *nor was there any rule prohibiting employees being in the yard at any time.*

It is undisputed that prior to the agreement "D. 3" firemen were always in the habit of selecting tools, such as hammers, chisels, wrenches, etc. for use on their engines.

It will be observed that under this agreement the fireman is not prohibited from securing his necessary tools nor does the company agree to have

supplies placed on engines under all conditions, but only where *practicable* and *consistent* to do so. In other words, if tools are not placed on the engine of course the fireman and engineer could not leave their engine stand and refuse to proceed with their run, but would be obliged to secure these tools themselves as theretofore. Even after the date of this agreement, the assistant foreman of the round house (page 204, line 25), testified, it was the duty of the fireman to see that proper tools were on the engine and if they were not placed on the engine by the tool boy, firemen would get off and get the tools themselves and that the small tools were used by the engineer and firemen in making ordinary repairs (page 206, line 15, etc.). Sometimes it was necessary for firemen to use small tools to scrape or repair a shovel (page 213, line 10). If an engineer went out without proper tools he would be suspended (page 218, line 25).

It is apparent from the record that lack of small tools and proper ones was rather chronic with the Railroad Company for sometime prior to Hansen's death, and although the company had a tool boy to take tools off engines as they came in from their runs and to place them on engines before departure, still the employees endeavored to keep their small tools in order to avoid constant changes and the possibility of their receiving inferior tools, or no tools at all, in time to get away on schedule. Some of the employees had boxes in which they kept their tools under lock and key. Kathan, Hansen's engineer on the pony engine, had such a tool box which he carried around from engine to engine (page 100, line 30, etc.; page 101, line 5). Some careful and discriminating engineers carried their own kit of tools, consisting of a hammer, monkey

wrench and chisel (page 102, line 2), whereas others, such as the witness Griffin, Hansen's engineer on the pick up had no tool box of his own but was satisfied with indiscriminate tools thrown on his engine by the tool boy before departure (page 212, line 5).

James Holt, the tool boy at the round house in Granton at the time Hansen was killed, and for three or four months prior thereto, testified that during that period it was the practice of firemen to get their own small tools to put on the engine.

"A. They would sometimes, if I happened to be behind, they would come up and help themselves sometimes, and sometimes they would ask me, according to how big a hurry they happened to be.

Q. And at about the period of his death did you have enough of these small tools or was there a shortage of tools? A. Well, we were kind of short.

Q. What do you mean by kind of short? A. Well, didn't have very good ones—very many.

Q. What would that result in before his death—how would the firemen act about his tools, what would they do about tools? (Interruption.)

Q. Small tools? (Interruption.)

Q. Monkey wrenches, hammers and chisels? A. They would come and ask me for them.

Q. If you went out what would they do; how would they get them? A. Well, they go and look for them themselves.

Q. What happened when you come back? A. They would be gone.

Q. Your small tools would be gone? A. Yes" (page 251, line 32; pages 253, 254).

He then proceeds to tell of an altercation with Hansen with reference to some small tools which Hansen desired.

"Did you have a discussion with him (Hansen) about the condition of a hammer when Carpenter was on the engine before his death? A. Yes.

Q. How long before he was killed did this thing take place? A. About a week.

Q. What occurred between you and him? A. Why, the hammer I gave him wasn't much good, had a poor handle into it, and he started hollering at me about it, and of course we got into an argument about it and I got up on the engine and the engineer parted us.

Q. What was the matter with the hammer that you had given him? A. The handle wasn't no good into it.

Q. Why did you give him that kind of himmer that was no good? A. Didn't have much—didn't have no—many good ones" (page 253, line 20 etc.; page 254).

"Q. A fireman didn't come to you to report tools lacking, did they? A. Sometimes.

Q. Sometimes? A. Yes, sir.

Q. If some of their tools were lacking the fireman came to you? A. Sometimes the fireman would come when the engineer's tools were not there.

Q. Came for the engineer? A. No; the fireman lots of times would come for the engineer's tools, say they were missing, and lots of times came to me—*he would be on the engine first and see what was missing*" (page 259, line 25, etc.).

On cross examination he said:

"Q. *Now do you know of your own knowledge whether there was any shortage of tools for the engines that were going out on August* 3, 1913? A. *I am quite sure there was.*

Q. *Well, what was the shortage?* A. *On hooks and scoops. On hooks and scoops and hammers, we most always was short of.*

Q. *You don't know whether on the second or third of August there was any shortage on engines that were to go out on the pick-up train?*

A. *I know there was a shortage on hammers*" (page 259, line 37; page 260, line 1, etc.).

He then proceeds to say that at the time he had the trouble with Hansen he got him a hammer but it was not as good as it should have been, because he had none better (page 260, line 30):

"Q. How long was it according to your memory before that shortage was made good after you had the argument; was it a week or two weeks or three weeks; how long was it?

A. I think it was around a week" (page 263, line 35).

"Q. What is your best memory on it? You remember the man being killed and you remember the tools coming in; was it after he was killed or when was it?

A. I can't say exactly when it was.

Q. What is your best judgment?

A. *Afterwards*—my best judgment" (page 264, line 15).

On page 266 at line 30 he states that if he did not have the tools in the tool car, he would go to the store room and often there were no tools in the

store room and he would scrape up what he could find and give the firemen the best he had.

> "Q. Where would you go for them then?
> A. Run around in the round house and see if I can find any there, pick them up wherever I could find them."

The witness complained to the foreman about the shortage and on occasions because of lack of tools the engine would go out late (page 267, line 30).

From the testimony as above recited, it will be seen that firemen were under an obligation to the Railroad Company to see to it that proper firing and small tools were upon their engines preparatory to leaving on their runs; or at least that tools were necessary and customarily used by them; that although a tool boy was provided to place tools upon engines under certain conditions, the firemen were still charged with the duty of seeing to it that the tools were actually there, and if the tools were not there to place them on the engines themselves; that up to the time of Hansen's death it had been the custom of firemen to look after this work; that there was a scarcity of small tools, often preventing trains leaving on time and that Hansen knew this; that about a week before his death Hansen had had an altercation relative to tools and that there was a scarcity and lack of tools on the day of Hansen's death.

Such being the condition of affairs at the yard of the defendant company, we find that after Hansen returned from his interstate trip on Saturday night, that he returned home, took his regular sleep and the following morning, Sunday, at eleven o'clock, he took a bunch of keys out of his working clothes (page 108, line 38), spoke to his wife and

told her that he was going to the round house to take his tools from number 25 (the pony engine) to put on his pick-up engine and to get his dirty overalls out of the locker to bring home for the purpose of being washed (page 110, line 12).

From the statement made to his wife relative to his possession or the presence of tools on the pony engine, it was a question of fact for the jury to determine whether Hansen actually had tools thereon, or that he had tools there which he intended to and could be used by him on his run the next morning, which tools on said train would have been in furtherance of his work in interstate commerce. In fact it would not be necessary to prove that there were any tools on the engine, provided Mr. Hansen at the time had reason to believe or thought such tools were there, and the jury could, from the declaration made by him to his wife, infer that it was his intention to go to the pony-engine to get tools which he thought were there, or ought to be there.

In Hillmon vs. Mutual Life Ins. Co., 145 U. S., page 295 hereafter again cited, the Court in commenting upon testimony of this character stated that such testimony "precluded a suspicion of misrepresentation." But there was ample evidence in the case to go to the jury on the question whether tools of Hansen were actually on the pony-engine.

The witness McCartney stated, that there were two boxes on the side of the pony-engine and that there were brass keys used to open the locks on these boxes (page 88, line 38). When shown the keys which were offered in evidence, being the same keys which were taken by Mr. Hansen from his trousers, on the morning of his death, and which were found on his body and returned to his widow,

he stated that one of the keys looked something like the keys to the pony-engine (page 91, line 30).

> "Q. Something on that order? And the keys that did resemble, what did they open on the pony-engine? A. Why the tool boxes on the tank" (page 92, line 10, etc.).

The tools in this box on the pony-engine consisted of a hammer, chisel and monkey wrench, and were used in making repairs on the engine (page 93, line 18).

The keys to the locks on the pony-engine were used by everybody that had anything to do with the engine, including the engineer and fireman.

> "Q. The firemen used them to get into the tool box? A. Yes, sir.
>
> Q. When? A. Whenever he wanted to get in there before going out or on coming in" (page 94, line 28).

The testimony of Kathan, the former engineer on the pony-engine does not negative the presence of tools of Hansen thereon on the 3rd of August, 1913, or at any other time. What he stated was that there were tool boxes on the engine and that oil cans were kept by the firemen in them (page 26, line 28, etc.). That there were hammers and chisels in the tool boxes, but they belonged to the engineer; that he had a kit of tools on the engine.

On page 37, line 35 he says, that he took everything out of the *house* of the pony-engine and shipped it to Weehawken, so that they could not be spoiled, such as carpets and chairs. Although the witness stated that he had removed everything from the pony-engine and that if there had been anything left he would have told Hansen, still we

find (page 35, line 12) that he sent to Mrs. Hansen for the keys after the pony-engine came back from the shops, long after he had removed everything from the engine, as stated by him, but did not receive them. Was it not a question for the jury to determine whether there was any truth in his statement that he had removed everything from the pony-engine before the accident? Why should he send to Mrs. Hansen for the keys to the pony-engine, after Hansen's death, if there was nothing there to be removed and he was no longer in charge of the pony-engine? This witness would neither admit nor deny that the keys shown to him were the keys to the tool box (page 39, line 35).

Engineer Kathan was recalled (page 273) and when asked whether Mr. Hansen had any tools on the pony-engine, stated:

"No, sir; *not as I know of.*"

He admitted that other keys to the tool box on the pony-engine were at the round-house, and although the question as to the identity of the keys which were found on Hansen's body, and produced in court, were the subject matter of considerable discussion and might have been evidence favorable to defendant, still we find that on the last day of the trial, when Kathan was recalled and admitted that keys were at the round-house which could be compared with the keys in evidence, no excuse was offered for their non-production (page 273, line 35, etc.).

Taking into consideration all the testimony already referred to, relative to the use of tools by engineers, and the testimony as to the keys, we contend that there was ample evidence for the jury to determine that there were tools on the engine at the time of Hansen's death, or that Hansen believed

that they were there and that the keys in his possession were the keys to the tool box on the pony-engine, or the keys to the house of the pony-engine, and that at the time of his death he was on his way to the engine for the purpose of securing these tools to be used in interstate commerce by him.

On leaving his home he went to the Railroad Y. M. C. A. Building, and there meet fireman Smith, as already stated, and from the Y. M. C. A. Building proceeded along the beaten path with Smith until Kathan came along with his engine and picked up Smith. The destination of both Smith and Hansen, at the time they left the Y. M. C. A. building, was the round-house where Smith expected to find Kathan and his engine, and where the pony-engine was (page 149, line 8, etc.).

It is contended by defendant that if Hansen desired to procure tools for the pick-up engine he could not have done so at noon on Sunday, because the pick-up train had no regular engine and he would not know what engine he was to go out on until about the time he registered in at about 3.30 A. M. The record shows that Hansen had a locker in the round-house. He could have put his tools there; he could have put them somewhere in the tool-house; he could have left them somewhere around the yard and close to the round-house; he might have placed them on an engine which he expected to leave on in the morning and might have done one of a hundred things in anticipation of the work he was going to do the following morning. What Hansen was endeavoring to do was to avoid running the risk of getting improper tools, no tools at all or tools so late as to prevent his leaving on time.

When is a railroad employee under the protection of the Act of Congress? When is he "employ-

ed" in Interstate Commerce? The Act of Congress is *inclusive;* it uses the word "While" employed in interstate commerce—it applies only to interstate carriers, whether their lines are entirely within a State or cross a State frontier into another State.

The Decisions of Winfield vs. N. Y. C. R. R. Co., and Winfield vs. Erie R. R., handed down by the Supreme Court of the United States, in May, 1917, held that the Act of Congress was thus so inclusive as to forbid to the interstate employees the benefit of the various state compensation acts. The decision of Chief Justice White in declaring the Adamson Law constitutional virtually classified interstate employees as persons possessed of and under the obligations of a *quasi-status.*

That the *interstate* employees were a separate class from intrastate employees has been continuously ruled by the United States Supreme Court, since the Act of April 22, 1908:

Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S., 1.
S. A. L. Ry. Co. vs. Horton, 233 U. S., 492.
North Carolina Ry. Co. vs. Zachary, 232 U. S., 248.

On pages 47 and 48 of the Defendant Railroad Company's brief is cited the cases:

Erie R. R. Co. vs. Welsh, 242 U. S., 303.
N. Y. C. & H. R. R. Co. vs. Carr, 238 U. S., 260.

Welsh was a yard conductor; always in the State of Ohio; Carr was a freight brakeman, always in the State of New York. These two deci-

sions belong to a class of decisions where interstate commerce and its benefits cannot be accorded to the employee by his geographical movement —he never moves beyond the State line. Hansen's *regular run* was from Hudson County, New Jersey, to the City of Kingston, N. Y., Hansen *every trip crossed the frontier.* He was regularly an interstate employee, just as were Messrs. Padgett, Tucker, Zachary and Whitacre. Messrs. Welsh and Carr had to find out whether their occupation was interstate or intrastate from time to time. Padgett vs. S. A. L. Ry. Co., 83 E. E., 632, wherein the Supreme Court of South Carolina held that there was a presumption of the continuance of the run and the use of the same engine in the run.

Affirmed by the U. S. Supreme Court, 236 U. S., 668.

In B. & O. R. R. Co. vs. Whitacre, 92 Atl., 1063 (Court of Appeals of Maryland), Whitacre, a freight brakeman, while walking through a railroad yard on a dark and foggy night, looking for a tin cup, fell into a water cinder pit and was seriously injured. (This language is taken verbatim from the opinion of Justice Brandeis.) When this case was decided in the U. S. Supreme Court, advanced sheet December 4, 1916, the Court said:

> "That the plaintiff must be regarded as being engaged in interstate commerce at the time of the happening of the accident seems conclusively settled by two cases. In P. W. & B. R. R. Co. vs. Tucker, 35 App. D. C., 123, subsequently affirmed per curiam by the Supreme Court, Tucker was killed by being struck by an engine when he was on the premises of the defendant in response to its call

> to assume the duties he had been engaged by the defendant to assume for their mutual interest and advantage; and it was there laid down that the obligation of the master commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master."

In Mo., Kan. & Tex. R. R. vs. Rentz, 162 S. W., 959, Rentz was employed as a locomotive engineer. In going to his work along a path in the railroad yard he was called to by another engineer, and stood on a track one or two over from this path through the yard. While here talking he was run down by an engine. He sued under the Federal Employees' Liability Act and a recovery was allowed.

In N. C. R. R. vs. Zachary, 232 U. S., 248, it was held that the acts of an employee in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling up of the interstate cars, are acts done while engaged in interstate commerce.

In Boyle vs. Penn. R. R., 228 Fed., 269, Judge Woolley said:

> "There is the underlying idea that work of interstate commerce and the preparation for their use in interstate commerce are so intimately and directly related to interstate commerce as to make such work or employment a part of it."

It is of course a fact that Hansen did not have a tool in his hand when he was killed; nor was he either stoking an engine or shovelling coal to make steam at the moment of death—in fact he was not on an engine at all. He was walking through the

yard on his way to get tools for his next run to Kingston, N. Y., and it matters not whether he put the tools on the engine that Sunday or early the following morning. He should not be penalized because he was diligent in the performance of his duties and was willing to give up his rest period to assist his master in avoiding the possibility of delay the next morning in its business of interstate commerce.

He chose as his time to get tools, the only daylight available to him before starting on his run the next morning at 3:45, a time when he had other duties to perform and when the night would be the darkest before the dawn.

Defendant Railroad Company makes claim:

(a) That Hansen was not acting within the scope of his employment when the accident occurred (R. R. Brief, page 29).

(b) That he was not then engaged in the performance of any duty he owed to the defendant (R. R. Brief, page 29).

(c) That he was not engaged in interstate commerce at the time and place of the accident (R. R. Brief, page 44).

(d) That at the time and place of the accident Hansen was a trespasser or at best a mere licensee (R. R. Brief, page 38).

The above facts and the law following will be found to rebut these various contentions, and several of the decisions referred to in Railroad Company's brief will be commented upon hereafter.

In Padgett vs. Seaboard Air L., 83 S. E. Rep., 632, it is said by the Supreme Court of South Carolina:

"These were questions for the jury. If they inferred from the circumstances that Mr. Padgett was doing the work required of him, not at the time it was required, but at a time when it was *not forbidden,* then they could conclude he was engaged in interstate commerce, and under the protection of the Federal Statute His Honor could *not* have directed a verdict on the ground that there was *no* evidence from which it could be inferred that Mr. Padgett was engaged at the time of his death in interstate commerce."

Padgett was two hours ahead of time at the roundhouse.

Judge Gage of the Supreme Court of South Carolina dissented on the grounds raised in Hansen's case, alleging Padgett was not "employed" and was a mere volunteer, because of the question of time, yet the Supreme Court of the United States in *S. A. L.* vs. *Padgett,* 236 U. S., 668, affirmed the decision of the Supreme Court of South Carolina.

In Philadelphia, B. & W. R. Co. vs. Tucker, 35 App. D. C., 123 (L. R. A., 1915 C., page 42), the Court said:

"Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurred before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and

artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the Annex, which was only another agency provided by the master for the accommodation of its servants."

Plaintiff and his fellow workmen were carried to and from work on defendant's construction train. On being brought back to camp, plaintiff was informed he need not go back to work that day. He asked permission to go back on the train and get his coat which was granted. Held, he was not a trespasser on the train, but was properly there in the line of his employment.

Rosenbaum vs. St. Paul & Duluth Ry. Co.,
38 Minn., 173.

