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**Notice of Appeal to Court of Errors
and Appeals.**

(Filed March 16, 1920.)

10

New Jersey Supreme Court

BRONISLAW GRIJNUK, Admr. ad
pros. of the Estate of Michael
Grijnuk,

Plaintiff-Respondent,

vs.

WILLIAM G. MCADOO, Director
General of Rairoads,

Defendant-Appellant.

Action at
Law.

On Appeal
from Sup-
reme Court.

20

To: ALEXANDER SIMPSON, Esq.,
Attorney of Plaintiff.

TAKE NOTICE that the defendant appeals to
the Court of Errors and Appeals from the
whole of the judgment entered in this cause.

Dated March 3, 1920.

30

Yours respectfully,

COLLINS & CORBIN,

Attorneys of Defendant-Appellant.

40

Opinion of the Supreme Court.

(No. 48 November Term 1919.)

NEW JERSEY SUPREME COURT.

10	BRONISLAW GRIJNUK, Admr.,	}
	<i>Respondent,</i>	
	<i>vs.</i>	
	WILLIAM G. MCADOO, Director General,	}
	<i>Appellant.</i>	

APPEAL HUDSON CIRCUIT.

Argued November Term 1919,
Decided February Term 1920.

20 ALEXANDER SIMPSON,
For Respondent.
COLLINS & CORBIN,
For Appellant.

ARGUED BEFORE THE CHIEF JUSTICE, MINTURN
AND BLACK, J. J. PER CURIAM:

30 The suit was instituted under the Federal
Employers Liability act, for damages consequent
upon the death of a brother of the adminis-
tratrix, and upon whom the jury might have
found the plaintiff to have been dependent, so
as to bring her within the provisions of the act.

Vreeland v. Michigan, C. R. R. 227 U.
S. 70 In re Kenney, 204 U. S. 497.

40 The plaintiff was employed by defendant com-
pany to remove lamps from the rear of trains
While engaged in this work, on a standing train
at the depot in Jersey City, the train was sudden-
ly and without any notice to the employees pushed
back against the bumper and plaintiff's intestate
was killed. This clearly indicated negligence in
operation, because the deceased had a right to as-
sume that the train being in the depot at rest and

Opinion of the Supreme Court.

practically up against the bumper would go forward rather than backward, if it moved at all; and in any event would not be moved back without notice of some kind to an employee like deceased, who it must be assumed would be expected there to perform his work.

10

We think the question was one of fact for the jury under all the cases involving questions of disputed facts regarding the performance of the duty imposed upon the master by law. We think the amendment allowed to the petition did not change in any material aspect the gravamen of the case so as to prejudice defendant in any material manner, and that the amendment in such circumstances is entirely a matter of sound discretion.

20

Koennecker v. Seaboard Air Line, 239 U. S. 353. The judgment will be affirmed.

30

40

Order of Affirmance.

(Filed March 9, 1920.)

NEW JERSEY SUPREME COURT.

10

BRONISLAW GRIJNUK, Admr.,
*Plaintiff-Respondent,**vs.*WILLIAM G. MCADOO, Director
General of Railroads, Hudson
and Manhattan Railroad Com-
pany,*Defendant-Appellant.*Action at
Law.
Appeal from
Hudson
Circuit.
Rule on
Affirmance
of Judg-
ment.

20 The above cause, having been regularly on the February Term list for argument, on appeal from the Hudson Circuit Court; Collins & Corbin, Esqs., appearing for the Appellant and Alexander Simpson, Esq., for the respondent, and no error being found therein.

30 It is on this ninth day of March 1920, on motion of Alexander Simpson, attorney for respondent, Ordered, that the judgment below be, and the same is in all things affirmed, with costs, and the record be remitted to the Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of said Court.

Entered March 9, 1920,

On motion of,

ALEXANDER SIMPSON,
Attorney for Plaintiff.

Grounds of Appeal in Court of Errors and Appeals.

(Filed March 18, 1920.)

The appellant states the following grounds of appeal:

I. The Supreme Court erred in affirming the judgment in favor of the plaintiff. 10

II. The Supreme Court erred in failing to reverse the judgment of the Hudson County Circuit Court in favor of the plaintiff for one or more of the reasons set forth at length in the defendant's grounds of appeal in the Supreme Court, which were as follows:

1. The trial judge erred in permitting the general administrator to be added as a new party plaintiff when thereunto moved by counsel for the plaintiffs at the trial. 20

2. The trial judge erred in permitting the general administrator to be substituted as a new party plaintiff when thereunto moved by counsel for the plaintiffs at the trial.

3. The trial judge refused to nonsuit the plaintiffs when thereunto moved by the defendants whereas said motion should have been granted on one or more of the following grounds urged in support of said motion:

(a) No evidence of any negligence on the part of the defendants. 30

(b) The plaintiff's intestate assumed the risk of his injuries as a part of his employment.

(c) No evidence that any of the next of kin were dependent upon the plaintiff's intestate within the meaning of the Federal Employers' Liability Act of April 22, 1908. (U. S. Comp. Stat, 1916, par. 8657.) 40

Grounds of Appeal in Court of Errors and Appeals

4. The trial judge refused to direct a verdict in favor of the defendants when thereunto moved, whereas said motion should have been granted on one or more of the following grounds urged in support of said motion:

10

(a) No evidence of any negligence on the part of the defendants.

(b) The plaintiff's intestate assumed the risk of his injuries as a part of his employment.

(c) No evidence that any of the next of kin were dependent upon the plaintiff's intestate within the meaning of the Federal Employers' Liability Act of April 22, 1908. (U. S. Copm. Stat. 1916, par. 8657.)