The following decision from the Court of Sessions in Scotland is precisely a case in point:

Goodlet vs. Caledonian Ry. Co., 39 Scottish Law Reports, the Court of Sessions (2nd Division) of Scotland, construing Section 1, Paragraph 1, of the Workmens' Compensation Act of 1897 (60 and 61 Vict., Cap. 37), which section and paragraph reads as follows:

> "If in any employment to which this act applies, personal injury by accident arising out and in the course of the employment is caused to a workman, his employer shall, subject as after mentioned, be liable to pay compensation in accordance with the first schedule of this act."

The facts admitted and proved were as follows:

> "On the night of the 23rd of November, 1901, the deceased, John Goodlet, an engine driver in the employment of the respondents, arrived at Princess St. Station, Edinburgh, about 10:10 P. M., after having brought a train from Leith, and was ordered to take his engine into a lye beside a water column. After placing his engine in the lye the deceased left his engine in charge of his fireman, and crossing some four or five sets of rails went to a small island platform to the west of the passenget station, where Donald Macrae, an assistant traffic regulator in the employment of the respondents, was standing, a distance of from 35 to 40 yards from his engine. When he reached Macrae, he asked him why his engine had been put into that particular lye. There was no necessity for the deceased to leave his engine, nor to interrogate Macrae, as the lye to which deceased's engine had been sent was

quite a convenient one for his next duty, of which he was fully aware, viz., to take the eleven o'clock train out to Balerno. After speaking to Macrae, the deceased left that island platform and crossing two more sets of rails still further from where his engine was placed and 12 or 13 yards from where Macrae was standing, spoke for a moment or two to Edward Wilson, a carriage inspector in the respondent's employment. *What he had to say to Wilson was merely casual conversation and had nothing to do with his duties as an engine driver.* After leaving Wilson, the deceased, while returning to his engine and recrossing the last mentioned lines of rails, was knocked down and killed by an empty train, which was being backed or shunted from the passenger station into a dock for the night. There was no lamp attached to the end of the carriage which knocked the deceased down, but it was both unusual and practically impossible to shunt empty trains within the station yard with tail lamps attached, this operation being conducted with hand lamps and hand signals. It is admitted by the parties that in the event of the respondent's being liable in compensation for the death of the deceased, the amount of such compensation should be £273 17s. 11d. The Court of Sessions *held* unanimously (only Lord Moncrieff being absent), that (opn. by Lord Justice Clerk). * * *"

"I think in view of these facts the pursuer is entitled to say that the deceased at the time he met with his accident was in the course of his employment within the meaning of the Act. No fault is attributable to him in going across

the rails, as he was an engine driver and entitled to cross them. Moreover at the time of the accident he was on his way back to his engine.

"If he could be held to have been doing anything wrong in crossing the rails the first time, the result might have been different, but he cannot."

"Lord Young says compensation should be granted."

"Lord Trayner—I think this is a case in which the injury arose out of and in the course of the deceased's employment."

The Court reversed the Sheriff-Substitute and granted the appeal, and gave compensation to the widow and the children.

The principle laid down in *Goodlet* vs. *Caledonian Ry. Co.,* is absolutely consonant with the ruling of the Supreme Court of the United States.

North Carolina R. R. Co. vs. *Zachary,* 2 N. S., 260, held

that Zachary, a locomotive fireman, who *left his engine and on the way to his boarding house was crossing tracks in the railroad yard prior to starting on an inter-state trip on no purpose inconsistent with the duty toward his master,* and was killed by a shifting engine running at full speed, at night, headed backwards, forwards, with no lights, and its noise being obliterated by the blower of a locomotive standing on an intervening track; HELD: First, Zachary was in inter-state commerce; Second, he was actually engaged in work; Third, the running of him down without warn-

ing was actionable, *even if the engineer of the shifting engine did not expect him on his track and thought that the switching engine had a clear field ahead,* it being negligence to run the switching engine in the manner it was run, as the jury found."

In re Stacy and In re Travellers Ins. Co. (Sup. Ct. of Mass., Nov. 28, 1916), 114 N. E. Reporter.

Where an icehouse laborer on his way home from work was drowned by breaking through the ice while crossing a pond in the control of the master, the *reasonable and customary* way for him to reach home, and he and other employees who lived in the same direction *"crossed it this way regularly,"* the accident occurred in the course of the employment; the Supreme Court of Massachusetts *held this although there was a path around the bank of the pond.*

Gane vs. *Norton Hill Colliery Co.*, L. R., 1909—2 K. B., 539.

A collier was going home from his work and in doing so he crossed railroad tracks and went underneath cars, and on land of and operated by the Coal Co. He was hurt by the moving of the cars. This way home was customarily used by the miners. There were *two other ways* for the miners to go home. Held, he was in the *course of his employment* and entitled to compensation under *English Act.*

This case quoted with approval in Terlecke vs. Strauss, Sup. Ct. N. J., 89 Atl., 1023, affirmed by Ct. of Errors, 92 Atl., 1087.

Gane vs. *Norton Hill Colliery Co.* followed, explained, and approved by House of Lords, in

Lancashire & Yorkshire Ry. Co. vs. Highley, L. R. (1917), A. C., 352.

Harber vs. Jenkins Rubber Co., 72 N. J. L., 171, on page 40 of defendant's brief, cited in support of the proposition that Hansen, at the time of his death, had deviated in such a way that he was not entitled to recover, is not a parallel case and has absolutely no application to the facts in Hansen's case. Harber at the time of his injury was clearly a licensee. At the time of his injury he was walking to a place "for no purpose of proceeding to his work." In the Hansen case even assuming that there was nothing in the testimony to go to the jury on the question of the purpose of Hansen speaking to Kathan, still at the time of his death he was on his way "for the purpose of proceeding to his work."

Hobbs vs. Great Northern Ry., 142 Pac., 20, cited on page 42 of defendant's brief in support of the same proposition is another case clearly distinguishable from the Hansen case. Hobbs was on the pilot of the engine, contrary to an express rule forbidding employees to ride there, and the evidence did not disclose any duties which called for his presence on the pilot. In Hansen's case there was no rule forbidding him to be upon the premises of the railroad, it was the custom of the men to walk through the yards, and there was evidence sufficient to go to the jury on the question as to whether his duties did not call for his presence in the yard at the time of his death.

In Padgett vs. Sea Board Air Line, 83 S. E. Rep., 632, affirmed in the U. S. Supreme Court, 236 U. S., 668, the Court said that if the jury inferred from the circumstances that Padgett was doing work required of him not at the time it was required but at a time when it was *not forbidden* then they could

conclude that he was engaged in interstate commerce.

POINT 4.

Defendant was guilty of negligence in causing the death of Hansen.

Engineer Kathan, while in the employ of the company, a very reluctant witness, when asked at what speed Clearwater's engine was running at the time it hit Hansen, states:

> "Q. Wasn't going very fast, was it? A. No, I should judge not. I wouldn't judge on that. I am no judge, as I was going one way and the other man coming the other way" (page 28, line 12).

It further appears that Clearwater's engine, after it struck Hansen, proceeded on its way up to the ash pit (page 28, line 40), and that engineer Clearwater did not even know that he struck Hansen.

> "Q. And Clearwater did not know he had gone over him, did he? A. No, sir.
>
> Q. How was Clearwater's engine going when you saw it, going backwards or forwards? A. Backwards.
>
> Q. Was there anybody on the engine with Clearwater? A. His fireman" (page 29, line 3, etc.).

Craig, the fireman on Clearwater's engine, was asked:

> "Q. You did not see him before your engine ran over him, did you? A. No, sir.

Q. Clearwater didn't see him? A. Not that I know of.

Q. Well, you didn't know. How did you or Clearwater know that there had been an accident? Wasn't it because some one came up and told you? A. Some one told us.

Q. What did you do when you found out that you had run over a man? A. Went right back to the scene of the accident.

Q. How far away from where you stopped your engine was it? A. Oh, I don't know, probably five minutes' walk—seven minutes' walk, something like that" (page 74, line 38, etc.).

According to this witness it was a clear day. There was nothing to obstruct his vision or the vision of the engineer if they looked out. He doesn't know whether the engineer looked out or not, and there was nothing in the way of their looking (page 76, line 20, etc.). There was no curve in the line of the track. From the shop up to the cross-over there was a straight piece of track (page 87, line 38).

Freleigh, a civil engineer, testified that the distance from the Y. M. C. A. to the point at which Smith was taken on by Kathan was 1,900 feet, and from that point to the roundhouse 2,500, and that the point at which Hansen was killed to the roundhouse was 2,100. It therefore appears that Hansen, after talking to Kathan, walked in the direction of the roundhouse, a distance of about 400 feet, during which time he would be within full view of anyone looking out on Clearwater's engine, if the crew were keeping their lookout in his direction along the track, as was their duty in law and under the company rules (pages 144-145).

Hansen was talking to Kathan between tracks one and two for several minutes before he started to walk this distance of 400 feet (page 162, line 10). The distance between tracks one and two was only 8.39 feet, a distance which might, under ordinary circumstances, be potentially dangerous to Hansen, if he was walking with his back turned to an engine coming from the rear in the same direction (the distance between passing engines being much less), unless warned of the approach of the engine (page 146, line 20).

Clearwater's engine, after killing Hansen, proceeded 1,300 feet before he knew what had happened (page 147, line 20).

The evidence and the map will show that if Hansen had continued on the path to the roundhouse he would necessarily have had to cross the engine track on which he was killed (page 72, line 22).

It is contended by defendant railroad company that there was no regular path from the Y. M. C. A. building to the roundhouse, and that the so-called path was one which could be shifted from time to time by the railroad company. It amply appears from the testimony that employees were in the habit of going from the Y. M. C. A. building to the roundhouse through the yards of the company, irrespective of what is called the path. This clearly appears, among other proof, by the testimony of the witness Smith, who walked with Hansen through the yard for the purpose of meeting Kathan, and who also walked across the tracks for the purpose of going on the engine. So that, then, if the jury found there was no regular path, as was contended by the railroad company, then they could have found that it was the custom of employees to cross the yards at any point in the

direction of the roundhouse, and such being the case, it became the duty of the railroad company to give fair warning to its employees.

It appears that the company did have rules for the protection of its employees in the yard.

Fireman Craig, on the engine which ran Hansen down, says that there was a rule governing the keeping of a lookout; that it was his duty to look out, if he was not firing, for all obstructions on the track, danger signals and employees; that this regulation was in the book of rules governing the operating department (page 83, line 32, etc.; page 160, l. 20, etc.).

Witness George, whose office was about 50 feet from the roundhouse, was in the habit of using the path Hansen and Smith used and states that it was used considerably by the men; that it was not laid out by the railroad company, but was just the result of employees walking back and forth; that there was considerable traffic along this path (page 194, line 32, etc.).

This and other testimony, together with the facts that the company regulated the running of its engines at a rate not exceeding six miles an hour through the yard, which means practical control of the engine under ordinary circumstances, and the fact that they also had a rule that it was the duty of firemen and engineers to keep a lookout, indicates that the company recognized the right and possibility of its employees being in and about all parts of the yard, including traffic tracks.

It further appears that from the point at which Hansen was talking to Kathan there was a view along the track in the direction in which Clearwater's engine was coming of 970 feet, but that there was a curve at a distance of about 700 feet (page 178, line 20), and that there would be a view

for several hundred feet beyond the curve, and that there was a view from the point at which Hansen was killed of about 1,000 feet (page 179, line 20).

Engineer Kathan clearly shows that Clearwater was guilty of gross negligence and recklessly ran Hansen down without keeping a lookout and without giving any warning. After Hansen ceased talking to Kathan, Hansen turned and walked in the direction of the roundhouse. As has already been shown, Hansen had already walked at least 400 feet north from the point at which Kathan's engine was stopped to let Smith on. Kathan then says that when Hansen left him he started his engine in the opposite direction from which Hansen was walking, to wit: towards the south, and in the direction from which Clearwater's engine afterwards appeared (page 239); that the natural place for him, Kathan, to look was in the direction in which he was going, but that he turned around and looked back.

> "Q. Why did you turn around and look in back of you? A. That is something I cannot answer; I never done it before in my life."

The query presents itself, why should Kathan for the first time in his life look in the opposite direction from which he was going, unless he saw Clearwater's engine coming along at an extraordinary rate of speed without warning and with no one keeping a look-out? Although Kathan on page 240, line 30, etc., says that Hansen, he guessed, was about 200 feet behind him when he last saw him, this would be mathematical impossibility if Hansen was struck 400 feet from the point at which Kathan's engine originally stopped. If Kathan's engine proceeded, as he says, after Hansen started to walk he must necessarily have been a great

deal more than 400 feet away from him at the time he was struck. Kathan observed Clearwater's engine coming along. Apparently the engine was going at an excessive rate of speed and without a look-out, for Kathan says:

"Q. And had the Clearwater engine passed him (you) when you blew your whistle? A. No, sir.

Q. It had not got up to you when you blew your whistle? A. No, sir.

Q. How far was the Clearwater engine from you when you blew your whistle? A. His front end was even with my front end when I whistled.

Q. Did you blow a pretty loud blast? A. Just blowed—

Q. Did he seem to pay any attention to it at all? A. No, sir, he did not.

Q. Kept right on going, didn't he? A. I lost view of him, yes.

Q. Did Clearwater stop when you blew this loud blast? A. No, sir.

Q. He kept right on going, did he? A. Yes, sir.

Q. Was it a shrill blast you blew? A. Yes, sir.

Q. Was that an alarm that you blew? A. Yes, sir" (page 241, line 5, etc.).

Hansen is dead, Clearwater is dead, and the only living witnesses to the accident, viz.: Craig, Smith and Kathan, testified to a state of facts from which it clearly appears that Hansen was run down through the reckless operation of Clearwater's engine without a look-out, and without warning.

It surely cannot be conceived that Clearwater deliberately ran Hansen down and the necessary

inference must therefore be that Clearwater and his fireman had the opportunity to, but did not see Hansen, and were therefore guilty of gross negligence.

The defendant's motions to non-suit and to direct a verdict in favor of the defendant were properly denied, and do not constitute error. The Administratrix, under the facts and law, was entitled to go to the jury.

The jury could find negligence in *either* the railroad company *or* Mr. Clearwater, the engineer of the locomotive which killed Hansen for which the Railroad Company would be liable under the Act of Congress.

As these grounds of negligence all intermingle and the decisions as to them dovetail, they will be for the sake of brevity considered together.

In *Waina* vs. *The Penn. R. R. Co.* (Supreme Court of Pennsylvania), 96 Atl., 461.

It was held that the Railroad Company was liable to a section man crossing tracks in a railroad yard where the only excuse he had for not seeing an engine coming were tools on his shoulder; the ground of liability was that the engine men failed to ring the bell, blow the whistle or give other warning. Judgment for the track-man was sustained. This was an action under the Federal Employers' Liability Act.

In *Saunders Administrator* vs. *The Southern Ry. Co.*, 167 North Carolina, 375, the rules of the railroad required an alarm to be sounded and brakes applied whenever a person appeared on the tracks. The locomotive engineer did not warn or slow down. A verdict for the plaintiff was sustained in this action, which was under the Federal

Employers' Liability Act. The employee was coming back, crossing tracks, from an individual duty performed.

Irrespective of the extent to which Aerkfetz vs. Humphreys, 145 U. S., 418, has been modified by the ruling in the Whiteacre, Tucker, Padgett and all the later cases adjudicating the Federal Employers' Liability Act, whether in the several Circuit Courts of Appeals or in the courts of last resort of the several States of the Union, it has been held by the Supreme Court of the United States specifically that the principle enunciated in this decision some twenty years ago or more, was, as of two years ago, *limited in its application to a yard engine known to be engaged in switching in a yard, where there was no custom to warn or to keep a lookout as to it.* This principle of law is enunciated, in concise terms and with the utmost precision, in the case of The Seaboard Air Line vs. Koennecke, 239 U. S., 352, at page 355, wherein Mr. Justice Holmes, delivering the opinion of the Court, says:

> "We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard; that the movement was not a yard movement, that it was on the main track and that there was *no lookout on the end of the train and no warning of its approach.* In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard like, *Aerkfetz* vs. *Humphreys,* 145 U. S., 418, *but one where the rules of the Company and reasonable care required a lookout*

> *to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence* or that the deceased assumed the risk. Upon a consideration of all the objections urged by the plaintiff in error in its brief, we are of the opinion the judgment should be affirmed."

In the *B. & O. R. R. Co.* vs. *State of Maryland,* to the use of Bridget Trainor (Court of Appeals of Md., 1871), 33 Md., 542, it was held that it is negligence not to give reasonable and usual signal of the approach of a locomotive or train—viz., to blow a whistle and *keep a lookout for employees on the track.* Trainor, a trackman, was killed, *beyond his beat, on the track of a branch road,* on his way home after work. Judgment for Trainor's death was affirmed.

In a Railroad yard, where the Railroad undertakes to warn employees, it is *negligence not to keep a lookout.*

Louisville & Nashville Railroad Co. vs. *Johnson's Administratrix,* 161 Ky., 824; S. C., 171 Southwestern, 847.

In the case of *Southern Ry. Co.* vs. *Gray,* 167 North Carolina, 433, at 435, Judge Clark, delivering the opinion of the State Supreme Court of North Carolina, said in affirming a judgment for a killed flagman;

> "* * * It was the duty of the engineer and fireman to have kept a proper lookout on the track and if they could not do so, it was the duty of the defendant to have had still another person on the lookout to prevent any avoidable accident. *Arrowood* vs. *The R. R.,* 126 N. C., 629."

Gray was asleep on the track.

When this case was heard on a writ of error in the U. S. Supreme Court (241 U. S., 333), at pages 339, the Railroad was held to be without negligence because *the engineer blew the locomotive's whistle 1,254 feet away and at the first sight of the killed flagman's light.*

In the *Lexington & Eastern Ry. Co.* vs. *Smith's Administrator* (Court of Appeals of Ky., 1916), 188 Southwestern, 1091.