20

5. The trial judge charged the jury:

"So that, under any circumstances you must take into consideration what the reasonably fair cost would have been and was for the maintenance and support in the household and in the family of this brother now deceased, and if you find that there was a difference between that sum and the sum which you may find was contributed by him, then it would be only that difference which you may use in your consideration of what a verdict may be for."

30

COLLINS & CORBIN,

Attorneys of Defendant-Appellant.

Service acknowledged March 17, 1920.

ALEX SIMPSON,

Attorney of Plaintiff.

40

Notice and Grounds of Appeal.

(Filed August 25, 1919.)

To Alexander Simpson, attorney of plaintiffs:

TAKE NOTICE that the defendants appeal to the New Jersey Supreme Court from the whole of the judgment entered in this case on the following grounds: 10.

1. The trial judge erred in permitting the general administrator to be added as a new party plaintiff when thereunto moved by counsel for the plaintiffs at the trial.

2. The trial judge erred in permitting the general administrator to be substituted as a new party plaintiff when thereunto moved by counsel for the plaintiffs at the trial. 20.

3. The trial judge refused to non-suit the plaintiffs when thereunto moved by the defendants whereas said motion should have been granted on one or more of the following grounds urged in support of said motion.

(a) No evidence of any negligence on the part of the defendants.

(b) The plaintiff's intestate assume the risk of his injuries as a part of his employment.

(c) No evidence that any of the next of kin were dependent upon plaintiff's intestate within the meaning of the Federal Employers' Liability Act of April 22nd, 1908. (U. S. Comp. Stat. 1916 par. 8657.) 30.

4. The trial judge refused to direct a verdict in favor of the defendants when thereunto moved, whereas said motion should have been granted on one or more of the following grounds urged in support of said motion. 40.

Notice and Grounds of Appeal.

(a) No evidence of any negligence on the part of the defendants.

(b) The plaintiff's intestate assumed the risk of his injuries as a part of his employment.

10 (c) No evidence that any of the next of kin were dependent upon plaintiff's intestate within the meaning of the Federal Employers' Liability Act of April 22nd, 1908. (U. S. Comp. Stat. 1916 par. 8657.)

5. The trial judge charged the jury:

20 "So that, under any circumstances you must take into consideration what the reasonably fair cost would have been and was for the maintenance and support in the household and in the family of his brother now deceased, and if you find that there was a difference between that sum and the sum which you may find was contributed by him, then it would be only that difference which you may use in your consideration of what a verdict may be for."

COLLINS & CORBIN,

Attorneys for Defendant-Appellant.

30

40

Summons.

(Filed January 23, 1919.)

THE STATE OF NEW JERSEY to William G. Mc-
Adoo, Director General of Rail-
roads, of the Hudson and Manhat-
tan Railroad Company.

(Seal)

You are summoned to an-
swer the annexed complaint of
Bronislaw Grijnuk, administrator *ad prosequen-*
dum of the Estate of Michael Grijnuk, deceased,
in an action at law in the Circuit Court of the
County of Hudson. And take notice, that unless
you file your answer to said complaint with the
Clerk of said Court within twenty days after serv-
ice upon you of this writ and the annexed com-
plaint, the plaintiff may proceed in the suit and
judgment may be entered against you.

Witness, Luther A. Campbell, Judge of the
Circuit Court of the County of Hudson, at Jersey
City, this fifteenth day of January, Nineteen hun-
dred and Nineteen.

JOHN J. MCGOVERN,
Clerk.

ALEX. SIMPSON,
Attorney.

10

20

30

40

Complaint.

(Filed January 23, 1919.)

HUDSON COUNTY CIRCUIT COURT.

10 BRONISLAW GRIJNUK, Adminis-
trator *ad prosequendum* of the
Estate of Michael Grijnuk, de-
ceased,

*Plaintiff,**vs.*

WILLIAM G. MCADOO, Director
General of Railroads, Hudson
and Manhattan Railroad Com-
pany,

20

Defendant.

Action at
Law.

The plaintiff, who resides at No. 186 Pavonia Avenue, in the City of Jersey City, in the County of Hudson, says that:

1. That he is administrator *ad prosequendum* of the Estate of Michael Grijnuk, deceased, and brings into Court Letters of Administration granted to him upon the said Estate by the Surrogate of the County of Hudson.

30 2. The Hudson and Manhattan Railroad Company, is now and was at all times hereinafter mentioned a corporation of the State of New Jersey, and was a common carrier by railroad engaged in interstate commerce, transporting passengers for hire between the State of New Jersey and the State of New York.

3. The intestate of the plaintiff was at all times hereinafter mentioned in the employ of the defendant, carrying on interstate commerce.

40

Complaint.

4. On the 29th day of October, 1918, at Jersey City aforesaid, the intestate of the plaintiff, while in the employ of the defendant and engaged in interstate commerce oiling lamps and fitting lamps to the rear of trains, he was injured by reason of the negligence of the defendant.

10

5. The negligence of the defendant consisted in this:

While the intestate of the plaintiff was doing his work for the defendant, fitting lamps to the rear of a train, the agents and servants of the defendant, without using due care to ascertain the position of plaintiff's intestate, backed the train down upon the intestate of the plaintiff, and crushed him against a block stop; and it did not use reasonable care to give the plaintiff's intestate any warning of the intention to move said train and did not use reasonable care to provide him with a safe place in which to work or to promulgate rules for the protection of such employees, and by reason of said negligence the intestate of the plaintiff was killed.

20

6. The intestate of the plaintiff was at all times in the exercise of due care for his safety and his injury was not a risk incident to the employment.

30

7. The intestate of the plaintiff left him surviving next of kin who have suffered pecuniary injury by reason of his death.

8. The within action is commenced within twenty-four calendar months after the death of the intestate of the plaintiff.

Plaintiff demands \$10,000.

ALEX. SIMPSON,
Attorney for Plaintiff.

40

Answer.

(Filed January 24, 1919.)

Defendants, William G. McAdoo, Director General of Railroads, residing in the City of Washington, D. C., and Hudson & Manhattan Railroad Company, a corporation of the States of New Jersey and New York, having its principal office in New Jersey at No. 243 Washington Street, Jersey City, say that:

FIRST DEFENSE.

1. They have no knowledge nor information thereof sufficient to form a belief as to the allegations of paragraph 1.

2. They admit that Hudson & Manhattan Railroad Company is now and at all times mentioned in the complaint was a corporation of the State of New Jersey, and was a common carrier by railroad engaged in interstate commerce but they say it was also a corporation of the State of New York and that at the times set forth in the complaint the defendant, William G. McAdoo, as Director General of Railroads, was operating said railroad company by virtue of authority of law vested in him by the Proclamations of the President of the United States dated December 26, 1917 and April 11, 1918, and by the Act of the Congress of the United States entitled: "An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes," approved March 21, 1918.

3. They admit that the plaintiff's intestate at the times mentioned in the complaint was in the employ of the defendant, William G. McAdoo, as Director General of Railroads; they admit that at said times said William G. McAdoo, as Director General of Railroads was carrying on interstate commerce by means of the railroad of the defend-

Answer.

ant Hudson & Manhattan Railroad Company under and by virtue of the authority hereinbefore set forth.

4. They admit that on October 29, 1918 at Jersey City plaintiff's intestate while in the employ of the said William G. McAdoo, as Director General of Railroads, and while he was engaged in interstate commerce, as set forth in paragraph 4, receive certain personal injuries; but they deny that he received said injuries by reason of any negligence on the part of the defendants, or either of them, or of any of their servants and agents, or any or either of them. 1000

5. They deny the allegations of paragraph 5.

6. They deny the allegations of paragraph 6.

7. They deny the allegations of paragraph 7. 2000

8. They admit the allegations of paragraph 8.

SECOND DEFENSE.

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

THIRD DEFENSE.

The accident set forth in the complaint was due to contributory negligence on the part of the plaintiff's intestate, and the damages, if any, must therefore be diminished in proportion to the amount of such contributory negligence attributable to the plaintiff's intestate. 3000

FOURTH DEFENSE.

Defendant will object that the complaint discloses no cause of action. It fails to show that the plaintiff has any legal right to maintain the cause of action set forth in the complaint. 4000

COLLINS & CORBIN,
Attorneys of Defendant.

Judgment.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson County Circuit Court April 23, 1919.

The cause having been heard and submitted to the jury they returned their verdict as follows:

- 10** They say that they find for the plaintiffs and against the defendant, and they assess the damages of the plaintiffs on occasion of the premises at the sum of \$3,000.

Whereupon, it is adjudged that the plaintiffs recover of the defendant the sum of \$3,000 damages and their costs which are taxed at \$55.65, making in whole the sum of \$3,055.65.

Judgment entered April 25, 1919.

LUTHER A. CAMPBELL,
Judge.

20

Attest:

John J. McGovern,
Clerk.

Rule to Show Cause.

(Filed June 12, 1919.)

- 30** On due application on behalf of the defendant ORDERED that the plaintiff show cause before this Court on Friday, the 27th day of June, 1919, at 10 o'clock in the forenoon why the verdict rendered in his favor on the 24th day of April, 1919, should not be set aside and a new trial granted on the sole ground that the verdict is excessive.

It is FURTHER ORDERED that all the objections and exceptions noted by the defendant to the rulings of the trial court at the trial of the cause be and the same are hereby expressly reserved.

LUTHER A. CAMPBELL,
Circuit Judge.

Rule entered this 12th day of June, 1919.

- 40** On motion of

COLLINS & CORBIN,
Attorneys of Defendants.

Reasons.

(Filed June 16, 1919.)

Defendant writes down the following reasons upon which they rest their motion for a new trial in the above case:

The damages awarded by the jury were excessive. 10

COLLINS & CORBIN,
Attorneys of Defendants.

Conclusions.

(Filed July 31, 1919.)

CAMPBELL, Judge.

Plaintiff has a verdict for Three Thousand (\$3,000) Dollars which the defendant seeks to have set aside as excessive.

The question whether the testimony shows a dependency, under the statute, to have existed between decedent and his sister, I have not considered because it is reserved as a subject of appeal. 20

The sole question considered is, is the weight of the evidence such that the jury could not have found in the sum of Three Thousand (\$3,000) Dollars without passion, prejudice or mistake.

My conclusion is that the state of the evidence was such as to reasonably warrant the verdict found. 30

The Rule is therefore discharged.

Dated July 26th, 1919.

LUTHER A. CAMPBELL,
Judge.

Order Discharging Rule to Show Cause.

(Filed August 11th, 1919.)

10 The plaintiff recovered a judgment against the defendant above named, April 25th, 1919, and thereafter a rule to show cause was allowed at the instance of the defendant for the plaintiff to show cause why a new trial should not be granted.

The rule was brought on for argument and regularly argued by Collins & Corbin, for the defendant and Alexander Simpson for the plaintiff and the Court having duly considered the same,

It is on motion of Alexander Simpson, Attorney of plaintiff ORDERED that the said rule to show cause be discharged and a new trial decreed.

20 LUTHER A. CAMPBELL,
Judge.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

BRONISLAU GRIJANK, Admr.

vs.

30 WILLIAM G. MCADOO, etc., and
HUDSON & MANHATTAN RAIL-
ROAD Co.

At Law.

Alexander Simpson, Esq., for plaintiff.
Collins & Corbin, Esqs., (Mr. Broadhurst) for defendant.

The above entitled case was tried April 23, 1919, before Honorable Luther A. Campbell, Judge, and a jury.