In a suit for the killing of an employee who looked after the switch lights in a busy freight yard and made repairs on the yard tracks, the Railroad was held to be negligent in not having some person on the front end of a caboose pushed by an engine, to warn employees of its presence.

In *Easter* vs. *The Virginian Ry. Co.* (The West Virgina Court of Appeals, on a re-hearing, 1915), 86 Southeastern, 37, it was held that under the Federal Employers' Liability Act abolishing the defense of fellow servant and making the employer liable for the fellow servant's negligence, that the failure to have a head-light on an engine front or on the rear of an engine when backing, at night time where there is a custom or a rule to that effect, is the negligence of a fellow-servant for which the Railroad is responsible.

In *Going's Administratrix* vs. *The Norfolk & Western R. R. Co.* (Court of Appeals of Virginia), 119 Va., 543, at 555; S. C., 89 Southeastern 914, it was held that Going, who was a fireman and who was killed while shaking the grates of his engine and to do so was walking backward and forward at right angles at the side of his engine from a space between two tracks from and on to an express track, at a siding where it was the practice to so shake the locomotive, that there was no liability because of the killing of Going, though the

train was running 45 miles an hour, because the engineer kept a *lookout* and blew four times, one mile east of the place Going was killed, the train being a westbound train and inasmuch as Going was going back and forth from the express track to a place of safety between the two tracks, and each time the engineer looked he saw Going in a place of safety.

In *Willever* vs. *The D., L. & W. R. R. Co.,* 99 Atl., 321, at 324, the Court of Errors has laid down for New Jersey the same rule as prevails throughout the Railroad law of the country as follows:

> "We think the present case falls rather within that line of cases illustrated by D'Agostino vs. The Pennsylvania R. R. Co., 72 N. J. Law, 358, 60 Atl., 1113, in the Supreme Court, and Germanus vs. The Lehigh Valley R. R. Co., 74 N. J. Law, 662, 67 Atl., 79, in this Court, both of which hold that, where a system or custom of warning under certain circumstances is established, the employees involved had the right to rely upon such warnings being given, and that failure to give them, resulting in injury, constitutes a cause of action."

In the Southern Ry. Co. vs. Gray, 241 U. S., 333 at 338, Mr. Justice McReynolds delivered the opinion of the Supreme Court of the United States, said:

> "* * * * * * *
>
> "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of Common Law, as interpreted and applied in the Federal Courts. Seaboard Air Line vs. Hor-

ton, 233 U. S., 492; Central Vermont Ry. vs. White, 238 U. S., 507; Great Northern Ry. vs. Wiles, 240 U. S., 444.

"Negligence by the railway company is essential to a recovery; and there is not a *scintilla* of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error * * *."

It is apparent that, in this case, the United States Supreme Court reversed the State courts on what is negligence.

In the Southern Ry. Co. vs. Cook, 226 Federal Reporter, page 1, the Circuit Court of Appeals for the Fourth Circuit *held* that for the death of a section foreman killed by an express train on an open track, first, that the section foreman was entitled to a lookout and a warning and, second, that the jury could find it also negligence that the train had run sixty miles an hour at and past a slow board where the speed limit was thirty miles an hour, and that the killed section foreman was entitled to rely on the speed limit of 30 miles an hour, and to run faster than it at this point, at 60 miles an hour, was negligence.

In the Southern Ry. Co. vs. Smith, 205 Federal Reporter, 360, the Circuit Court of Appeals for the Sixth Circuit said:

"While it is the duty of switchmen in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty independent of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employee who might neglect to protect him-

self, and the extent of such duty is measured by the peculiar circumstances of the case."

This rule is *stare decisis* in the Sixth Circuit. Southern Railway Co. vs. White, 232 Federal Reporter, 144.

By reading the report of the Southern Ry. Co. vs. Smith, supra, it will be found that the Federal Courts have established a common law of torts on this subject for themselves, irrespective as to what may or may not be the rule of the State courts.

But in this case now *sub judice* in this Honorable Court, so far as a case arising under the Federal Employees' Liability Act in this State is concerned, the difference is immaterial, inasmuch as all the cases dovetail, whether in the State courts of New Jersey, or elsewhere in the United States.

In Williver vs. D., L. & W. R. R. Co., 99 Atl. Reporter, 320 at 324, Judge White, in delivering the opinion of the Court of Errors and Appeals, said:

"* * * * * * *

"* * * We do not think the negligence of the defendant employee in failing to comply with the rule established for Williver's safety was one of the dangers he undertook to look out for, and therefore one of the risks he assumed."

Williver's case, as applied to Hansen's case, is parallel in two respects; first, there was a custom to warn employees generally in the yard; second, there was a six mile limit of speed for locomotives in the yard; on both this custom and this rule Hansen had a right to rely; for the failure of the first,

Hansen's Administratrix can charge the defendant road for its negligence; for the failure of the second, she can charge the railroad for fellow servant liability under the Federal Act.

There is no doubt of the right of an employee to charge the master with the duty of lookout and the duty to warn him, when there is a custom so to do, where a rule has been varied from or violated, or where from the nature of his work he cannot look for himself.

In the Illinois Central R. R. Co. vs. Pierce's Admx., Court of Appeals of Kentucky, May, 1917, 194 Southwestern, 534, at 536, the Court of Appeals of Kentucky said:

> "Likewise in the case of employees in themselves charged with the duty of lookout in switching yards and other places where employees in considerable numbers are habitually at work, the Company must in the operation of its trains anticipate that presence and exercise a proportionate care."

And just above the last excerpt quoted, the Court had previously said:

> "In other words the duty of lookouts and signals depends upon what is reasonable care in each case, and that is dependent upon the extent of the use by the public or employees in themselves charged with the duty of lookout; for what is reasonable care at places in the country, where but few persons, whether of the public or employees, use the track, would manifestly be totally inadequate in cities, at public crossings, in switch yards, and other places *where people are frequently upon the tracks.*"

In Illinois Central R. R. Co. vs. Skaggs, 240 U. S., 66, at 69, it is said:

> "It is contended that the State Court erred in permitting a recovery under the Federal Statute for the reason that the injury resulted from Skagg's own act, or from an act in which he participated. The Company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous conditions.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of actions *exclusively his own;* that is, where his injury does not result in whole or in part, from the negligence of any of its officers, agents, or employees of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. April 22, 1908, 35 Stat., 65. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee *participated* in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and if the injury to one employee resulted *'in whole or in part'* from the negligence of its other employees, it is liable under the express terms of the act. That is, the Statute *abolished the fellow servants rule.* If the injury was due to the neglect of a co-employee in the performance of his duty, that neglect must be attributed to the employer and if the injured employee was himself guilty of negligence contributing to the injury, the Statute expressly provides that it shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee."

"Briefly stated, the departure from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer, and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives."

Mondou vs. New York, N. H. & H. R. Co.,
223 U. S. Sup. Ct. Rep., page 346.

Questions for the Jury.

As to whether the defendant's negligence was the causal force of the accident, or whether the plaintiff's own conduct was either the sole cause or contributed to it in part, is a question for the jury, as so held by the Supreme Court of the United States in Illinois Central R. R. Co. vs. Skagg, 240 U. S., 66.

See also cases cited above under negligence.

The factor of contributory negligence co-operating with the negligence of the defendant is merely to reduce the damages, and as such is a question for the jury.

See N. & W. Ry. Co. vs. Ernest, 229 U. S., 114:

> "The purpose of the provision in regard to contributory negligence in the Employers' Liability Act is to abrogate the common law rule or of complete exoneration of the carrier from liability in case of negligence whatever on the part of the employee and to substitute therefor a new rule confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee."

See also Skaggs vs. Illinois R. Co., supra.

Contributory negligence can give no trouble in this case. There was either negligence in the railroad company, or in Clearwater, the servant, for which the railroad company is responsible, or there was not. The jury has found in favor of the Administratrix and its verdict negatives any accusations of *causal* negligence in Hansen. The case

was heard on a rule to show cause before Judge Campbell, in Hudson County (the only tribunal in this State in this cause to hear the question of damages, their sufficiency or insufficiency; Central R. R. Co. of N. J. vs. Tunison, 26 Vroom, 561; Guggenheim Smelting & Refining Co. vs. Flanigan, 34 Vroom, 647), and he ordered a reduction of the verdict; all question of contributory negligence has therefore been settled and merged in to the judgment for the amount as it now stands.

See Skagg case, supra.

"No presumption of negligence upon the part of the decedent arises from the mere occurrence of an accident at a railroad crossing. To justify a non-suit, the contributory negligence of the decedent must clearly appear conclusively as a fact, or by necessary exclusive inference, from the plaintiff's proof."

"Where the evidence, when the plaintiff rests, leaves the contributory negligence of the plaintiff's intestate in doubt, the determination of the question must be submitted to the jury."

Danskin vs. Pennsylvania R. R. Co., 79 N. J. L., 526.

POINT 5.

Hansen, under the facts in the case, assumed no risk which would prevent a recovery for his death; and the question of assumed risk was one for the jury.

Hansen did not assume the risk of an unknown danger, of *any unwarned danger,* nor did he as-

sume the risk of the negligence either of his master or, under the act of Congress, of any fellow-servant. For this latter negligence the master is responsible.

Hansen did not assume any risk of being run down without any lookout being kept for him or a warning being given to him by Clearwater's engine, whether Clearwater's locomotive was not yet around the curve or had come around the curve.

"An employee assumes the risk of such dangers attending the prosecution of his work as he knows, or could discover, by the exercise of ordinary care for his personal safety, and for hurt happening to him from those dangers the employer is not responsible."

Cetola vs. Lehigh Valley R. Co., 99 Atl. Rep., page 310.

"The Trial Court cannot be charged with error in refusing to take the question of the assumption of risk from the jury in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L., 65, Chap. 149. Comp. Stat. 1913, Sec. 8657), unless the evidence tending to show such assumption of risk was clear and from unimpeached witnesses and free from contradiction."

Kanawha & Michigan R'y Co. vs. Krese, Admx., 239 U. S. Sup. Court, Foot, page 448.

"Assumption of risk is ordinarily a question of fact for the jury, depending on whether plaintiff knew or ought to have known the

danger, and, knowing it, appreciated or ought to have appreciated it."

Norton vs. Maine Cent. R. Co., 100 Atl. Rep., 598.

"The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him."

Gila Valley R. Co. vs. Hall, 232 U. S., page 101.

"The 'assumption of risk' of a section gang foreman engaged in interstate commerce in the employ of a common carrier by railroad, whose duty it is to look out for the safety of himself as well as of the men under him, does not include the negligence of his fellow-employees under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. 1913, Sections 8657-8665), in failing to take a precaution or give a warning provided, with his knowledge, to secure his safety by the system adopted by his employer for the operation of the railroad upon which he worked."

Willever vs. D., L. & W. R. Co., 99 Atl. Rep., 321.

"It is insisted that, even conceding the train was operated at a negligent rate of speed, in view of plaintiff's purpose to board it, yet he assumed the risk of injury involved in the attempt. The Act of Congress, by making the carrier liable for an employee's injury 'result-

ing in whole or in part from the negligence of any of the officers, agents or employees' of the carrier, abrogated the common law rule known as the fellow-servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer. At the same time, in saving the defense of assumption of risk in cases other than those where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee (Seaboard Air Line R. Co. vs. Horton, 233 U. S., 492, 502; 58 L. Ed. 1062, 1069; L. R. A. 1915C, 1, 34; Sup. Ct. Rep., 635; Ann. Cas. 1915B, 475; 8 N. C. C. A. 834), the act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk.

"On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent dan-

ger was so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other. (Gila Valley, G. & N. R. Co. vs. Hall, 232 U. S., 94, 101; 58 L. Ed., 521m, 534; 34 Sup. Ct. Rep., 229; Seaboard Air Line R. Co. vs. Horton, 233 U. S., 492, 504; 58 L. Ed., 1062, 1070; L. R. A., 1915C, 1; 34 Sup. Ct. Rep., 635; Ann. Cas. 1915B, 475; 8 N. C. C. A., 834.)"

Chesapeake & Ohio R. Co. vs. De Atley, 241, U. S. Sup. Ct., 310.

"It is insisted that the true test is not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this Court. According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Ibid.

"We are unable to concur in the view that there was no question for the jury. Whether

the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive, and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and the consequent danger to him was so obvious that an ordinarily prudent person in his situation would have realized and appreciated them."

Ibid.

Requests to Charge.

Under Point 3, page 56 of defendant railroad's brief, the only requests which were refused, or charged as modified, are requests 9, 10, 15, 16, 18, 19, additional request 2 and request 20, which it is claimed should have been charged without modification.

The law and the right of defendant to have requests 9, 10, 15 and 16, charged, has already been discussed under Point 3 hereof; request 18 under Point 4, and request 19 under Points 4 and 5; the additional request 2 is covered by Points 3 and 4. Request No. 20, which does not appear on page 303 of the case, appears on page 299, line 5. This request was charged as requested with the addi-

tional language of the Court set out on page 297, line 16. This request is covered by Point 4.

The law and facts relating to all the requests to charge, to which exception was taken, have already been discussed under the various points of this brief. All the requests to charge, which are assigned as error, are covered by the substantive law of the case. Several exceptions were taken to the charge of the Court, by defendant, which have not been assigned as error nor argued in its brief, and being abandoned, will not be considered. The charge of the Court, as an entirety, charged correctly the law of the case.

It is respectfully submitted that the verdict and judgment thereon be sustained.

WELLER & LICHTENSTEIN,
ALEXANDER SIMPSON,
Attorneys for Plaintiff-Respondent.

Federal Employers' Liability Act of 1908.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and if none, then to the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and

if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: PROVIDED, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of

which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: PROVIDED, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. (As amended April 5, 1910.)

Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employees under any other act or acts of Congress, or to affect the prose-

cution of any pending proceeding or right of action under the act of Congress, entitled, 'An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees,' approved June 11, 1906.

Approved April 22, 1908."

(This addenda does not include several amendments to Act of 1908 not necessary to decision of this case.)

New Jersey Court of Errors and Appeals

ROSE HANSEN, Administratrix, Plaintiff-Respondent, vs. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant-Appellant.	On Appeal.

BRIEF OF PLAINTIFF-RESPONDENT.

This action was brought under the Federal Employers' Liability Act of April 22, 1908 (a copy of which is annexed to this brief), governing the relation of carriers and employees engaged in interstate commerce.

Decedent was a locomotive fireman on an engine which throughout the testimony has been called a "pick-up," engaged in interstate commerce between the states of New York and New Jersey. There is no dispute that both the deceased, Hansen, and the defendant Railroad Company were engaged in interstate commerce in the operation of this train, the dispute in the case, among other things, being whether deceased was engaged in interstate commerce at the time and place of the accident causing his death.

He was killed on Sunday, August 3, 1913, at about noon, under the following circumstances: On Saturday evening, August 2nd, he returned

from his regular run, went home, and shortly after eleven o'clock on Sunday morning took certain keys which he had in his working trousers, and informed his wife just before leaving the house, that he was going to the round-house where an engine called a "pony engine" was standing, for the purpose of taking his tools therefrom and placing them on the "pick-up" engine, which was scheduled to leave with him in interstate commerce the following morning at 3:45 o'clock, and also to get his dirty overalls to bring home to be washed. He had worked on this "pony engine" for some time before it was sent to a repair shop, and thereafter was put to work on the "pick-up" engine. Hansen took these keys to go to the "pony engine" to get his tools, it appearing that at that time there was a scarcity of firemen's tools in the yard. While walking through the railroad yards on his way to the round-house, he was struck by an engine, which ran him down, without any signal or warning, and without having a look-out thereon.

A verdict was rendered in his favor for $20,000, which was reduced by the Trial Court to $16,500.

POINT 1.

VARIANCE.

Error is assigned and insisited on as being reversible error, in that the defendant railroad says, there is a variance in the facts proven before the jury and the allegations of the complainant.

The complaint is at *pages* 1-6 of the State of Case. The criticism of the complaint as being insufficient to allow the facts proven to go to the jury

is found on pages 24 to 29 inclusive of the defendant railroad's brief, especially at pages 24 and 25 thereof.

By a perusal of the complaint it will be found to contain as a minimum, so far as is necessary to be set out to argue this point, the following allegations, which are virtually omnibus in character.

Paragraph 1. On August 3rd, 1913, prior thereto and since then, at Granton, in Hudson County, and elsewhere in the State of New Jersey and in the State of New York, the defendant company was a common carrier by railway engaged in interstate commerce.

Paragraph 2. That among other servants and operatives, the decedent, Hansen, was employed by the defendant railroad as a locomotive fireman to fire a locomotive on a freight train between points in the States of New Jersey and New York, and as such he was engaged in interstate commerce, and the injuries suffered by Hansen were received by him while he was so employed in interstate commerce.

Paragraphs 3 *and* 4, read respectively as follows:

Paragraph 3. "The employment of the plaintiff's intestate as such fireman was exceedingly dangerous and hazardous, if he was not provided with a reasonably safe place in which to perform his said work, and such place was not carefully and properly inspected, protected and guarded * * * if the cars and engines of said defendant were not properly manned, and a man was not kept on the rear end of engines and tenders while they were running backwards, if cars and engines were not run at a moderate rate of speed in the yards of said defendant and if the plaintiff's intestate was not warned of the approach of such

cars and engines and it * * * was the duty of the defendant to * * * provide and maintain a reasonably safe place for its employees, and more especially the plaintiff's intestate to perform the duties required of him by the said defendant, and when he was employed upon the tracks of said defendant company, to warn him of the approach of all cars and engines on said track so that he might not be subjected and exposed to unnecessary risks, dangers and hazards of life and bodily peril, not contemplated by his employment, to properly man said cars and engines, and at all times to keep a man on the rear end of such cars and engines and ring a bell when they were running backwards, and not to run backwards in the yard of said company at a greater rate of speed than 6 miles an hour."