40 MR. SIMPSON: I move to add a new party, to wit, Bronislau Grijank, Administrator of the Estate of so and so, deceased.

Colloquy.

MR. BROADHURST: I object on the ground that it amounts to nothing more than a substitution of a new party plaintiff; that the party plaintiff in this action is the administrator ad prosequendum, who has no authority to bring an action under the Federal Act, and that the mere adding of an administrator, or someone as an administrator—a substitution—is not adding a party, but is substituting a party. The plaintiff has brought a suit in court here, and I think the cases cited to your Honor, which is Rankin against the Central Railroad Company, 77 Law, and Fitzhenry against Consolidated Traction Company, 63 Law, are conclusive on the point. The fact that the cases were prior to the present Practice Act hasn't got any weight, because I looked at the general statutes under which case in 63 Law was decided, and the language of the act is practically the same as the language of the present section of the Practice Act.

THE COURT: Well, in the case of Rankin, as well as in the other case, which you have spoken to me of,—Fitzhenry, was it?

MR. BROADHURST: Fitzhenry against the Consolidated Traction Company.

THE COURT: In the first case the action was originally brought in the name of Rankin as Administratrix, and should have been brought under the laws of the State of Pennsylvania in her name as the widow; and the court said there that the amendment could not take place. It was held by this court, Justice McKee, writing the opinion, that the amendment would not continue the existing suit except in mere form, but would create and institute a new suit with a new question in controversy between the parties. The determination in that case would be con-

Colloquy.

trolling in this—speaking of the case in 31 Vroom, page 99.

10 In the case of Fitzhenry against the Consolidated Traction Company, there the action was brought in the name of the father for the death of the son, and of course, should have been brought under the name of the son as the personal representative at that time, and there the court said, "It is to be observed that this amendment would not be the only one to be made in order that action should be in accordance with the Death Act; but, conceding for the purpose of the argument that the amendment be sufficient, yet still it is one which cannot be made under section 138 of the Practice Act. Referring to general 20 statutes, page 556, one of the defenses to the action if it were now commenced in the name of the administrator under the Death Act would be that the action is barred by the statute of limitations.

Well, of course, that does not appear in this case. The statute does not run against this particular action.

30 MR. BROADHURST: But, as far as the privilege to amend is concerned, it seems to me that it does not make any difference except that a judge might be more willing to permit an amendment if the statute of limitations had run, because the plaintiff would be barred then.

THE COURT: Do you say that section 9 of the Practice Act of 1912 has no applicability to this motion?

MR. BROADHURST: You read that before, your Honor.

40 THE COURT: Yes. That reads that no action shall be defeated by non-joinder or mis-joinder of parties, and new parties may be added and parties

Colloquy.

misjoined may be dropped by order of the court at any stage of the cause as the ends of justice may require.

MR. BROADHURST: I do not think it has any application, because this is substitution. This is one party plaintiff being substituted for another party plaintiff. 10

THE COURT: Well, you have a misjoinder now?

MR. SIMPSON: I am not asking to substitute. I do not say to strike my plaintiff administrator ad prosequendum out. I only ask to add another. The Court of Errors and Appeals and the United States Supreme Court may say he is the one to sue, so I want to be sure, and I ask to add another party, to wit, the administrator with full power. 20

MR. BROADHURST: I am not sure whether that was a Supreme Court decision or Court of Errors and Appeals decision. My recollection is it was by the Court of Errors and Appeals. But still that is the law of the state.

THE COURT: If the Supreme Court of the state has said it I have to abide by it.

MR. BROADHURST: That is the law, and the mere adding of another administrator—that is just a play on words; it practically amounts to a substitution. 30

THE COURT: My inclination is to permit the amendment, and take your exception to it. Place yourself properly on the record. Mr. Simpson now realizes his position, and if I am wrong in my ruling his whole action fails.

MR. BROADHURST: I note an exception on the record.

(The jury was duly impaneled, accepted and sworn). 40

Colloquy.

Trial adjourned to the following morning at ten o'clock.

April 24, 1919, 10 A. M. Trial resumed pursuant to adjournment.

10 THE COURT: Mr. Broadhurst, you do not say, as I understand it, that this admission of the general administrator is working a surprise towards your defense; that is, that it raised a thing which because of the fact that it was made yesterday is putting you in a position where you cannot prosecute your defense?

20 MR. BROADHURST: Why, no, your Honor. If we had had to go to trial yesterday perhaps it would; but since we have had the night to go over the matter I cannot say that it has caused a surprise.

30 THE COURT: I think, Mr. Simpson, you shall have to go a little further than you have. I think you shall have to amend your complaint; because otherwise your very first paragraph would be quite insufficient; because in that you allege that the then existing or sole plaintiff was the administrator ad prosequendum. Now, you say your plaintiffs are two in number, one the original, and one the other who is the general administrator. You are not alleging the name of the general administrator at all in your complaint.

MR. SIMPSON: Well, it is the same as the administrator ad prosequendum. I will amend to that effect. I think that will cover it, both the administrator ad prosequendum, and the administrator of the goods and chattels, rights, and so forth.

THE COURT: Any objection to that particular form of amendment?

Colloquy.

MR. BROADHURST: Except that I wish my general objection to the amendment, and my exception to your Honor's ruling allowing it to also apply to this, so as to be consistent.

THE COURT: All right sir.

Mr. Simpson opened the plaintiff's case to the jury. 10

Mr. Broadhurst opened the defendant's case to the jury.

THE COURT: As I understand, gentlemen, the two questions that so often are troublesome in cases of this character are not in question at all here; that is, that at the time of the happening both the defendant and the decedent were engaged in interstate commerce.

MR. BROADHURST: Interstate commerce is admitted in the answer. 20

THE COURT: I so understood.