Paragraph 4. "Defendant * * * did not provide sound, safe and indefective engines, cars, tracks, rails, road-beds, tools and appliances; did not provide a reasonable safe place for its employees and more especially the plaintiff's intestate to perform the work required of him as such fireman; did not keep the cars and engines of said defendant properly manned, did not keep a man on the rear end of its engines and cars while running backwards, did not ring a bell when running backwards in accordance with the rules of said company, did not warn the plaintiff's intestate of the approach of cars and engines, and thereby the plaintiff's intestate was subjected and exposed to extreme and unnecessary dangers of life and bodily peril, not required nor contemplated by his said employment, and there, while he was so employed in such commerce as such fireman at the place aforesaid, and while said defendant was such common carrier and engaged in commerce between the

aforesaid States, and while the plaintiff's intestate was engaged in such work of firing and caring for his engine over the tracks and road-bed of the defendant used in such commerce as aforesaid, and while he was engaged in removing tools from one engine to another, to be used in caring for his engine used in such commerce, and by reason of the unsound, unsafe and defective condition of the engines, cars, tracks, road-beds, tools and appliances, which had been allowed to be and remain out of order for a long space of time, and by reason of the unsafe place furnished by the defendant in which the plaintiff's intestate was required to perform his work, and by reason of the defendant failing and neglecting to guard said plaintiff's intestate, and warn him of the approach of all trains and engines that might pass over said track while he was lawfully employed thereon, and just after the plaintiff's intestate had stepped from an engine to one of the tracks of said defendant, an engine running backwards in a northerly direction over one of said tracks at a high and dangerous rate of speed, without ringing any bell, and improperly manned, there being only one of the crew thereon, and no man on the rear of said engine and tender, ran foul of and struck against said plaintiff's intestate, whereby he was knocked down to and upon the ground, and run over and killed by said engine, on said 3rd day of August, 1913. * * *"

Defendant contends (brief, page 25) that the case attempted to be made by the proofs is "*radically* different from that set out in the complaint, both in place and circumstances," because:

1. Plaintiff's intestate was not firing or caring for his engine.

2. He was not removing the tools from one engine to another.

3. He had not just stepped from the engine to the tracks of the defendant.

The complaint did not limit the place of the accident to any particular spot in the yard. The only conceivable variance between the proof and the allegations of the complaint is that, at the time of his death he was not actually firing his engine and did not have some tools in his hands or upon his person, and that he did not actually *alight from* a locomotive to the tracks of the defendant. Using words in their strictest sense, this is the only microscopic difference which can be charged against the complaint. Plaintiff attempts to give the language of the complaint, a very strict construction and disregards the general form and allegations of the complaint. The language of the complaint does not bear out the construction that it was intended to charge, that plaintiff, at the time of his death, was actually firing an engine or in the act of handling tools, but rather that at the time of the accident plaintiff was in the general employ of the defendant, charged with the duty of firing and caring for one of its engines, and to remove tools from one engine to another. Nor does it bear out the construction that when the complaint charged plaintiff stepped from an engine to the track that the term "stepped" was used in the sense that plaintiff alighted from an engine to the track.

In Paragraph 4 of the complaint the words "so," "such," "and while" and "in" clearly show that the dereliction of duty charged to the railroad covers Hansen's rights as to his entire course of employment and gives notice of it.

Nor can it be said that the Railroad Company in making their defense was surprised. At the time of the accident every witness called by the plaintiff (save the widow and Miss Tucker) were railroad employees, and with the exception of Holt, continued to be and were still the employees of the Railroad Company at the time of the trial. Clearwater, the engineer of the locomotive which ran Hansen down, had died before the trial.

At page 276 of the State of Case, during the argument as to whether the case should go to the jury, or a verdict directed in favor of the defendant Railroad Company, an offer was made to file an amended complaint, to which the Counsel for the Railroad Company objected.

In making his objections and taking his exceptions because of this alleged variance, at no time and place in this three day trial did Counsel for the Defendant Company claim that either he or it was surprised at the facts as proven. *All the witnesses as to the facts and circumstances of the accident were railroad* men in the Company's employ. The facts of the case were brought out in their entirety and with completeness full to overflowing. It is respectfully submitted that there was no surprise occasioned to the defendant by this microscopic difference; there was no occasion for surprise; the company according to Kathan's testimony made no effort to produce a bunch of keys to the pony engine, which, when produced, it was claimed would have entirely destroyed the efficiency of Hansen's declaration to his wife as to why he was going this Sunday to the railroad yard (page 273).

Surely, under all these circumstances, there is not the slightest hint even that the railroad was surprised, or as to the slightest circumstance that the Railroad Company was put in a position,

where it could not with ease produce every detail of evidence to substantiate every defense available to it to meet the case proved by the plaintiff, on the contrary the case was fully tried on the theory of plaintiff's case as made out by her.

In addition to the authorities cited on the Defendant Railroad Company's brief, the following authorities sustain the principle that there can be no reversal on this ground of alleged error.

Hallock vs. The Insurance Co., 26 N. J. Law, 268.
Belleville Stone Co. vs. Mooney, 60 N. J. Law, 323.
Jordan vs. Moore, 77 N. J. Law, 584.
Price vs. The N. J. R. R. & Transportation Co., 2 Vroom, 229.
Ware vs. Millville Fire Insurance Co., 16 Vroom, 177.
American Life Ins. Co. vs. Day, 39 N. J. L., 89.

"The power of amendment extends to this Court, and, where the issue has been fairly tried and no injury has been done to the party complaining, it is incumbent on this court in the interest of justice to exercise the power."

Van Houton vs. Van Houton, 98 Atl., 251.

POINT 2.

The admissibility of Hansen's declarations.

Grounds of Appeal Numbers 2 and 5, on pages 17, 18 and 19 of the State of Case, raise the question as to the admissibility of the declaration made

by the decedent at the time he left his house Sunday morning, the last time before his death, as to where he was going and why he was going there. His words to his wife (pages 110, 111, 112 to 116 inclusive) were as follows:

> "I am going up to the Round House and take the tools off of Number 25 to put on the pick-up—and to get my dirty overalls off—out of the locker, to bring home."

On pages 109, ll. 32 and 33, the testimony fixing the time of Declaration is as follows:

> "Q. What did he say as he left the house? A. He was going up to the Round House."

The declaration as to his intentions as to where he was going and the purpose of his trip were made when he left the house, and immediately following this statement to his wife he went away. The next that his wife knew of him was that, within about an hour, he had been killed in the railroad yard. On page 18 of the Defendant Railroad's brief, the statement is made that, "the trial court erred in admitting in evidence Mr. Hansen's statement to Mr. Kathan and to Mrs. Hansen. Defendant's motion to strike out these statements should have been allowed and the request to charge with respect thereto should have been granted."

Then follows in the Defendant Railroad's brief several pages of discussion of the Railroad's contention in this regard.

The leading case in New Jersey as to the admissibility and the clear legal right to offer in evidence such a statement made by decedent prior to his death as to his intentions, of the destination

of his journey, and the purpose of it, is *Hunter* vs. *The State,* 40 N. J. Law, 495. *Wigmore on Evidence,* Sec. 1725, also sustains the proposition that such a declaration is part of the *res gestae* as does also Fromme vs. Dennis, 45 N. J. L., 515. In *Padgett* vs. *The Seaboard Air Line Railway Co.,* in 83 Southeastern Reporter, 632, it was urged as error before the Supreme Court of South Carolina that there was no such declaration from the decedent Padgett in the testimony. The Supreme Court of South Carolina, however, said that it was unfair to raise the question on appeal in that court, inasmuch as it had not been admitted in evidence at the trial of the case before the jury because the Railroad Company itself had objected to its admission. This case of *Padgett* vs. *The Seaboard Air Line Railway* was sustained by the Supreme Court of the United States in 236 U. S., 668. In this case it was assumed by the attorneys in all the Courts, except the attorneys of the railroad, that such a declaration was legal, and all the courts impliedly held the same way. In a note in L. R. A., 1915-d, at page 504, there are cited the following decisions sustaining the admission into evidence by the trial court, in Hansen's case now *sub judice,* of this declaration as to where Hansen was going and why Hansen was leaving his house that Sunday morning.

Chicago & Eastern Illinois Railroad Co. vs. *Chancellor,* 165 Ill., 438; s. c. 46 North Eastern Reporter, 269.

Lake Shore & Michigan Southern Railway Co. vs. *Herrick,* 49 Ohio State, 25; s. c. 29 North Eastern Reporter, 1052.

Central of Georgia Railway Co. vs. *Bell* (Supreme Court of Alabama), 65 Southern, 835,

which last case quotes from *Kilgore* vs. *Stanley*, 90 Ala., 523, s. c. 8 Southern, 130, wherein the Court said:

> "What a person says on setting out on a journey, or to go to a particular place, explanatory of the object he has in view in so setting out, is res gestae evidence, and may be proven; and the jury may give it such weight as they think it entitled to."

Baltimore & Ohio Railroad Co. vs. *The State*, 81 Maryland, 371, s. c., 32 Atlantic Reporter, 201.

This case from Maryland quotes *Greenleaf on Evidence*, Vol. 1, Sec. 108.

In *Denver & Rio Grande Railroad Co.* vs. *Spencer*, 25 Colorado, page 9; s. c. 52 Pacific Reporter, 211, the declaration that deceased was going to meet his daughter in law at a depot at the time he was killed by a train, was admitted, it having been made several days previously. The Colorado case quotes *Wharton on Evidence*, Sec. 259. See also, *Inness* vs. *The Boston, etc., Railway Co.*, 168 Mass., 433; s. c. 47 North Eastern 193; *Cincinnati, etc., Railroad Co.* vs. *Howard*, 124 Ind., 280; s. c. 24 North Eastern 892. Quotations from the above cases will be found in this note to the L. R. A. 1915d., at page 504, etc.

Declaration of Decedent.

Sustained as legal to prove intent, viz., that it had been his purpose to contribute to his mother's support.

Boyle, Admr. vs. *Columbia Fire Proofing Co.*, 182 Mass., 93; s. c. 64 N. E. Rep., 726.

In *Lloyd* vs. *Powell-Duffryn Steam Coal Co.* (1914), 7 B. W. C., 330, the House of Lords held that it was not hearsay evidence, but primary evidence, where the witnesses testified to the fact that the decedent had said he intended to marry a certain woman, whom he had made pregnant, and to support her unborn illegitimate child. In these last two decisions there was no possibility of following up the saying by any doing—the declaration by any subsequent conduct prior to the death of the maker of the declaration. Hansen *followed through* his declared intention to within several hundred feet of his destination, viz., the pony engine stalled near the round house, and at no time did he turn back or turn away from his intended destination, or do or say anything inconsistent with what he said to his wife. He had the keys to the tool box with him, at the time of his death (page 207, line 32). The Railroad produced no evidence —whether other keys, the lock of the tool box, or testimony to disprove that Hansen's bunch of keys would not have unlocked the cabin or tool box on the pony engine.

On the morning of his death Hansen took the keys in question from his working clothes, and said to his wife where and why he was going away from his home Sunday morning (pages 108-110). The next we hear of Hansen was that he was at the Railroad Y. M. C. A. at the Railroad Yards, that he there talked to Smith (page 68) and walked down the path and across the track with Smith. Then he had a conversation with Kathan (page 43), saying that he was going to the round house for his overalls. Kathan's statement as to Hansen's declaration is entirely consistent with the statement which Hansen made to his wife. Kathan had been the engineer on the pony engine to which

Hansen was going for tools (page 34) and in all probabilities he intended to talk with his superior regarding the engine tools and his taking them away. Hansen then continued his journey in the direction of the round house and pony engine and was killed by Clearwater's engine coming toward him from the rear. When on the porch of the Y. M. C. A. (page 149) Hansen asked Smith if he was going up to the round house, and Smith told him yes, and Hansen said wait a minute, "I'll go with you," and they walked off together in the direction of the round house (page 149). There cannot be any doubt that Hansen *followed through* his declared intention of going to the railroad yards, the round house and pony engine, and he accomplished that intention, so far as he could. When killed he was walking to the round house and he was nearly there. No wish of his prevented the accomplishment of his declared purpose. He talked to Kathan a couple of minutes and when Kathan's engine started up with Smith as fireman again on it, *Hansen continued on in the direction of the round house.* Assuredly, as far as Hansen had it in his power to do, he accomplished his determination of going to the round house, except by only a few hundred feet, and the testimony of Holt certainly shows that his declared purpose of getting tools from the pony engine besides getting his overalls at the round house was something that was not only at that time in the yard a purpose generally pursued and many times accomplished by engineers and firemen in general, but was a most natural one for Hansen, especially as he had had a quarrel with Holt, about a week before his death, over the poor quality of the tools, there being an insufficiency at that time in this yard of good tools, which was not remedied until after the death of Hansen.

The witness, Holt, who was the tool boy in the round house, testified, among other things, that it was the custom of the firemen on occasions to help themselves in getting small tools (page 251); that at the time of Hansen's death there was a shortage of small tools and they had very few good ones (page 252); that about a week before Hansen's death witness had a quarrel with Hansen relative to the quality of a hammer which he had given to Hansen and which Hansen refused to take (page 254, line 10); that it was the practice of engineers and firemen to try to keep possession of their small tools by locking them up (page 254); that there was a shortage of tools on August 3, 1913—the date of Hansen's death—(page 259, line 35; page 260; line 1), and that the shortage of proper tools was not made good until after the death of Hansen (page 263, line 35; 264, line 21).

On page 19 of defendant Railroad Company's brief, it is admitted that it is the law of this state that provable acts material to the issue, which tend to explain or give legal character to the acts, are admissible. Some of the provable acts material to the issue were that Hansen took the keys the morning of his death from his own clothes just prior to his leaving the house; that he left the house immediately after making the alleged erroneously admitted statement to his wife; that he went to the Railroad Y. M. C. A. building, at which place one of the accustomed paths to the round house and pony engine began; that he proceeded along this path in the direction of the round house with Kathan's fireman, who was also going to the round house for the purpose of picking up his engine; that Hansen stopped and talked to Engineer Kathan, who was the engineer on the pony engine with Hansen before it was laid up and on which engine it was contended that Hansen had small tools and that the jury might in-

fer from this fact that Hansen's purpose or intention was to speak to Kathan about the pony engine and his tools, in view of the fact that Kathan testified that he had removed certain tools from the pony engine (page 248); that after speaking to Kathan, Hansen started back in the direction of the path and round house.

All of these acts were not only material to the issue, but tended to explain and give legal character to these acts.

The communications by Hansen to his wife and by Hansen to Kathan were directly connected with the acts of the deceased from the time he took the keys from his pocket until the time of his death, and as was said by Chief Justice Beasley in the Hunter case, the declaration is to be "in a reasonable sense part of such acts" (page 536) and "the declaration and act must make up one transaction. The theory justifying this cause is that, when such declarations are thus coupled with a provable act, they receive confirmation from it * * *" (page 537).

Defendant Railroad argues (page 20, brief), not so much that these acts are not provable in support of the declaration, but rather that inasmuch as Hansen was on his way to the round house by way of the path instead of the turnpike there was "a departure" from his declaration.

It is also stated in this connection (page 21) that "the only way to reach the round house was by way of the turnpike." This statement is incorrect.

The witness Smith, Kathan's fireman (page 56, line 40), as well as other witnesses, testified that there were two ways to get to the round house, habitually used by the employees, one by way of the Plankroad and the other by way of the Y. M. C. A. Building by way of the path over which he

and Hansen were proceeding just before Hansen's death.

> "The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of that fact, as his own testimony that he then had that intention would be. After his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

Mutual Life Ins. Co. vs. Hillmon, 145 U. S. Sup. Ct. Rep., 295.

Again it is said by defendant (page 21, Brief) that when Hansen left the path to talk to Kathan he departed from the intention expressed in his declaration and that it was not an act performed pursuant to his declaration and, therefore, the declarations could in no way characterize the act or the act support the declaration.

It is impossible to conceive how it can be said that merely because he walked a few paces from the beaten path that thereby he departed from the intention expressed in his declaration, that he was going to get his tools from the pony engine, etc., nor can it be said, *as a matter of law*, that his speaking to Kathan was not an act performed pursuant to his declaration. This would be a jury question if it were necessary to be considered at all.

As already stated, Kathan had been the engineer on the pony engine when Hansen was his fireman thereon. Hansen had, *or claimed to have,* tools on this pony engine which were used by him in his interstate runs. He wanted these tools to be used on his pick-up engine, because it was the custom of some, presumably careful firemen, to provide themselves with tools, and inasmuch as there was frequently a scarcity of tools, some firemen, therefore kept a set permanently rather than turn them over to the tool boy at the end of each run, thus avoiding the risk of getting no tools, improper tools, or tools in time for the train to start. It was a perfectly natural thing for him to speak to the former engineer of the very train from which he was going to get his tools, particularly in view of the fact that the engineer is the person in charge of the train, and Kathan claimed to have been on the engine after it was returned from the repair shop and removed his tools (page 248). It would be a question for the jury to say, if it was necessary so to do, whether Hansen, in talking to Kathan, rather than having temporarily diverted or deviated from the beaten path, did not actually speak or intend to talk to his former superior relative to his tools on the pony engine.

Defendant further says (page 21, Brief) that the act of crossing the track resulted in Hansen's death and that this act was not performed pursuant to his declaration and hence the declaration could not characterize the act. At the time he was struck he had left Kathan and was on his way, *walking in the direction of the pony engine and round house,* and would have come back to the beaten path before getting there. His walking, therefore, towards the beaten path, the round house and pony engine was, therefore, in fact, an act performed pursuant to his declaration and incidental to interstate commerce,

which declaration did characterize the act, in which he was engaged, at the time he was killed, and his act in so walking does support the declaration in the light of the cases cited.

In Bumsted vs. Mo. Pac. R. R. Co., 162 Pac. Rep., 347, which is cited on page 51 of defendant's brief, plaintiff, a freight conductor, after his run was completed, went to bed in a caboose. Before his work began and while he was dressing, the caboose was run into by a train of cars. At the time he was injured he had *not as yet commenced to do any work for his master* and a recovery was not allowed. The Court said:

> "The collision occurred, not while he was *momentarily or temporarily diverted* from the duties of his employment, but *before* the performance of such duties had begun."

It will be seen in this case the Court recognizes the principle of law that if a person momentarily or temporarily diverts from the duties of his employment it does not follow that he is not entitled to recovery.

In Graber vs. Duluth, etc., R. Co., 150 N. W., 489 (Wis.), a brakeman had finished his regular duties after a run between two State points on a train which had some interstate cars. He had then gone to a saloon and from there started to cross over a train to go to the station in order to see if the conductor had any further orders for him. He was injured while crossing the track. Held, that he was employed in interstate commerce.

In the Zackary cases, 232 U. S., at page 260, Justice Pitney said:

> "Again, it is said that because deceased had left his engine and was going to his boarding

house, he was engaged upon a personal errand, and not upon the carrier's business. Assuming (what is not clear) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the locomotive engine. See Missouri, K. & T. R. Co. vs. United States, 231 U. S., 112, 119, ante, 144, 147, 34 Sup. Ct. Rep., 26.

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

In the Bumsted case a recovery was not allowed because plaintiff had not commenced to do his master's work while dressing in the caboose; the facts in that case put Bumsted in the same position that Hansen would be in if he had been injured while dressing in his own home after he had made up his mind to go to work.

In the Graber case plaintiff was held to be employed in interstate commerce upon the theory that although he had finished his regular duties and had diverted by going to a saloon, still inasmuch as he was *on his way* from the saloon to defendant's sta-

tion, for the purpose of doing an act in furtherance of interstate commerce, he was entitled to recover.

So in the case before the Court, Hansen came into the railroad yards of the defendant for the purpose of doing an act in furtherance of interstate commerce, and the fact that he momentarily diverted, if it can be so considered, would be immaterial in view of his having again started on his mission. It would appear that the least that can be said is that it was a jury question as in the Zackary case.

Again on page 22 of defendant's brief it is said that "interstate commerce consists in acts and not in intentions." According to this standard and test of evidence no recovery would have been granted to Zachary in coming back to but not yet reaching his engine, or to Whitacre searching for a tool boy to give him a tin cup to take with him on his run from Cumberland into West Virginia, or to Tucker when he had been called by the call boy to go out on a run, and when he was hit prior to his crossing the yard to where his engine was stalled for the night; or to Padgett preparing for his run, or to Graber coming upon railroad premises from a saloon. Most of these are cases that were decided by the Supreme Court of the United States, and as such they are controlling and ultimate final authority in interpreting the Federal Act.

Graber vs. Duluth, etc., R. Co., 150 N. W., 489.

Central Vermont Railway Co. vs. White, 238 U. S., 507.

North Carolina R. R. Co. vs. Zachary, 232 U. S., 260.

B. & O. R. R. Co. vs. Whitacre, 124 Maryland, 411.

S. C., 92 Atlantic, 1060.

S. C. affirmed by U. S. Supreme Court, 242 U. S., Nov. 4, 1916.

Phila., B. & Washington R. R. Co. vs. Tucker, 35 D. C. Appeals, 123.
S. C. affirmed by U. S. Supreme Court, 220 U. S., 608.
Padgett vs. S. A. L. Ry. Co., 83 S. E., 632.
S. C., 236 U. S., 668.

POINT 3.

Plaintiff's intestate and the defendant were engaged in interstate commerce, bringing the case within the act of Congress.

For three weeks prior to Sunday, August 3rd, Hansen had been continuously employed as a fireman on one of defendant's locomotives, known as a "pick up," running between Weehawken, New Jersey, and Kingston, New York. Hansen came in on his last trip at 6:30 Saturday evening, August 2nd, and although he had a regular run the engine was likely to be changed from time to time (page 47, lines 10 to 30; page 53, line 1). It was the duty of Hansen to register not later than 3:40 on Monday morning in order to have his engine ready to leave at 4:45 from Weehawken, to go on his regular run to Kingston (Page 54, line 30). Hansen was to go out with engineer Griffin on this "pick up" run to Kingston on Monday morning (page 48, line 18).

According to the railroad system, men who were not actually working would report their whereabouts at the roundhouse so that they could be found when needed in case there was a short call, or a call during his absence from home. According to this system if a man left his home he would give notice to the Railroad where he could be found (page 121, lines 35 to 20; page 122). Hansen ob-

served this rule and after taking eight hours' rest, if he left his home, he always notified the round house where he could be found to take care of short calls. He never failed in this duty (page 112, line 20).

Small tools, such as monkey wrench, chisel and hammer, are put on engines in addition to the firing tools, such as a hook, rake and shovel. Small tools are used for the purpose of making light repairs.

> "Q. What is the monkey wrench and chisel and hammer put on the engine for? A. In case they break down, if it was a light repair they could make it and proceed" (page 206, line 15).
>
> "Q. When you say 'they could make it,' you meant the engineer? A. Engineer and *fireman.*
>
> Q. Engineer and firemen, eh? A. Yes" (page 206, line 30).

Hansen was studying to be an engineer and had passed several of his tests. After the firemen passed their examinations they became engineers (page 78, line 30).

It was the custom, among other things, for the firemen to assist the engineer in making repairs if the engine broke down and to give such assistance with tools to the engineer with reference to repairs as he, the engineer, desired (page 29, line 18), and for firemen to fill the lubricating cups on engines by the use of a monkey wrench (page 256, line 20), and tighten up joints to prevent the escape of steam (page 262, line 30, etc.).

Fireman Smith testified that a fireman had to pass an examination in mechanics, on the repair of engines and the use of tools, such as monkey wrench, hammer and chisel (page 165, line 25;

page 167, line 30) ; that these small tools were used by the engineer to fill lubricators, to tighten up nuts, etc. (page 170, line 20).

Prior to 1910 no provision or regulation was made by the Railroad for the placing of "supplies" on the engine by anyone in particular. All supplies, including tools, were placed on the engine by the engineer or fireman (page 230, line 30). Firemen were in the habit of getting small tools for the engine in order to get away on time (page 231, line 30). If the tool boy was not around he would get the tools himself (page 232, line 10); but in 1910 an agreement was entered into between the Railroad and its employees (Ex. D. 3, page 306), under which the Company agreed to "have *supplies* placed on *engines where practicable and consistent to do so,*" and it is contended by defendant that in view of this agreement no duty rested upon the firemen to provide the engine or himself with tools, and hence Hansen at the time he was killed was not acting within the scope of his employment, nor performing any duty he owed to the defendant.

No rule or regulation existed prohibiting firemen from looking after or securing the tools necessary for the proper carrying out of their duties, nor any rule specifying what the duties of the firemen were with reference to tools (page 204, line 20; page 205, line 35), *nor was there any rule prohibiting employees being in the yard at any time.*

It is undisputed that prior to the agreement "D. 3" firemen were always in the habit of selecting tools, such as hammers, chisels, wrenches, etc. for use on their engines.

It will be observed that under this agreement the fireman is not prohibited from securing his necessary tools nor does the company agree to have

supplies placed on engines under all conditions, but only where *practicable* and *consistent* to do so. In other words, if tools are not placed on the engine of course the fireman and engineer could not leave their engine stand and refuse to proceed with their run, but would be obliged to secure these tools themselves as theretofore. Even after the date of this agreement, the assistant foreman of the round house (page 204, line 25), testified, it was the duty of the fireman to see that proper tools were on the engine and if they were not placed on the engine by the tool boy, firemen would get off and get the tools themselves and that the small tools were used by the engineer and firemen in making ordinary repairs (page 206, line 15, etc.). Sometimes it was necessary for firemen to use small tools to scrape or repair a shovel (page 213, line 10). If an engineer went out without proper tools he would be suspended (page 218, line 25).

It is apparent from the record that lack of small tools and proper ones was rather chronic with the Railroad Company for sometime prior to Hansen's death, and although the company had a tool boy to take tools off engines as they came in from their runs and to place them on engines before departure, still the employees endeavored to keep their small tools in order to avoid constant changes and the possibility of their receiving inferior tools, or no tools at all, in time to get away on schedule. Some of the employees had boxes in which they kept their tools under lock and key. Kathan, Hansen's engineer on the pony engine, had such a tool box which he carried around from engine to engine (page 100, line 30, etc.; page 101, line 5). Some careful and discriminating engineers carried their own kit of tools, consisting of a hammer, monkey

wrench and chisel (page 102, line 2), whereas others, such as the witness Griffin, Hansen's engineer on the pick up had no tool box of his own but was satisfied with indiscriminate tools thrown on his engine by the tool boy before departure (page 212, line 5).

James Holt, the tool boy at the round house in Granton at the time Hansen was killed, and for three or four months prior thereto, testified that during that period it was the practice of firemen to get their own small tools to put on the engine.

"A. They would sometimes, if I happened to be behind, they would come up and help themselves sometimes, and sometimes they would ask me, according to how big a hurry they happened to be.

Q. And at about the period of his death did you have enough of these small tools or was there a shortage of tools? A. Well, we were kind of short.

Q. What do you mean by kind of short? A. Well, didn't have very good ones—very many.

Q. What would that result in before his death—how would the firemen act about his tools, what would they do about tools? (Interruption.)

Q. Small tools? (Interruption.)

Q. Monkey wrenches, hammers and chisels? A. They would come and ask me for them.

Q. If you went out what would they do; how would they get them? A. Well, they go and look for them themselves.

Q. What happened when you come back? A. They would be gone.

Q. Your small tools would be gone? A. Yes" (page 251, line 32; pages 253, 254).

He then proceeds to tell of an altercation with Hansen with reference to some small tools which Hansen desired.

"Did you have a discussion with him (Hansen) about the condition of a hammer when Carpenter was on the engine before his death? A. Yes.

Q. How long before he was killed did this thing take place? A. About a week.

Q. What occurred between you and him? A. Why, the hammer I gave him wasn't much good, had a poor handle into it, and he started hollering at me about it, and of course we got into an argument about it and I got up on the engine and the engineer parted us.

Q. What was the matter with the hammer that you had given him? A. The handle wasn't no good into it.

Q. Why did you give him that kind of himmer that was no good? A. Didn't have much—didn't have no—many good ones" (page 253, line 20 etc.; page 254).

"Q. A fireman didn't come to you to report tools lacking, did they? A. Sometimes.

Q. Sometimes? A. Yes, sir.

Q. If some of their tools were lacking the fireman came to you? A. Sometimes the fireman would come when the engineer's tools were not there.

Q. Came for the engineer? A. No; the fireman lots of times would come for the engineer's tools, say they were missing, and lots of times came to me—*he would be on the engine first and see what was missing*" (page 259, line 25, etc.).

On cross examination he said:

"Q. *Now do you know of your own knowledge whether there was any shortage of tools for the engines that were going out on August* 3, 1913? A. *I am quite sure there was.*

Q. *Well, what was the shortage?* A. *On hooks and scoops. On hooks and scoops and hammers, we most always was short of.*

Q. *You don't know whether on the second or third of August there was any shortage on engines that were to go out on the pick-up train?*

A. *I know there was a shortage on hammers*" (page 259, line 37; page 260, line 1, etc.).

He then proceeds to say that at the time he had the trouble with Hansen he got him a hammer but it was not as good as it should have been, because he had none better (page 260, line 30):

"Q. How long was it according to your memory before that shortage was made good after you had the argument; was it a week or two weeks or three weeks; how long was it?

A. I think it was around a week" (page 263, line 35).

"Q. What is your best memory on it? You remember the man being killed and you remember the tools coming in; was it after he was killed or when was it?

A. I can't say exactly when it was.

Q. What is your best judgment?

A. *Afterwards*—my best judgment" (page 264, line 15).

On page 266 at line 30 he states that if he did not have the tools in the tool car, he would go to the store room and often there were no tools in the

store room and he would scrape up what he could find and give the firemen the best he had.

> "Q. Where would you go for them then?
> A. Run around in the round house and see if I can find any there, pick them up wherever I could find them."

The witness complained to the foreman about the shortage and on occasions because of lack of tools the engine would go out late (page 267, line 30).

From the testimony as above recited, it will be seen that firemen were under an obligation to the Railroad Company to see to it that proper firing and small tools were upon their engines preparatory to leaving on their runs; or at least that tools were necessary and customarily used by them; that although a tool boy was provided to place tools upon engines under certain conditions, the firemen were still charged with the duty of seeing to it that the tools were actually there, and if the tools were not there to place them on the engines themselves; that up to the time of Hansen's death it had been the custom of firemen to look after this work; that there was a scarcity of small tools, often preventing trains leaving on time and that Hansen knew this; that about a week before his death Hansen had had an altercation relative to tools and that there was a scarcity and lack of tools on the day of Hansen's death.

Such being the condition of affairs at the yard of the defendant company, we find that after Hansen returned from his interstate trip on Saturday night, that he returned home, took his regular sleep and the following morning, Sunday, at eleven o'clock, he took a bunch of keys out of his working clothes (page 108, line 38), spoke to his wife and

told her that he was going to the round house to take his tools from number 25 (the pony engine) to put on his pick-up engine and to get his dirty overalls out of the locker to bring home for the purpose of being washed (page 110, line 12).

From the statement made to his wife relative to his possession or the presence of tools on the pony engine, it was a question of fact for the jury to determine whether Hansen actually had tools thereon, or that he had tools there which he intended to and could be used by him on his run the next morning, which tools on said train would have been in furtherance of his work in interstate commerce. In fact it would not be necessary to prove that there were any tools on the engine, provided Mr. Hansen at the time had reason to believe or thought such tools were there, and the jury could, from the declaration made by him to his wife, infer that it was his intention to go to the pony-engine to get tools which he thought were there, or ought to be there.

In Hillmon vs. Mutual Life Ins. Co., 145 U. S., page 295 hereafter again cited, the Court in commenting upon testimony of this character stated that such testimony "precluded a suspicion of misrepresentation." But there was ample evidence in the case to go to the jury on the question whether tools of Hansen were actually on the pony-engine.

The witness McCartney stated, that there were two boxes on the side of the pony-engine and that there were brass keys used to open the locks on these boxes (page 88, line 38). When shown the keys which were offered in evidence, being the same keys which were taken by Mr. Hansen from his trousers, on the morning of his death, and which were found on his body and returned to his widow,

he stated that one of the keys looked something like the keys to the pony-engine (page 91, line 30).

> "Q. Something on that order? And the keys that did resemble, what did they open on the pony-engine? A. Why the tool boxes on the tank" (page 92, line 10, etc.).

The tools in this box on the pony-engine consisted of a hammer, chisel and monkey wrench, and were used in making repairs on the engine (page 93, line 18).

The keys to the locks on the pony-engine were used by everybody that had anything to do with the engine, including the engineer and fireman.

> "Q. The firemen used them to get into the tool box? A. Yes, sir.
>
> Q. When? A. Whenever he wanted to get in there before going out or on coming in" (page 94, line 28).

The testimony of Kathan, the former engineer on the pony-engine does not negative the presence of tools of Hansen thereon on the 3rd of August, 1913, or at any other time. What he stated was that there were tool boxes on the engine and that oil cans were kept by the firemen in them (page 26, line 28, etc.). That there were hammers and chisels in the tool boxes, but they belonged to the engineer; that he had a kit of tools on the engine.

On page 37, line 35 he says, that he took everything out of the *house* of the pony-engine and shipped it to Weehawken, so that they could not be spoiled, such as carpets and chairs. Although the witness stated that he had removed everything from the pony-engine and that if there had been anything left he would have told Hansen, still we

find (page 35, line 12) that he sent to Mrs. Hansen for the keys after the pony-engine came back from the shops, long after he had removed everything from the engine, as stated by him, but did not receive them. Was it not a question for the jury to determine whether there was any truth in his statement that he had removed everything from the pony-engine before the accident? Why should he send to Mrs. Hansen for the keys to the pony-engine, after Hansen's death, if there was nothing there to be removed and he was no longer in charge of the pony-engine? This witness would neither admit nor deny that the keys shown to him were the keys to the tool box (page 39, line 35).

Engineer Kathan was recalled (page 273) and when asked whether Mr. Hansen had any tools on the pony-engine, stated:

"No, sir; *not as I know of.*"

He admitted that other keys to the tool box on the pony-engine were at the round-house, and although the question as to the identity of the keys which were found on Hansen's body, and produced in court, were the subject matter of considerable discussion and might have been evidence favorable to defendant, still we find that on the last day of the trial, when Kathan was recalled and admitted that keys were at the round-house which could be compared with the keys in evidence, no excuse was offered for their non-production (page 273, line 35, etc.).

Taking into consideration all the testimony already referred to, relative to the use of tools by engineers, and the testimony as to the keys, we contend that there was ample evidence for the jury to determine that there were tools on the engine at the time of Hansen's death, or that Hansen believed

that they were there and that the keys in his possession were the keys to the tool box on the pony-engine, or the keys to the house of the pony-engine, and that at the time of his death he was on his way to the engine for the purpose of securing these tools to be used in interstate commerce by him.

On leaving his home he went to the Railroad Y. M. C. A. Building, and there meet fireman Smith, as already stated, and from the Y. M. C. A. Building proceeded along the beaten path with Smith until Kathan came along with his engine and picked up Smith. The destination of both Smith and Hansen, at the time they left the Y. M. C. A. building, was the round-house where Smith expected to find Kathan and his engine, and where the pony-engine was (page 149, line 8, etc.).

It is contended by defendant that if Hansen desired to procure tools for the pick-up engine he could not have done so at noon on Sunday, because the pick-up train had no regular engine and he would not know what engine he was to go out on until about the time he registered in at about 3.30 A. M. The record shows that Hansen had a locker in the round-house. He could have put his tools there; he could have put them somewhere in the tool-house; he could have left them somewhere around the yard and close to the round-house; he might have placed them on an engine which he expected to leave on in the morning and might have done one of a hundred things in anticipation of the work he was going to do the following morning. What Hansen was endeavoring to do was to avoid running the risk of getting improper tools, no tools at all or tools so late as to prevent his leaving on time.