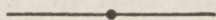
MR. BROADHURST: Yes, that is a fact.

MR. SIMPSON: I offer the letters of administration in evidence.

THE COURT: Of general administration or both?

MR. SIMPSON: General administration, I haven't my prosequendum. I will get them later. I do not seem to have them in the files, but I want to offer them also. 30

(Letters of general administration marked P-1 in evidence.)



Stanislaw Chrinuch—Direct.

STANISLAW CHRINUCH, sworn through interpreter.

DIRECT EXAMINATION BY MR. SIMPSON:

10 Q. Where do you live? A. 121 Pavonia Avenue.

Q. Jersey City? A. Yes, Jersey City.

Q. Where do you work? A. Sugar house.

Q. Where? A. Sugar house; that refining company.

Q. And on the 29th day of October, 1918, were you working for the Hudson & Manhattan Railroad Company? A. Yes, sir, I was.

Q. Where were you working at that time? A. I was working on the inspection pit as a helper, inspector's helper.

20 Q. Did you know Michael Grijank on that day? A. Yes, sir; we worked together.

Q. And did you see him on that day working there? A. Yes, sir.

Q. And where was he working when you saw him? A. At the time when he was killed he was on the fifth track.

Q. And what was he doing on the fifth track? A. He went to fill in a lamp with kerosene.

Q. And where was the lamp that he went to fill? A. From the rear of the car.

30 Q. And was that car alone or was it attached to other cars? A. There was a whole train of cars, with the exception of one or two which were not connected.

Q. Well, the car that he was working on, was it connected with the train of cars or was it disconnected and alone? A. It was connected.

Q. And which end of it was he working on? The end that was the rear end or the end that was connected with the other car? A. The rear end

40 of the car.

Stanislaw Chrinuch—Direct.

Q. And about how many cars were there in the train that that was connected to? A. About eight, maybe more.

Q. And you say that at the other end there were one or two cars that were not connected, as I understand it? A. Yes, sir. 10

Q. Now, was anything done with those cars that were unconnected to move them up to this train that he was working on? A. These cars were taken into the shop.

Q. Well, was anything done with the two single cars to connect them with the train that he was working on? A. I do not know what they did with those cars.

Q. Well, how was he killed? Just describe it? A. The cars were standing near the block, not quite close to the block; he went behind intending to remove the lamp and wanted to fill it with kerosene, and the motorman drove the rear cars—he probably didn't see the man standing there—and he knocked—the car hit him. 20

Q. And what did it do to him after it hit him? A. He hollered, and a whole lot of people came running towards him and three or four minutes lasted while he was hollering and then the motorman came and shifted the cars back and he was taken away. 30

Q. Why was the necessity of shifting the cars back before he was taken away.

MR. BROADHURST: I object unless he knows.

Q. Well, what did you see the condition to be before the motorman shifted the cars, that is, after he was struck?

MR. BROADHURST: Just a minute, please. I object to the question. We have admitted the death was because of the accident. There 40

Stanislaw Chrinuch—Direct.

is no claim for pain and suffering, so I do not see what relevancy the question has.

10 MR. SIMPSON: I am not asking for mental pain and suffering. I am asking so the jury will understand where the man was caught between the cars—

MR. BROADHURST: Ask him that question.

THE COURT: What was the question?

Q. (Repeated by the stenographer.) Well, what did you see the condition to be before the motorman shifted the cars; that is, after he was struck?

THE COURT: What is the objection?

20 MR. BROADHURST: The objection is that we have admitted the death was because of the accident. I do not see what materiality it has.

THE COURT: I will overrule the objection.

Q. (Last question repeated again by the stenographer.) A. He was hit (indicating with his hand the private parts).

Q. What was the condition of his body? A. He fell down on the ground.

30 Q. What was the position of his body with reference to the rear of the train and the block which you describe? A. He went there not expecting that this thing would happen. He went there with the expectation of filling the lamp.

MR. SIMPSON: I ask that that be stricken out as not responsive. I do not want all that. Ask him the question over again.

40 Q. (Interpreter speaks to the witness.) A. He was lying—he was lying between the block and the car; he could not move either one way or the other.

Stanislaw Chrinuch—Direct.

Q. Then what did the motorman do after he was in that position, caught between the block and the car? A. After the motorman saw the man was lying there he went to pull the cars away.

Q. Where was the motorman when he was moving the car? What car was he on? A. I did not follow him to see where he was. He run somewhere. 10

Q. Did you see what car he was on when he moved the train and struck the man now dead? A. He was in the rear of the car.

Q. And did you or did you not hear any whistle blown or signal given before these cars moved down on the man that was struck? A. No, sir; there was no signs or signal given, no bell rang, no whistle blew. 20

Q. And was there anybody—a conductor or any trainman on the rear end of this train where the man was taking the lamp from at the time he was injured?

MR. BROADHURST: I object to the question, unless it is shown the witness saw it himself.

MR. SIMPSON: Well, that is what I am asking him. He is describing the accident. 30

MR. BROADHURST: You asked him was there any one there. I do not know whether it is mere hearsay on his part or whether he saw it.

MR. SIMPSON: Well, he was there. He has already described the location and described what he saw. He is certainly competent to testify whether any one was there.

THE COURT: Well, there cannot be any very great objection, Mr. Simpson, in so framing your question as to make it positive. 40

Stanislaw Chrinuch—Direct.

Q. Did you see with your eyes anybody standing on the rear end of the car where the man was taking the lamp from? A. There was a lot of people around the yard.

Q. The rear end of the car I am talking about?

10 A. There were people after the accident, a lot of people around there.

Q. But before the accident when the man was taking the lamp and before he was struck, did you see with your eyes any one standing upon the rear platform of this train of cars? A. No, sir; I did not see. The only thing that attracted us was the noise, and we all ran there.

Q. And you say there were people walking around the yard, working around the yard. How many tracks are there in that yard? A. In the whole yard?

Q. Where you were, where this accident happened? A. There was five tracks, and he was killed on the fifth track.

Q. Was it in the daylight, or was it dark in there? A. It was light.

Q. Do you know of your own knowledge whether his foreman told him to go and get that lamp or not? A. I don't know whether he went there at his own free will or not.

30 Q. Was he doing the same kind of work that you were doing? A. No, sir; no, sir. He always worked at the same kind of work that killed him.

Q. What was that? A. He was cleaning cars first, and then he was sent to Cortlandt Street after kerosene. I don't know who—somebody may have told him to go and fill in the lamp.

Q. But how long had he been doing this work around the lamps before he was killed? A. About a month.

40 MR. SIMPSON: Cross examine.

Stanislaw Chrinuch—Cross.

CROSS EXAMINATION BY MR. BROADHURST:

Q. What do they use this yard for? A. For the storing of cars.

Q. Do they clean the cars there too? A. They clean cars.

Q. And they repair cars there too, don't they? A. Yes, sir; in the same place, same shop.

Q. And there are quite a few men work in the yard, aren't there? A. Yes, sir.

Q. This yard is on the surface level of the ground? A. Yes, sir.

Q. These cars, when they are put on the tracks for repairs, are there any men stationed on the cars? A. I don't know that; I don't know.

Q. The cars are empty, aren't they? A. Yes, sir; standing in the yard.

Q. Now, at the time this man was hurt you say there was a block? A. Yes, sir.

Q. At the end of track 5? A. Yes, sir.

Q. And then there were two cars? A. No, sir; that whole drill of cars stood there.

Q. How far was the car from the block—the car nearest the block, how far was that from the block itself? A. About two feet.

Q. And the man that was killed went in behind, between the car and the block, to fill a lamp; is that right? A. He only wanted to go there for about a minute to remove the lamp.

Q. How far was that car from the cars that came moving in on the tracks? A. I don't know how many cars there were; I don't know where these cars came from. They may have come from the tunnel or may have come from the shop.

Q. This block is the end of track 5, isn't it? A. Yes, sir.

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Stanislaw Chrinuch—Cross.

Q. And if they were going to move those cars off the track they would have to move them away from the block, wouldn't they? A. The block is there for the purpose so the cars would not go further off the track.

10 Q. Now, where were you standing? How far from track 5 were you standing at the time? A. We were eating our dinner on the car, the so-called "pitcher."

Q. Where is that? On what track is that? A. Second track.

Q. How far is that from the block on track 5? A. Not very far; about the distance of about eight cars.

20 Q. The distance of eight cars? A. Yes, sir, distance of about the length of eight cars.

Q. Which side of the track 5 is that track 2? Is it nearest Henderson Street or Newark Avenue—Steuben Street or Newark Avenue? A. Yes., Steuben Street.

Q. And track 5 is nearest Newark Avenue? A. Yes, outside of Newark Avenue.

Q. Then there were two tracks in between the track that you were on and track 5; is that right? A. The first and second track was what they call a special pit.

30 Q. Well, how many tracks were there between where you were and where track 5 is? A. Third, fourth and fifth.

Q. And the block on track 5, that is away from Henderson Street; that is on the opposite side from Henderson Street, isn't it? What is the next street, Provost? A. No—yes—that is right.

Q. So you were on track 2? A. Yes.

Q. And the block is down here on track 5? A. Yes.

40 Q. And you were about eight cars lengths from the block? A. Yes.

Stanislaw Chrinuch—Cross.

Q. Now, how many cars were on tracks in between you and the block? How many cars were on the two tracks in between you and the block?

A. Eight cars, eight cars. You can't get any more cars on there.

Q. Well, were there any more cars standing there at the time? A. Where? Where I was or where the accident happened? **10**

Q. Between where you were and where the accident happened? A. Yes; there were cars standing there.

Q. And you were eating your lunch at the time, weren't you? A. Yes.

Q. Which way were you facing? Were you facing Steuben Street or Newark Avenue? A. Newark Avenue. **20**

Q. You were facing Newark Avenue? A. Yes.

Q. Were you sitting down inside of the car? A. Yes.

Q. And has this car got windows in it, the car you were sitting in? Has that got windows in it? A. Yes, sir.

Q. What were you doing, looking out of the window? A. Looking out of the window. I looked out of the window and I saw people running and we noticed it and we also ran.

Q. And that was the first thing you knew anything about it, when you saw people running, wasn't it? A. Yes. **30**

Q. Are you any relation to the man who was killed? A. Yes. (Answering in English.)

THE COURT: Does he understand that question?

Q. (Repeated by the stenographer and apparently interpreted by the interpreter.) Are you any relation to the man who was killed? A. No. **40**

Hernie Sadowska—Direct.

MR. BROADHURST: What was the question you asked him?

THE INTERPRETER: I asked him was he any relation to the man who was killed.

10 Q. Do you live in the same place where this man used to live? A. I live in Jersey City.

Q. Do you live in the same house that the man who was killed used to live in? A. No, sir.

Q. How long had you known him? A. Several years.

Q. What time of the day did the accident happen? A. About half-past twelve and maybe twenty-five minutes more.

20 Q. They are bringing cars from the tunnel up into this yard all the time, aren't they, and taking them back down after they are cleaned? A. Yes, sir.

MR. BROADHURST: That is all.

MR. SIMPSON: That is all.

HERNIE SADOWSKA, SWORN.

DIRECT EXAMINATION BY MR. SIMPSON:

Q. How old are you? A. Twenty-seven.

30 Q. And the man who was killed was your brother, wasn't he, Grijank? A. Yes, sir.

Q. He lived— A. My natural born brother.

Q. Well, how could he be anything else but a natural born brother?

THE INTERPRETER: I do not know. I simply say what she says.