When is a railroad employee under the protection of the Act of Congress? When is he "employ-

ed" in Interstate Commerce? The Act of Congress is *inclusive;* it uses the word "While" employed in interstate commerce—it applies only to interstate carriers, whether their lines are entirely within a State or cross a State frontier into another State.

The Decisions of Winfield vs. N. Y. C. R. R. Co., and Winfield vs. Erie R. R., handed down by the Supreme Court of the United States, in May, 1917, held that the Act of Congress was thus so inclusive as to forbid to the interstate employees the benefit of the various state compensation acts. The decision of Chief Justice White in declaring the Adamson Law constitutional virtually classified interstate employees as persons possessed of and under the obligations of a *quasi-status.*

That the *interstate* employees were a separate class from intrastate employees has been continuously ruled by the United States Supreme Court, since the Act of April 22, 1908:

Mondou vs. N. Y., N. H. & H. R. R. Co., 223 U. S., 1.

S. A. L. Ry. Co. vs. Horton, 233 U. S., 492.

North Carolina Ry. Co. vs. Zachary, 232 U. S., 248.

On pages 47 and 48 of the Defendant Railroad Company's brief is cited the cases:

Erie R. R. Co. vs. Welsh, 242 U. S., 303.

N. Y. C. & H. R. R. Co. vs. Carr, 238 U. S., 260.

Welsh was a yard conductor; always in the State of Ohio; Carr was a freight brakeman, always in the State of New York. These two deci-

sions belong to a class of decisions where interstate commerce and its benefits cannot be accorded to the employee by his geographical movement —he never moves beyond the State line. Hansen's *regular run* was from Hudson County, New Jersey, to the City of Kingston, N. Y., Hansen *every trip crossed the frontier.* He was regularly an interstate employee, just as were Messrs. Padgett, Tucker, Zachary and Whitacre. Messrs. Welsh and Carr had to find out whether their occupation was interstate or intrastate from time to time. Padgett vs. S. A. L. Ry. Co., 83 E. E., 632, wherein the Supreme Court of South Carolina held that there was a presumption of the continuance of the run and the use of the same engine in the run.

Affirmed by the U. S. Supreme Court, 236 U. S., 668.

In B. & O. R. R. Co. vs. Whitacre, 92 Atl., 1063 (Court of Appeals of Maryland), Whitacre, a freight brakeman, while walking through a railroad yard on a dark and foggy night, looking for a tin cup, fell into a water cinder pit and was seriously injured. (This language is taken verbatim from the opinion of Justice Brandeis.) When this case was decided in the U. S. Supreme Court, advanced sheet December 4, 1916, the Court said:

> "That the plaintiff must be regarded as being engaged in interstate commerce at the time of the happening of the accident seems conclusively settled by two cases. In P. W. & B. R. R. Co. vs. Tucker, 35 App. D. C., 123, subsequently affirmed per curiam by the Supreme Court, Tucker was killed by being struck by an engine when he was on the premises of the defendant in response to its call

> to assume the duties he had been engaged by the defendant to assume for their mutual interest and advantage; and it was there laid down that the obligation of the master commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master."

In Mo., Kan. & Tex. R. R. vs. Rentz, 162 S. W., 959, Rentz was employed as a locomotive engineer. In going to his work along a path in the railroad yard he was called to by another engineer, and stood on a track one or two over from this path through the yard. While here talking he was run down by an engine. He sued under the Federal Employees' Liability Act and a recovery was allowed.

In N. C. R. R. vs. Zachary, 232 U. S., 248, it was held that the acts of an employee in preparing an engine for a trip to move freight in interstate commerce, although done prior to the actual coupling up of the interstate cars, are acts done while engaged in interstate commerce.

In Boyle vs. Penn. R. R., 228 Fed., 269, Judge Woolley said:

> "There is the underlying idea that work of interstate commerce and the preparation for their use in interstate commerce are so intimately and directly related to interstate commerce as to make such work or employment a part of it."

It is of course a fact that Hansen did not have a tool in his hand when he was killed; nor was he either stoking an engine or shovelling coal to make steam at the moment of death—in fact he was not on an engine at all. He was walking through the

yard on his way to get tools for his next run to Kingston, N. Y., and it matters not whether he put the tools on the engine that Sunday or early the following morning. He should not be penalized because he was diligent in the performance of his duties and was willing to give up his rest period to assist his master in avoiding the possibility of delay the next morning in its business of interstate commerce.

He chose as his time to get tools, the only daylight available to him before starting on his run the next morning at 3:45, a time when he had other duties to perform and when the night would be the darkest before the dawn.

Defendant Railroad Company makes claim:

(a) That Hansen was not acting within the scope of his employment when the accident occurred (R. R. Brief, page 29).

(b) That he was not then engaged in the performance of any duty he owed to the defendant (R. R. Brief, page 29).

(c) That he was not engaged in interstate commerce at the time and place of the accident (R. R. Brief, page 44).

(d) That at the time and place of the accident Hansen was a trespasser or at best a mere licensee (R. R. Brief, page 38).

The above facts and the law following will be found to rebut these various contentions, and several of the decisions referred to in Railroad Company's brief will be commented upon hereafter.

In Padgett vs. Seaboard Air L., 83 S. E. Rep., 632, it is said by the Supreme Court of South Carolina:

"These were questions for the jury. If they inferred from the circumstances that Mr. Padgett was doing the work required of him, not at the time it was required, but at a time when it was *not forbidden,* then they could conclude he was engaged in interstate commerce, and under the protection of the Federal Statute His Honor could *not* have directed a verdict on the ground that there was *no* evidence from which it could be inferred that Mr. Padgett was engaged at the time of his death in interstate commerce."

Padgett was two hours ahead of time at the roundhouse.

Judge Gage of the Supreme Court of South Carolina dissented on the grounds raised in Hansen's case, alleging Padgett was not "employed" and was a mere volunteer, because of the question of time, yet the Supreme Court of the United States in *S. A. L.* vs. *Padgett,* 236 U. S., 668, affirmed the decision of the Supreme Court of South Carolina.

In Philadelphia, B. & W. R. Co. vs. Tucker, 35 App. D. C., 123 (L. R. A., 1915 C., page 42), the Court said:

"Is it possible that the act under consideration warrants a distinction so fine as to permit a master to escape liability for negligence resulting in the injury of one hired to perform service, because the injury occurred before the service is actually undertaken, notwithstanding that, at the time of the injury, the servant is properly and necessarily upon the premises of the master for the sole purpose of his employment? We think not. Such a rule, in our view, would be as technical and

artificial as it would be unjust. We think the better rule, the one founded in reason and supported by authority, is that the relation of master and servant, in so far as the obligation of the master to protect his servant is concerned, commences when the servant, in pursuance of his contract with the master, is rightfully and necessarily upon the premises of the master. The servant in such a situation is not a mere trespasser nor a mere licensee. He is there because of his employment, and we see no reason why the master does not then owe him as much protection as it does the moment he enters upon the actual performance of his task. In the present case, assuming for the moment the existence of a way through said opening, and across the two main tracks adjacent thereto, we can see no reason for a distinction between the master's obligation to Tucker while he was traveling over that way, and its obligation to him after he had entered the Annex, which was only another agency provided by the master for the accommodation of its servants."

Plaintiff and his fellow workmen were carried to and from work on defendant's construction train. On being brought back to camp, plaintiff was informed he need not go back to work that day. He asked permission to go back on the train and get his coat which was granted. Held, he was not a trespasser on the train, but was properly there in the line of his employment.

Rosenbaum vs. St. Paul & Duluth Ry. Co.,
38 Minn., 173.

The following decision from the Court of Sessions in Scotland is precisely a case in point:

Goodlet vs. Caledonian Ry. Co., 39 Scottish Law Reports, the Court of Sessions (2nd Division) of Scotland, construing Section 1, Paragraph 1, of the Workmens' Compensation Act of 1897 (60 and 61 Vict., Cap. 37), which section and paragraph reads as follows:

> "If in any employment to which this act applies, personal injury by accident arising out and in the course of the employment is caused to a workman, his employer shall, subject as after mentioned, be liable to pay compensation in accordance with the first schedule of this act."

The facts admitted and proved were as follows:

> "On the night of the 23rd of November, 1901, the deceased, John Goodlet, an engine driver in the employment of the respondents, arrived at Princess St. Station, Edinburgh, about 10:10 P. M., after having brought a train from Leith, and was ordered to take his engine into a lye beside a water column. After placing his engine in the lye the deceased left his engine in charge of his fireman, and crossing some four or five sets of rails went to a small island platform to the west of the passenget station, where Donald Macrae, an assistant traffic regulator in the employment of the respondents, was standing, a distance of from 35 to 40 yards from his engine. When he reached Macrae, he asked him why his engine had been put into that particular lye. There was no necessity for the deceased to leave his engine, nor to interrogate Macrae, as the lye to which deceased's engine had been sent was

quite a convenient one for his next duty, of which he was fully aware, viz., to take the eleven o'clock train out to Balerno. After speaking to Macrae, the deceased left that island platform and crossing two more sets of rails still further from where his engine was placed and 12 or 13 yards from where Macrae was standing, spoke for a moment or two to Edward Wilson, a carriage inspector in the respondent's employment. *What he had to say to Wilson was merely casual conversation and had nothing to do with his duties as an engine driver.* After leaving Wilson, the deceased, while returning to his engine and recrossing the last mentioned lines of rails, was knocked down and killed by an empty train, which was being backed or shunted from the passenger station into a dock for the night. There was no lamp attached to the end of the carriage which knocked the deceased down, but it was both unusual and practically impossible to shunt empty trains within the station yard with tail lamps attached, this operation being conducted with hand lamps and hand signals. It is admitted by the parties that in the event of the respondent's being liable in compensation for the death of the deceased, the amount of such compensation should be £273 17s. 11d. The Court of Sessions *held* unanimously (only Lord Moncrieff being absent), that (opn. by Lord Justice Clerk). * * *"

"I think in view of these facts the pursuer is entitled to say that the deceased at the time he met with his accident was in the course of his employment within the meaning of the Act. No fault is attributable to him in going across

the rails, as he was an engine driver and entitled to cross them. Moreover at the time of the accident he was on his way back to his engine.

"If he could be held to have been doing anything wrong in crossing the rails the first time, the result might have been different, but he cannot."

"Lord Young says compensation should be granted."

"Lord Trayner—I think this is a case in which the injury arose out of and in the course of the deceased's employment."

The Court reversed the Sheriff-Substitute and granted the appeal, and gave compensation to the widow and the children.

The principle laid down in *Goodlet* vs. *Caledonian Ry. Co.,* is absolutely consonant with the ruling of the Supreme Court of the United States.

North Carolina R. R. Co. vs. *Zachary,* 2 N. S., 260, held

that Zachary, a locomotive fireman, who *left his engine and on the way to his boarding house was crossing tracks in the railroad yard prior to starting on an inter-state trip on no purpose inconsistent with the duty toward his master,* and was killed by a shifting engine running at full speed, at night, headed backwards, forwards, with no lights, and its noise being obliterated by the blower of a locomotive standing on an intervening track; HELD: First, Zachary was in inter-state commerce; Second, he was actually engaged in work; Third, the running of him down without warn-

ing was actionable, *even if the engineer of the shifting engine did not expect him on his track and thought that the switching engine had a clear field ahead,* it being negligence to run the switching engine in the manner it was run, as the jury found."

In re Stacy and In re Travellers Ins. Co. (Sup. Ct. of Mass., Nov. 28, 1916), 114 N. E. Reporter.

Where an icehouse laborer on his way home from work was drowned by breaking through the ice while crossing a pond in the control of the master, the *reasonable and customary* way for him to reach home, and he and other employees who lived in the same direction *"crossed it this way regularly,"* the accident occurred in the course of the employment; the Supreme Court of Massachusetts *held this although there was a path around the bank of the pond.*

Gane vs. *Norton Hill Colliery Co.*, L. R., 1909—2 K. B., 539.

A collier was going home from his work and in doing so he crossed railroad tracks and went underneath cars, and on land of and operated by the Coal Co. He was hurt by the moving of the cars. This way home was customarily used by the miners. There were *two other ways* for the miners to go home. Held, he was in the *course of his employment* and entitled to compensation under *English Act.*

This case quoted with approval in Terlecke vs. Strauss, Sup. Ct. N. J., 89 Atl., 1023, affirmed by Ct. of Errors, 92 Atl., 1087.

Gane vs. *Norton Hill Colliery Co.* followed, explained, and approved by House of Lords, in

Lancashire & Yorkshire Ry. Co. vs. Highley, L. R. (1917), A. C., 352.

Harber vs. Jenkins Rubber Co., 72 N. J. L., 171, on page 40 of defendant's brief, cited in support of the proposition that Hansen, at the time of his death, had deviated in such a way that he was not entitled to recover, is not a parallel case and has absolutely no application to the facts in Hansen's case. Harber at the time of his injury was clearly a licensee. At the time of his injury he was walking to a place "for no purpose of proceeding to his work." In the Hansen case even assuming that there was nothing in the testimony to go to the jury on the question of the purpose of Hansen speaking to Kathan, still at the time of his death he was on his way "for the purpose of proceeding to his work."

Hobbs vs. Great Northern Ry., 142 Pac., 20, cited on page 42 of defendant's brief in support of the same proposition is another case clearly distinguishable from the Hansen case. Hobbs was on the pilot of the engine, contrary to an express rule forbidding employees to ride there, and the evidence did not disclose any duties which called for his presence on the pilot. In Hansen's case there was no rule forbidding him to be upon the premises of the railroad, it was the custom of the men to walk through the yards, and there was evidence sufficient to go to the jury on the question as to whether his duties did not call for his presence in the yard at the time of his death.

In Padgett vs. Sea Board Air Line, 83 S. E. Rep., 632, affirmed in the U. S. Supreme Court, 236 U. S., 668, the Court said that if the jury inferred from the circumstances that Padgett was doing work required of him not at the time it was required but at a time when it was *not forbidden* then they could

conclude that he was engaged in interstate commerce.

POINT 4.

Defendant was guilty of negligence in causing the death of Hansen.

Engineer Kathan, while in the employ of the company, a very reluctant witness, when asked at what speed Clearwater's engine was running at the time it hit Hansen, states:

> "Q. Wasn't going very fast, was it? A. No, I should judge not. I wouldn't judge on that. I am no judge, as I was going one way and the other man coming the other way" (page 28, line 12).

It further appears that Clearwater's engine, after it struck Hansen, proceeded on its way up to the ash pit (page 28, line 40), and that engineer Clearwater did not even know that he struck Hansen.

> "Q. And Clearwater did not know he had gone over him, did he? A. No, sir.
>
> Q. How was Clearwater's engine going when you saw it, going backwards or forwards? A. Backwards.
>
> Q. Was there anybody on the engine with Clearwater? A. His fireman" (page 29, line 3, etc.).

Craig, the fireman on Clearwater's engine, was asked:

> "Q. You did not see him before your engine ran over him, did you? A. No, sir.

Q. Clearwater didn't see him? A. Not that I know of.

Q. Well, you didn't know. How did you or Clearwater know that there had been an accident? Wasn't it because some one came up and told you? A. Some one told us.

Q. What did you do when you found out that you had run over a man? A. Went right back to the scene of the accident.

Q. How far away from where you stopped your engine was it? A. Oh, I don't know, probably five minutes' walk—seven minutes' walk, something like that" (page 74, line 38, etc.).

According to this witness it was a clear day. There was nothing to obstruct his vision or the vision of the engineer if they looked out. He doesn't know whether the engineer looked out or not, and there was nothing in the way of their looking (page 76, line 20, etc.). There was no curve in the line of the track. From the shop up to the cross-over there was a straight piece of track (page 87, line 38).

Freleigh, a civil engineer, testified that the distance from the Y. M. C. A. to the point at which Smith was taken on by Kathan was 1,900 feet, and from that point to the roundhouse 2,500, and that the point at which Hansen was killed to the roundhouse was 2,100. It therefore appears that Hansen, after talking to Kathan, walked in the direction of the roundhouse, a distance of about 400 feet, during which time he would be within full view of anyone looking out on Clearwater's engine, if the crew were keeping their lookout in his direction along the track, as was their duty in law and under the company rules (pages 144-145).

Hansen was talking to Kathan between tracks one and two for several minutes before he started to walk this distance of 400 feet (page 162, line 10). The distance between tracks one and two was only 8.39 feet, a distance which might, under ordinary circumstances, be potentially dangerous to Hansen, if he was walking with his back turned to an engine coming from the rear in the same direction (the distance between passing engines being much less), unless warned of the approach of the engine (page 146, line 20).

Clearwater's engine, after killing Hansen, proceeded 1,300 feet before he knew what had happened (page 147, line 20).

The evidence and the map will show that if Hansen had continued on the path to the roundhouse he would necessarily have had to cross the engine track on which he was killed (page 72, line 22).

It is contended by defendant railroad company that there was no regular path from the Y. M. C. A. building to the roundhouse, and that the so-called path was one which could be shifted from time to time by the railroad company. It amply appears from the testimony that employees were in the habit of going from the Y. M. C. A. building to the roundhouse through the yards of the company, irrespective of what is called the path. This clearly appears, among other proof, by the testimony of the witness Smith, who walked with Hansen through the yard for the purpose of meeting Kathan, and who also walked across the tracks for the purpose of going on the engine. So that, then, if the jury found there was no regular path, as was contended by the railroad company, then they could have found that it was the custom of employees to cross the yards at any point in the

direction of the roundhouse, and such being the case, it became the duty of the railroad company to give fair warning to its employees.