Q. Did he live with you when he was killed? A. Yes, sir; he lived with me.

40 Q. And what financial arrangement—what did he do about keeping up that house?

Hernie Sadowska—Direct.

MR. BROADHURST: I object to that, your Honor.

THE COURT: Why?

MR. BROADHURST: "What did he do about keeping up your house"?

MR. SIMPSON: I will withdraw it. 10

Q. Did he pay you any lawful currency of the United States of America every month, and if so, how much? A. He gave me thirty dollars a month.

Q. And of whom did your household consist? Who lived there? A. I have four children and myself.

Q. And your brother? A. Yes, sir; he was living with me.

Q. And did he ever give you anything more than thirty dollars a month at any time during the year? A. He always assisted me. He was very good to me. He always aided me. 20

Q. Well, can you tell this jury how much a year he would give you besides the thirty dollars a month?

MR. BROADHURST: I object to the form of the question, your Honor. If Mr. Simpson is trying to show gifts he is not entitled to show it in this action. 30

MR. SIMPSON: I am using the word "give" in the colloquial sense. Of course, I cannot say, "transport", because we usually say "give" when we talk about money.

MR. BROADHURST: Mr. Simpson thinks I am trying to be very technical, but your Honor understands I cannot get my objection in after this witness starts talking.

THE COURT: Mere gifts are not bases for recovery in an action of this kind. 40

Hernie Sadowska—Cross.

MR. SIMPSON: We all understand that, but I am using the word in a colloquial sense—how much.

10 Q. Do you know what you received from him a year besides thirty dollars a month, if you can tell? A. Any time that I needed money for rent my brother was ailing.

MR. SIMPSON: Sick, does she mean?

THE INTERPRETER: Sick.

A. (Continuing.) And he always gave me enough to pay my rent.

Q. This thirty dollars a month that you got, what did you do with that? A. I have four children. I need to spend it for their keep.

20 Q. And how about yourself? A. I need a lot for the upkeep of my household.

Q. And is that what you used this money for? A. Yes, sir.

Q. How old was your brother, if you know, when he was killed? A. Thirty something; I cannot say.

Q. Between thirty and forty? A. About thirty-five, or maybe thirty-eight. I am not sure.

30 Q. He was not any older than thirty-eight? A. I am not sure.

MR. SIMPSON: That is all. Cross examine.

CROSS EXAMINATION BY MR. BROADHURST:

Q. How long was your brother living with you? A. Always with me.

Q. Well, when did he first start to live with you? A. He lived with me from the time I got married, and that is eight years ago.

40 Q. And what is your husband's name? A. Bronislaw Sadowska.

Hernie Sadowska—Cross.

Q. Where does he work? A. He works near the cars at Erie.

Q. And how much does he make? A. He makes twenty dollars in two weeks.

Q. And the time that your brother lived with you your husband was living with you too, wasn't he? A. Yes, yes, sir; always. 10

Q. And he was working, too, wasn't he? A. No. When he was sick he couldn't work.

Q. Well, was he sick all the time or was he sick once in a while? A. He suffers some ailment that impairs him from steady work.

Q. Now, how long has he been working for the Erie? A. About a year since we arrived here from Brooklyn.

Q. And where was he working at the time that your brother was killed? A. When he was working on the docks, whenever he could, in Brooklyn. 20

Q. How much money did he make there? A. Sometimes he would work a week and other times he would not work because he was an extra hand there.

Q. Well, how much did he make on an average? A. When he would work day and also overtime at night he would make sometimes twenty dollars and sometimes less.

Q. A week? A. Yes, sir. 30

Q. Now, was there anybody else lived in the household besides you and your husband and this brother who was killed?

THE COURT: She has said her four children.

A. Only my husband and my brother, that is all, and the children.

Q. Now, how old is—

MR. BROADHURST: I withdraw that. 40

Hernie Sadowska—Cross.

Q. Your brother had a room then, did he? A. Yes, sir.

Q. And he ate his meals with you, too, didn't he? A. Yes, sir.

10 Q. How much money did your brother owe you at the time he was killed?

MR. SIMPSON: I object to that. We are not suing for any debt. Our theory is that she was depending on him.

MR. BROADHURST: And I think if she says her brother owed her any money it shows she was not depending on him.

MR. SIMPSON: How does that show, if he owed her any money.

20 MR. BROADHURST: Yes. If he owed her any money, she was keeping her brother and her husband.

MR. SIMPSON: I object on the ground that that does not show anything of the kind.

THE COURT: I do not follow you at all, Mr. Broadhurst.

MR. BROADHURST: Well, I will withdraw the question.

30 Q. Were you over to New York about this accident, to see someone from the Hudson and Manhattan? A. I was there; I was there with my brother.

Q. And does your brother speak English? A. A little, he understands.

Q. How did you talk to the gentleman over there if he only spoke a little English? Did you have an interpreter with you? A. There was an interpreter along.

Q. And who was that interpreter? A. I do not know him.

40 Q. Did you bring him along or was he there?

Hernie Sadowska—Cross.

A. He came with my brother. I didn't know him.

Q. Does your brother know him? A. I do not know.

MR. SIMPSON: I object. This is not cross examination as to whether the brother knew the interpreter. 10

MR. BROADHURST: Well, I am laying the foundation for a question.

Q. Now at that time did you state through the interpreter, speaking of your brother, that he boarded with me at 181 Pavonia Avenue, and paid five dollars a month for his room and did not eat at my house; he ate in the restaurant most of the time?

MR. SIMPSON: I object to that. Repeat the question. 20

Q. (Repeated by the stenographer.) Now, at that time did you state through the interpreter, speaking of your brother, that he boarded with me at 181 Pavonia Avenue, and paid five dollars a month for his room and did not eat at my house; he ate in the restaurant most of the time?