It appears that the company did have rules for the protection of its employees in the yard.

Fireman Craig, on the engine which ran Hansen down, says that there was a rule governing the keeping of a lookout; that it was his duty to look out, if he was not firing, for all obstructions on the track, danger signals and employees; that this regulation was in the book of rules governing the operating department (page 83, line 32, etc.; page 160, l. 20, etc.).

Witness George, whose office was about 50 feet from the roundhouse, was in the habit of using the path Hansen and Smith used and states that it was used considerably by the men; that it was not laid out by the railroad company, but was just the result of employees walking back and forth; that there was considerable traffic along this path (page 194, line 32, etc.).

This and other testimony, together with the facts that the company regulated the running of its engines at a rate not exceeding six miles an hour through the yard, which means practical control of the engine under ordinary circumstances, and the fact that they also had a rule that it was the duty of firemen and engineers to keep a lookout, indicates that the company recognized the right and possibility of its employees being in and about all parts of the yard, including traffic tracks.

It further appears that from the point at which Hansen was talking to Kathan there was a view along the track in the direction in which Clearwater's engine was coming of 970 feet, but that there was a curve at a distance of about 700 feet (page 178, line 20), and that there would be a view

for several hundred feet beyond the curve, and that there was a view from the point at which Hansen was killed of about 1,000 feet (page 179, line 20).

Engineer Kathan clearly shows that Clearwater was guilty of gross negligence and recklessly ran Hansen down without keeping a lookout and without giving any warning. After Hansen ceased talking to Kathan, Hansen turned and walked in the direction of the roundhouse. As has already been shown, Hansen had already walked at least 400 feet north from the point at which Kathan's engine was stopped to let Smith on. Kathan then says that when Hansen left him he started his engine in the opposite direction from which Hansen was walking, to wit: towards the south, and in the direction from which Clearwater's engine afterwards appeared (page 239); that the natural place for him, Kathan, to look was in the direction in which he was going, but that he turned around and looked back.

> "Q. Why did you turn around and look in back of you? A. That is something I cannot answer; I never done it before in my life."

The query presents itself, why should Kathan for the first time in his life look in the opposite direction from which he was going, unless he saw Clearwater's engine coming along at an extraordinary rate of speed without warning and with no one keeping a look-out? Although Kathan on page 240, line 30, etc., says that Hansen, he guessed, was about 200 feet behind him when he last saw him, this would be mathematical impossibility if Hansen was struck 400 feet from the point at which Kathan's engine originally stopped. If Kathan's engine proceeded, as he says, after Hansen started to walk he must necessarily have been a great

deal more than 400 feet away from him at the time he was struck. Kathan observed Clearwater's engine coming along. Apparently the engine was going at an excessive rate of speed and without a look-out, for Kathan says:

"Q. And had the Clearwater engine passed him (you) when you blew your whistle? A. No, sir.

Q. It had not got up to you when you blew your whistle? A. No, sir.

Q. How far was the Clearwater engine from you when you blew your whistle? A. His front end was even with my front end when I whistled.

Q. Did you blow a pretty loud blast? A. Just blowed—

Q. Did he seem to pay any attention to it at all? A. No, sir, he did not.

Q. Kept right on going, didn't he? A. I lost view of him, yes.

Q. Did Clearwater stop when you blew this loud blast? A. No, sir.

Q. He kept right on going, did he? A. Yes, sir.

Q. Was it a shrill blast you blew? A. Yes, sir.

Q. Was that an alarm that you blew? A. Yes, sir" (page 241, line 5, etc.).

Hansen is dead, Clearwater is dead, and the only living witnesses to the accident, viz.: Craig, Smith and Kathan, testified to a state of facts from which it clearly appears that Hansen was run down through the reckless operation of Clearwater's engine without a look-out, and without warning.

It surely cannot be conceived that Clearwater deliberately ran Hansen down and the necessary

inference must therefore be that Clearwater and his fireman had the opportunity to, but did not see Hansen, and were therefore guilty of gross negligence.

The defendant's motions to non-suit and to direct a verdict in favor of the defendant were properly denied, and do not constitute error. The Administratrix, under the facts and law, was entitled to go to the jury.

The jury could find negligence in *either* the railroad company *or* Mr. Clearwater, the engineer of the locomotive which killed Hansen for which the Railroad Company would be liable under the Act of Congress.

As these grounds of negligence all intermingle and the decisions as to them dovetail, they will be for the sake of brevity considered together.

In *Waina* vs. *The Penn. R. R. Co.* (Supreme Court of Pennsylvania), 96 Atl., 461.

It was held that the Railroad Company was liable to a section man crossing tracks in a railroad yard where the only excuse he had for not seeing an engine coming were tools on his shoulder; the ground of liability was that the engine men failed to ring the bell, blow the whistle or give other warning. Judgment for the track-man was sustained. This was an action under the Federal Employers' Liability Act.

In *Saunders Administrator* vs. *The Southern Ry. Co.*, 167 North Carolina, 375, the rules of the railroad required an alarm to be sounded and brakes applied whenever a person appeared on the tracks. The locomotive engineer did not warn or slow down. A verdict for the plaintiff was sustained in this action, which was under the Federal

Employers' Liability Act. The employee was coming back, crossing tracks, from an individual duty performed.

Irrespective of the extent to which Aerkfetz vs. Humphreys, 145 U. S., 418, has been modified by the ruling in the Whiteacre, Tucker, Padgett and all the later cases adjudicating the Federal Employers' Liability Act, whether in the several Circuit Courts of Appeals or in the courts of last resort of the several States of the Union, it has been held by the Supreme Court of the United States specifically that the principle enunciated in this decision some twenty years ago or more, was, as of two years ago, *limited in its application to a yard engine known to be engaged in switching in a yard, where there was no custom to warn or to keep a lookout as to it.* This principle of law is enunciated, in concise terms and with the utmost precision, in the case of The Seaboard Air Line vs. Koennecke, 239 U. S., 352, at page 355, wherein Mr. Justice Holmes, delivering the opinion of the Court, says:

> "We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard; that the movement was not a yard movement, that it was on the main track and that there was *no lookout on the end of the train and no warning of its approach.* In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard like, *Aerkfetz* vs. *Humphreys,* 145 U. S., 418, *but one where the rules of the Company and reasonable care required a lookout*

> *to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence* or that the deceased assumed the risk. Upon a consideration of all the objections urged by the plaintiff in error in its brief, we are of the opinion the judgment should be affirmed."

In the *B. & O. R. R. Co.* vs. *State of Maryland,* to the use of Bridget Trainor (Court of Appeals of Md., 1871), 33 Md., 542, it was held that it is negligence not to give reasonable and usual signal of the approach of a locomotive or train—viz., to blow a whistle and *keep a lookout for employees on the track.* Trainor, a trackman, was killed, *beyond his beat, on the track of a branch road,* on his way home after work. Judgment for Trainor's death was affirmed.

In a Railroad yard, where the Railroad undertakes to warn employees, it is *negligence not to keep a lookout.*

Louisville & Nashville Railroad Co. vs. *Johnson's Administratrix,* 161 Ky., 824; S. C., 171 Southwestern, 847.

In the case of *Southern Ry. Co.* vs. *Gray,* 167 North Carolina, 433, at 435, Judge Clark, delivering the opinion of the State Supreme Court of North Carolina, said in affirming a judgment for a killed flagman;

> "* * * It was the duty of the engineer and fireman to have kept a proper lookout on the track and if they could not do so, it was the duty of the defendant to have had still another person on the lookout to prevent any avoidable accident. *Arrowood* vs. *The R. R.,* 126 N. C., 629."

Gray was asleep on the track.

When this case was heard on a writ of error in the U. S. Supreme Court (241 U. S., 333), at pages 339, the Railroad was held to be without negligence because *the engineer blew the locomotive's whistle 1,254 feet away and at the first sight of the killed flagman's light.*

In the *Lexington & Eastern Ry. Co.* vs. *Smith's Administrator* (Court of Appeals of Ky., 1916), 188 Southwestern, 1091.

In a suit for the killing of an employee who looked after the switch lights in a busy freight yard and made repairs on the yard tracks, the Railroad was held to be negligent in not having some person on the front end of a caboose pushed by an engine, to warn employees of its presence.

In *Easter* vs. *The Virginian Ry. Co.* (The West Virgina Court of Appeals, on a re-hearing, 1915), 86 Southeastern, 37, it was held that under the Federal Employers' Liability Act abolishing the defense of fellow servant and making the employer liable for the fellow servant's negligence, that the failure to have a head-light on an engine front or on the rear of an engine when backing, at night time where there is a custom or a rule to that effect, is the negligence of a fellow-servant for which the Railroad is responsible.

In *Going's Administratrix* vs. *The Norfolk & Western R. R. Co.* (Court of Appeals of Virginia), 119 Va., 543, at 555; S. C., 89 Southeastern 914, it was held that Going, who was a fireman and who was killed while shaking the grates of his engine and to do so was walking backward and forward at right angles at the side of his engine from a space between two tracks from and on to an express track, at a siding where it was the practice to so shake the locomotive, that there was no liability because of the killing of Going, though the

train was running 45 miles an hour, because the engineer kept a *lookout* and blew four times, one mile east of the place Going was killed, the train being a westbound train and inasmuch as Going was going back and forth from the express track to a place of safety between the two tracks, and each time the engineer looked he saw Going in a place of safety.

In *Willever* vs. *The D., L. & W. R. R. Co.,* 99 Atl., 321, at 324, the Court of Errors has laid down for New Jersey the same rule as prevails throughout the Railroad law of the country as follows:

> "We think the present case falls rather within that line of cases illustrated by D'Agostino vs. The Pennsylvania R. R. Co., 72 N. J. Law, 358, 60 Atl., 1113, in the Supreme Court, and Germanus vs. The Lehigh Valley R. R. Co., 74 N. J. Law, 662, 67 Atl., 79, in this Court, both of which hold that, where a system or custom of warning under certain circumstances is established, the employees involved had the right to rely upon such warnings being given, and that failure to give them, resulting in injury, constitutes a cause of action."

In the Southern Ry. Co. vs. Gray, 241 U. S., 333 at 338, Mr. Justice McReynolds delivered the opinion of the Supreme Court of the United States, said:

> "* * * * * * *
>
> "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of Common Law, as interpreted and applied in the Federal Courts. Seaboard Air Line vs. Hor-

ton, 233 U. S., 492; Central Vermont Ry. vs. White, 238 U. S., 507; Great Northern Ry. vs. Wiles, 240 U. S., 444.

"Negligence by the railway company is essential to a recovery; and there is not a *scintilla* of evidence to show this under the most favorable view of the testimony urged by counsel for defendant in error * * *."

It is apparent that, in this case, the United States Supreme Court reversed the State courts on what is negligence.

In the Southern Ry. Co. vs. Coók, 226 Federal Reporter, page 1, the Circuit Court of Appeals for the Fourth Circuit *held* that for the death of a section foreman killed by an express train on an open track, first, that the section foreman was entitled to a lookout and a warning and, second, that the jury could find it also negligence that the train had run sixty miles an hour at and past a slow board where the speed limit was thirty miles an hour, and that the killed section foreman was entitled to rely on the speed limit of 30 miles an hour, and to run faster than it at this point, at 60 miles an hour, was negligence.

In the Southern Ry. Co. vs. Smith, 205 Federal Reporter, 360, the Circuit Court of Appeals for the Sixth Circuit said:

"While it is the duty of switchmen in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty independent of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employee who might neglect to protect him-

self, and the extent of such duty is measured by the peculiar circumstances of the case."

This rule is *stare decisis* in the Sixth Circuit. Southern Railway Co. vs. White, 232 Federal Reporter, 144.

By reading the report of the Southern Ry. Co. vs. Smith, supra, it will be found that the Federal Courts have established a common law of torts on this subject for themselves, irrespective as to what may or may not be the rule of the State courts.

But in this case now *sub judice* in this Honorable Court, so far as a case arising under the Federal Employees' Liability Act in this State is concerned, the difference is immaterial, inasmuch as all the cases dovetail, whether in the State courts of New Jersey, or elsewhere in the United States.

In Williver vs. D., L. & W. R. R. Co., 99 Atl. Reporter, 320 at 324, Judge White, in delivering the opinion of the Court of Errors and Appeals, said:

"* * * * * * *

"* * * We do not think the negligence of the defendant employee in failing to comply with the rule established for Williver's safety was one of the dangers he undertook to look out for, and therefore one of the risks he assumed."

Williver's case, as applied to Hansen's case, is parallel in two respects; first, there was a custom to warn employees generally in the yard; second, there was a six mile limit of speed for locomotives in the yard; on both this custom and this rule Hansen had a right to rely; for the failure of the first,

Hansen's Administratrix can charge the defendant road for its negligence; for the failure of the second, she can charge the railroad for fellow servant liability under the Federal Act.

There is no doubt of the right of an employee to charge the master with the duty of lookout and the duty to warn him, when there is a custom so to do, where a rule has been varied from or violated, or where from the nature of his work he cannot look for himself.

In the Illinois Central R. R. Co. vs. Pierce's Admx., Court of Appeals of Kentucky, May, 1917, 194 Southwestern, 534, at 536, the Court of Appeals of Kentucky said:

> "Likewise in the case of employees in themselves charged with the duty of lookout in switching yards and other places where employees in considerable numbers are habitually at work, the Company must in the operation of its trains anticipate that presence and exercise a proportionate care."

And just above the last excerpt quoted, the Court had previously said:

> "In other words the duty of lookouts and signals depends upon what is reasonable care in each case, and that is dependent upon the extent of the use by the public or employees in themselves charged with the duty of lookout; for what is reasonable care at places in the country, where but few persons, whether of the public or employees, use the track, would manifestly be totally inadequate in cities, at public crossings, in switch yards, and other places *where people are frequently upon the tracks.*"

In Illinois Central R. R. Co. vs. Skaggs, 240 U. S., 66, at 69, it is said:

> "It is contended that the State Court erred in permitting a recovery under the Federal Statute for the reason that the injury resulted from Skagg's own act, or from an act in which he participated. The Company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous conditions.' It may be taken for granted that the statute does not contemplate a recovery by an employee for the consequences of actions *exclusively his own;* that is, where his injury does not result in whole or in part, from the negligence of any of its officers, agents, or employees of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment. April 22, 1908, 35 Stat., 65. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee *participated* in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and if the injury to one employee resulted *'in whole or in part'* from the negligence of its other employees, it is liable under the express terms of the act. That is, the Statute *abolished the fellow servants rule.* If the injury was due to the neglect of a co-employee in the performance of his duty, that neglect must be attributed to the employer and if the injured employee was himself guilty of negligence contributing to the injury, the Statute expressly provides that it shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of the negligence attributable to such employee."

"Briefly stated, the departure from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employee resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee; (b) the rule exonerating an employer from liability for injury sustained by an employee through the concurring negligence of the employer, and the employee is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury, and in other instances is displaced by the rule of comparative negligence, whereby the exoneration is only from a proportional part of the damages corresponding to the amount of negligence attributable to the employee; (c) the rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury; and (d) the rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives."

Mondou vs. New York, N. H. & H. R. Co.,
223 U. S. Sup. Ct. Rep., page 346.

Questions for the Jury.

As to whether the defendant's negligence was the causal force of the accident, or whether the plaintiff's own conduct was either the sole cause or contributed to it in part, is a question for the jury, as so held by the Supreme Court of the United States in Illinois Central R. R. Co. vs. Skagg, 240 U. S., 66.

See also cases cited above under negligence.

The factor of contributory negligence co-operating with the negligence of the defendant is merely to reduce the damages, and as such is a question for the jury.

See N. & W. Ry. Co. vs. Ernest, 229 U. S., 114:

> "The purpose of the provision in regard to contributory negligence in the Employers' Liability Act is to abrogate the common law rule or of complete exoneration of the carrier from liability in case of negligence whatever on the part of the employee and to substitute therefor a new rule confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee."

See also Skaggs vs. Illinois R. Co., supra.

Contributory negligence can give no trouble in this case. There was either negligence in the railroad company, or in Clearwater, the servant, for which the railroad company is responsible, or there was not. The jury has found in favor of the Administratrix and its verdict negatives any accusations of *causal* negligence in Hansen. The case

was heard on a rule to show cause before Judge Campbell, in Hudson County (the only tribunal in this State in this cause to hear the question of damages, their sufficiency or insufficiency; Central R. R. Co. of N. J. vs. Tunison, 26 Vroom, 561; Guggenheim Smelting & Refining Co. vs. Flanigan, 34 Vroom, 647), and he ordered a reduction of the verdict; all question of contributory negligence has therefore been settled and merged in to the judgment for the amount as it now stands.

See Skagg case, supra.

"No presumption of negligence upon the part of the decedent arises from the mere occurrence of an accident at a railroad crossing. To justify a non-suit, the contributory negligence of the decedent must clearly appear conclusively as a fact, or by necessary exclusive inference, from the plaintiff's proof."

"Where the evidence, when the plaintiff rests, leaves the contributory negligence of the plaintiff's intestate in doubt, the determination of the question must be submitted to the jury."

Danskin vs. Pennsylvania R. R. Co., 79 N. J. L., 526.

POINT 5.

Hansen, under the facts in the case, assumed no risk which would prevent a recovery for his death; and the question of assumed risk was one for the jury.

Hansen did not assume the risk of an unknown danger, of *any unwarned danger,* nor did he as-

sume the risk of the negligence either of his master or, under the act of Congress, of any fellow-servant. For this latter negligence the master is responsible.

Hansen did not assume any risk of being run down without any lookout being kept for him or a warning being given to him by Clearwater's engine, whether Clearwater's locomotive was not yet around the curve or had come around the curve.

"An employee assumes the risk of such dangers attending the prosecution of his work as he knows, or could discover, by the exercise of ordinary care for his personal safety, and for hurt happening to him from those dangers the employer is not responsible."

Cetola vs. Lehigh Valley R. Co., 99 Atl. Rep., page 310.

"The Trial Court cannot be charged with error in refusing to take the question of the assumption of risk from the jury in an action under the Federal employers' liability act of April 22, 1908 (35 Stat. at L., 65, Chap. 149. Comp. Stat. 1913, Sec. 8657), unless the evidence tending to show such assumption of risk was clear and from unimpeached witnesses and free from contradiction."

Kanawha & Michigan R'y Co. vs. Krese, Admx., 239 U. S. Sup. Court, Foot, page 448.

"Assumption of risk is ordinarily a question of fact for the jury, depending on whether plaintiff knew or ought to have known the

danger, and, knowing it, appreciated or ought to have appreciated it."

Norton vs. Maine Cent. R. Co., 100 Atl. Rep., 598.

"The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him."

Gila Valley R. Co. vs. Hall, 232 U. S., page 101.

"The 'assumption of risk' of a section gang foreman engaged in interstate commerce in the employ of a common carrier by railroad, whose duty it is to look out for the safety of himself as well as of the men under him, does not include the negligence of his fellow-employees under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. 1913, Sections 8657-8665), in failing to take a precaution or give a warning provided, with his knowledge, to secure his safety by the system adopted by his employer for the operation of the railroad upon which he worked."

Willever vs. D., L. & W. R. Co., 99 Atl. Rep., 321.

"It is insisted that, even conceding the train was operated at a negligent rate of speed, in view of plaintiff's purpose to board it, yet he assumed the risk of injury involved in the attempt. The Act of Congress, by making the carrier liable for an employee's injury 'result-

ing in whole or in part from the negligence of any of the officers, agents or employees' of the carrier, abrogated the common law rule known as the fellow-servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer. At the same time, in saving the defense of assumption of risk in cases other than those where the violation by the carrier of a statute enacted for the safety of employees may contribute to the injury or death of an employee (Seaboard Air Line R. Co. vs. Horton, 233 U. S., 492, 502; 58 L. Ed. 1062, 1069; L. R. A. 1915C, 1, 34; Sup. Ct. Rep., 635; Ann. Cas. 1915B, 475; 8 N. C. C. A. 834), the act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk.

"On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent dan-

ger was so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other. (Gila Valley, G. & N. R. Co. vs. Hall, 232 U. S., 94, 101; 58 L. Ed., 521m, 534; 34 Sup. Ct. Rep., 229; Seaboard Air Line R. Co. vs. Horton, 233 U. S., 492, 504; 58 L. Ed., 1062, 1070; L. R. A., 1915C, 1; 34 Sup. Ct. Rep., 635; Ann. Cas. 1915B, 475; 8 N. C. C. A., 834.)"

Chesapeake & Ohio R. Co. vs. De Atley, 241, U. S. Sup. Ct., 310.

"It is insisted that the true test is not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this Court. According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

Ibid.

"We are unable to concur in the view that there was no question for the jury. Whether

the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive, and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and the consequent danger to him was so obvious that an ordinarily prudent person in his situation would have realized and appreciated them."

Ibid.

Requests to Charge.

Under Point 3, page 56 of defendant railroad's brief, the only requests which were refused, or charged as modified, are requests 9, 10, 15, 16, 18, 19, additional request 2 and request 20, which it is claimed should have been charged without modification.

The law and the right of defendant to have requests 9, 10, 15 and 16, charged, has already been discussed under Point 3 hereof; request 18 under Point 4, and request 19 under Points 4 and 5; the additional request 2 is covered by Points 3 and 4. Request No. 20, which does not appear on page 303 of the case, appears on page 299, line 5. This request was charged as requested with the addi-

tional language of the Court set out on page 297, line 16. This request is covered by Point 4.

The law and facts relating to all the requests to charge, to which exception was taken, have already been discussed under the various points of this brief. All the requests to charge, which are assigned as error, are covered by the substantive law of the case. Several exceptions were taken to the charge of the Court, by defendant, which have not been assigned as error nor argued in its brief, and being abandoned, will not be considered. The charge of the Court, as an entirety, charged correctly the law of the case.

It is respectfully submitted that the verdict and judgment thereon be sustained.

WELLER & LICHTENSTEIN,
ALEXANDER SIMPSON,
Attorneys for Plaintiff-Respondent.

Federal Employers' Liability Act of 1908.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia, or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and if none, then to the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the Territories, the District of Columbia, the Panama Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and

if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: PROVIDED, however, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose and intent of

which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: PROVIDED, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, or relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto, on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued. Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. (As amended April 5, 1910.)

Sec. 7. That the term 'common carrier' as used in this act shall include the receiver or receivers, or other persons or corporations charged with the duty of the management of the business of a common carrier.

Sec. 8. That nothing in this act shall be held to limit the duty or liability of common carriers or impair the rights of their employees under any other act or acts of Congress, or to affect the prose-

cution of any pending proceeding or right of action under the act of Congress, entitled, 'An act relating to liability of common carriers in the District of Columbia and Territories, and to common carriers engaged in commerce between the States and between the States and foreign nations to their employees,' approved June 11, 1906.

Approved April 22, 1908."

(This addenda does not include several amendments to Act of 1908 not necessary to decision of this case.)

New Jersey Court of Errors and Appeals

ROSE HANSEN, *Administratrix*, &c., *Plaitniff-Respondent*, *vs.* NEW YORK CENTRAL RAILROAD COMPANY, *Defendant-Appellant*.	On Appeal.

SUPPLEMENTAL MEMORANDUM FOR APPELLANT.

At the close of the oral argument, counsel for the Respondent obtained permission to submit a further memorandum of law on the subject of the admissibility in evidence of the declarations of Mr. Hansen to his wife and to Engineer Kathan. Counsel was directed to serve this memorandum upon Counsel for Appellant. This memorandum has not yet been served.

Counsel for Appellant, having been served with Respondent's digest of the testimony and citation of cases only a short time prior to the argument, permission was granted to reply to the cases cited by Respondent, both on his original and supplemental briefs.

Respondent having failed thus far to serve any additional memorandum, it is assumed that the intention so to do has been abandoned. This

memorandum is now submitted without waiting further for service of Respondent's memorandum.

Copies of this memorandum have been served on Counsel for Respondent.

In considering this case and the cases cited by Respondent and claimed to be applicable thereto, there are certain essential facts, fully established by the evidence, which should be constantly kept in mind.

1. Mr. Hansen was not on duty at the time of the accident.

2. No duty which he owed to the defendant called him to any place in the Granton Yards after 6:30 P. M., Saturday, when he registered off duty, until 3:30 o'clock Monday morning when he was due at the round house to register for his outgoing run. He was not called for any special duty on the day of the accident.

3. *No duty to defendant ever called him to the place on engine track No. 2, where he was killed, except when he was riding over that place on his engine.*

4. His declared intention (to take tools from the pony engine and place them on the pickup engine) was not in the line of his duty;

a. Since January 1st, 1909, outgoing engines at the Granton Yards had been equipped with tools by tool men, employed by defendant for that purpose. This was done from 15 to 30 minutes before the engine started on its run.

b. Tool men took tools from the tool car or storehouse and placed them on the engines.

c. The sole duty of engineers and firemen with respect to equipping engines with tools was to see that their respective tools were on the engine when they took charge of it, 15 minutes before leaving on their run. If tools were lacking they reported to the tool men or to the roundhouse foreman.

d. Not an instance was shown where either an engineer or fireman had ever taken tools from one engine and put them on another, either immediately prior to starting on a run or at a more remote time.

e. There was no shortage of tools on the pickup engine on August 4th.

5. At the time of the accident, Hansen's declared intention was incapable of accomplishment;

a. There were no tools on the pony engine.

b. At the time of the accident the pickup engine had not been designated and would not be for many hours thereafter.

c. At the time of the accident the engine which went out on the pickup train on August 4th, was not in the Yards and did not come in until 2.20 P. M.

6. Hansen was killed, *not while he was on a path leading through the yards,* but when and because he left the path, where he was entirely safe, and went onto a very active railroad track, a place of great danger.

7. His going onto this dangerous track did not and was not intended in the slightest degree to further his declared purpose to take tools from the pony engine and put them on the pickup engine. He went solely for the purpose of talking with Kathan, and the subject of tools was not mentioned.

In his "Digest of Evidence", counsel for Respondent says (p. 4);

"At all or any times the getting of tools for and the use of tools on locomotives was the duty of firemen."

There is no justification in the evidence for the statement that the getting of tools for use on

locomotives was the duty of firemen. Since January 1st 1909, it had not been the duty of firemen to place tools on engines. The evidence is conclusive that the only duty of firemen was to see that proper tools for his use were on the engine before starting out, and to report any shortage to the tool man or the roundhouse foreman.

(See citations of evidence on pp. 33-34 of our principal brief.)

True, the witness Holt testifies that when he failed to put proper tools on an engine, the engineer or fireman would come to him for them and would sometimes get the tools from the tool man and carry them to the engine. He also testified that when he was temporarily absent from the tool car, he would sometimes, on his return, find that some tools had been taken. But in the whole case, there is not any evidence of an engineer or fireman ever going anywhere to report a lack of tools except to the tool man or orundhouse foreman, nor is there any evidence that they ever got any tools from any other place than the tool car or storehouse,—much less that the ever took tools from one engine and put them on another.

Respondent alleges a duty and also a custom in this yard, to keep a lookout and to give warning of approaching engines. Of course, whatever duty of this nature existed, either from rule or custom, was owed only to those rightfully on the premises, and at the particular time and place, engaged in the performance of duties owed to defendant.

There was no admission on the part of any witness, as alleged in Respondent's brief (Digest of Evidence p. 6), that Clearwater's engine gave no warnings. Fireman Smith was not on Clearwater's engine, and was not asked on direct examination anything about signals by Clearwater. On cross-examination, against defendant's objections, this witness was asked if he had not

made certain statements as to Clearwater's failure to give signals. Defendant's objections were overruled, and the witness denied that he had made such statements. On rebuttal, plaintiff called a witness who testified, also against defendant's objections, that Smith had made the statements he denied having made. The testimony was improperly admitted and certainly constitutes no evidence of failure to give signals. There is no other evidence in the case tending to show failure to give signals. (Smith, pp. 162-164; Tucker, pp. 249-250.)

On the facts as established by the evidence, every case cited by Respondent is readily distinguishable from the Hansen case.

Citing *N. C. Railway Co.* v. *Zachary, 232 U. S. 248,* counsel states that decedent "was held engaged in interstate commerce, although on a personal errand to his boarding house when killed." This statement is quite inaccurate.

Zachary was a fireman and had prepared his engine to couple to an interstate train which was about to start on its run. Having done this, he temporarily left his engine standing on a yard track and was crossing some other yard tracks when he was killed. His destination was not shown. The Court said:

> "Again, *it is said,* that because deceased had left his engine and was going to his boarding house, he was engaged upon a personal errand, and not upon the carrier's business. *Assuming* (*what is not clear*) that the evidence fairly tended to indicate the boarding house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had not gone

> beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty' and employed in commerce, notwithstanding his temporary absence from the locomotive engine."

In *Shanks* v. *D. L. & W. R. R. Co., 239 U. S. 556,* the Court refers to the Zachary case as that of a fireman who, "having prepared his engine for a trip in interstate commerce and was about to start on his run, is walking across adjacent tracks *on an errand consistent with his duties*".

Thus the Court found and held, *not* that Zachary was killed "while on a personal errand to his boarding house" as alleged in Respondent's brief, but that his preparation of his engine for the interstate run which was presently to begin, was engaging in interstate commerce, and that his temporary absence from his engine was on an errand consistent with the continuation of those duties.

Even if we assume (what we deny) that when on the path going in the direction of the roundhouse, Hansen was within the scope of his employment, yet when he left the path, a place of entire safety, to talk with Kathan, about a matter which in no way tended to accomplish his declared purpose, and in so doing went into a place of extreme danger, where he was killed, he was not doing that which was "consistent with his duties." *On the contrary he did that which produced the accident.*

In *B. & O. R. R. Co.* vs. *Whitacre, 242 U. S. 169,* plaintiff, a brakeman, had responded to a call to make an interstate run. On arriving at his place of work, he was asked by the fireman to hunt up the tool boy and get a tin cup for use on the engine. While so doing he was injured.

No question was raised as to plaintiff's having been engaged in the scope of his employment and in interstate commerce at the time and place of the accident.

When the case reached the U. S. Supreme Court, that Court said:

> *"It was admitted that Whitacre was engaged in interstate commerce. The defenses relied upon were assumption of risk and denial of negligence."*

Thus the Whitacre case makes no decision as to what constitutes interstate commerce, that question having been eliminated by the admission. It has no bearing on the Hansen case.

In *Padgett* v. *Seaboard Air Line, 83 So. E. 633,* deceased, an engineer, while asleep on an engine, was carried through railroad yards to a point some distance from the place where he was to take his engine for his next run. When he was wakened the time for him to start on his run was approaching. He inquired for the location of his engine and was told by the man in charge that it was at the round-house. He went to the round-house and fell into a pit beside which his engine stood. He was required to inspect his engine before leaving on his run. The defense was that deceased was not engaged in interstate commerce at the time of the accident. The So. Carolina Supreme Court said:

> "The exact question is: For what purpose did Padgett go into the roundhouse? *If he went there for any purpose of his own* or there is an utter failure of evidence to prove any circumstances from which his purpose can be inferred, then the verdict ought to have been directed."

After discussing the inferences which it thought might be drawn from the evidence, the Court said:

> "If they (the jury) inferred from the circumstances *that Mr. Padgett was doing the work which was required of him,* not at the time it was required, but at a time when it was not forbidden, then they could conclude that he was engaged in interstate commerce."

Padgett was doing the work required of him, at or just before the time when he was required to do it.

Hansen had declared his intention to do *what he was not required to do,* what he had no right to do, and also what it was impossible for him to do because there were no tools on the pony engine, and the time was many hours before there was any pickup engine designated to receive them. He had declared his intention to do what was wholly unnecessary for anyone to do because there was no shortage of tools for the pickup engine on August 4. Furthermore, that which took him off the path to the place of danger was not an effort to execute his declared purpose, but his desire to talk with Kathan.

In *Prior* v. *Bishop, 234 Fed. 9* (C. C. A. 7th Circuit) deceased, a brakeman, when injured was in a caboose, which on his next run would regularly be attached to the train on which he would go out. For convenience in bringing deceased near to the place where his work was to begin, he was riding in this caboose. He had not yet been called for work, *but was subject to call at any time.* A few hours before the time for calling deceased for duty the caboose was run into and deceased was killed.

Held, on the authority of *Shanks* v. *D. L. & W. Ry. Co.,* 239 U. S. 556, that deceased was not then engaged in interstate commerce.

This case is a clear authority for defendant.

In *P. B. & W. R. R. Co.* v. *Tucker,* 35 App. Div. *District of Columbia,* affirmed in 220 U. S. 608,

without Opinion, the decedent was on his way to answer to a call to go out on an interstate train. He was going by a way customarily used by the defendant's employees for that purpose, and his death arose out of the negligence of the defendant. *At the time of the injury he was on the customary way,* hence the duty of caring for his safety rested upon defendant.

At the time Hansen was struck he was not answering any call to duty; *he was not on the path used by employees in going through the yard to the round-house,* but was on a dangerous railroad track, 30 feet away from the path. On that track neither he nor any other employee (except track-walkers and track repairers) was required to go in the performance of any duty owed to the defendant, except when passing over that track on an engine. There was nothing to call any employee to walk across that track at that point; hence the engineer had no reason to suppose that anybody would be walking on or across that track.

In *Seaboard Air Line Rwy. Co.* v. *Koennecke, 239 U. S. 352,* deceased was employed in distributing cars from an interstate train and clearing the track for another interstate train. He was in the performance of his duties and was clearly engaged in interstate commerce.

In *Pa. R. R. Co.* v. *Donat, 230 U. S. 40,* the injured employee was engaged in removing empty cars from defendant's track in order to place interstate cars thereon,—a clear case of interstate employment.

In *Willever* vs. *D. L. & W. Ry. Co., 99 Atl. 321,* a long freight train was backing through the yards without any lookout on the rear. This was in violation of the defendant's rule on which the injured man was entitled to rely. He was engaged in the performance of his duties in the yards. In every

essential particular the case differs from the Hansen case.

The Willever case divided this Court; a strong minority voted to affirm the judgment of the Supreme Court in favor of defendant, and in its progress through the Courts a majority of all the Judges who sat on the case held the defendant free from negligence.

In what way did Hansen serve defendant or further his declared purpose by leaving the path and going into the dangerous track where he was struck? How did he further interstate commerce by that act?

Respondent argues that if Hansen *thought* there were tools on the pony engine, and *thought* they should be transferred to the pickup engine, even though there were no tools on the pony engine, and even though there was no shortage of tools on the pickup engine, still he was engaged in interstate commerce. But the U. S. Supreme Court holds that the true test is whether *at the time of the injury the employe was engaged in interstate transportation,* or in work so closely related to it as to be practically a part of it. Interstate Commerce then *consists in acts,* not in thoughts. The employe *cannot think* himself into interstate commerce.

Nor is an employe within the protection of the Federal Act when doing what is not within the line of his duty, what he has no right to do, or what is unnecessary to be done. Where doing such acts voluntarily and in the absence of any request by defendant, the defendant is charged with no duty to care for his safety.

On respondent's theory a railroad company would be liable to a fireman, who might be injured while engaged voluntarily and without orders, in any kind of railroad operations, at any place or at any time he might see fit to engage therein, provided *he thought* such operations would be bene-

ficial to the company in its capacity as an Interstate carrier. The Act, however, charges liability upon the railroad carrier only to "Any person suffering injury while he is employed by such carrier in such (interstate) commerce". Liability then follows only in connection with *an act authorized or required by the carrier.*

We respectfully submit that the judgment should be reversed.

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Dated, August 1, 1917.