MR. SIMPSON: I will withdraw the objection. 30

A. I didn't understand what they said. I may have said it.

Q. And the man that interpreted this for you went with you and your brother to the offices of the Hudson & Manhattan, didn't he? A. My brother brought this interpreter from the house and told me to go with him to the office; but I did not know the man.

Q. Did you ever see that paper before? A. I do not understand that. I cannot read nor write. 40

Q. Now, where does Bronislav live? A. In Seventh Street, in Jersey City.

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Q. And did he live with you at the time your other brother was killed? A. Sometimes he stopped with me and sometimes he did not.

Q. Was he stopping with you at the time your brother was killed? A. No, he did not.

10 Q. Your mother and father are dead, are they? A. They are dead.

Q. And that brother that was killed, he was not married, was he? A. Yes, single.

Q. How old are your children? A. The oldest seven years old, next one four years, third one going on five, the youngest is not quite two years old.

MR. BROADHURST: That is all.

20 MR. SIMPSON: That is all. That is the case.

Witness excused.

DEFENDANT'S MOTION FOR NON-SUIT.

30 MR. BROADHURST: Your Honor, I wish to move for a non-suit, first on the ground there is no evidence of any negligence against the defendant; second, that from the evidence it is perfectly evident that the plaintiff's intestate assumed the risk of his injury in the nature of the yard and the character of the work that he was doing; and on the further ground that under the Federal Act there must be evidence as to this class of dependents which come under the third section of the act, where it says the next of kin dependent upon such employee. I want to draw your Honor's attention to the wording of the act.

40 It is divided into three sections, and the first section deals with husband and children, and the next with parents, and the third says

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then, "of the next of kin dependent upon such employee"

THE COURT: What section are you referring to?

MR. BROADHURST: Section 1, of the Federal Act. There are several cases—

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THE COURT: Just wait till I read that.

MR. BROADHURST: Yes, sir.

(The court refers himself to the section of the act in question.)

Yes, it would be as far as this case is concerned—every common carrier engaged in interstate commerce (this is paraphrasing, of course) shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce; or in case of his death, for want of widow, children, father, mother, and so forth then to the next of kin dependent upon such employee.

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MR. BROADHURST: Now, the courts have held that there is a difference between the other two sections and the third; that in the first two sections there may be a certain degree of expectancy of pecuniary profit that may be presumed. For example, a very recent work on the subject, Roberts on the Federal Liability Statute, states it very clearly. It says that even though a deceased employee left surviving him beneficiaries named in the statute, yet there is no liability when the Federal Act is applicable unless the beneficiaries were dependent upon the deceased or suffered pecuniary loss by his death. That is the general section. The point I want to make is that there is a distinction between the first two sections and the third section. Under the third section where next of kin come in other than parents there has to be proof of actual dependency.

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THE COURT: What do you mean by that? Absolute dependency upon the decedent? A total dependency upon the decedent?

10 MR. BROADHURST: No, not an absolute dependency; but there has to be actual proof that what the deceased did was more than merely pay for his own board, or give gifts of that character. Now a case in point that I would like to cite to your Honor, is Collins against the Pennsylvania Railroad Company, 148, Young Supplement, 707, in which the facts are a great deal like the facts in the case before us on this particular point. In that case the plaintiff's intestate was eighteen and single no father or mother. His next of 20 kin were two married brothers and sister living at home, which sister was sickly. The sickly sister lived at home with this brother who was killed, and another brother, and the intestate contributed in that case all of his salary which amounted to something like five dollars a week, to the sister, pooled it with the salary of her other brother, and in that way they supported all three. In other words the sickly sister, and the brother who was 30 killed, and the other brother. The court said, speaking of that particular section, that from that section it would seem that the recovery thus provided is for the next of kin dependent, and thus it will be seen that none of the next of kin of the said dependent would be entitled to share in the recovery except such of them as were actually dependent upon him; that the evidence would not seem to indicate that any of the next of kin was dependent upon said intestate, and that his wages would hardly be sufficient for his own maintenance.

40 THE COURT: But that does not say that the

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sickly sister was not under this statute to be taken as a dependent of his; but it seems to me from what you state that it turned on the other point, that the amount of his contribution was so small, namely, five dollars a week, that it could not be said to be more than enough for his own maintenance, and, therefore, there would be nothing left to satisfy a dependency of the sister. Of course, that would be true in any and all of these cases. If this intestate had left a widow and children and had contributed all of his earnings for the support of that household, of course, they would not be entitled to have that total sum that he paid used as the basis for a recovery. On the other hand, there would have to be a proper allowance made for what the cost was of the intestate's own keep and maintenance, and so forth. Now, would not that be the situation here?

MR. BROADHURST: Of course, your Honor has heard the evidence in this particular case, and there is no use of discussing it. My point is that in this particular case there is no evidence of such dependency as would warrant the submission of the question of damages to the jury.

THE COURT: Why do you say that, that there is no showing that there was any dependency at all?

MR. BROADHURST: What the evidence shows is that the deceased gave her thirty dollars a month for the maintenance of herself, her husband and her children?

THE COURT: Yes.

MR. BROADHURST: Now, that is the way she terms it; but on cross examination out

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of that she says that he boarded there and ate his meals there.

THE COURT: Yes.

10 MR. BROADHURST: And it seems to me that the thirty dollars is no more than maintenance for himself.

20 THE COURT: Well, that may be, that may be. But I do not think I am in a position to say that that is so. That may be a matter, if for other reasons this case goes to the jury which the jury should and ought to consider. I am of the opinion of the court in New York, whose opinion you spoke of, that if this sum which was paid was no more than enough to fairly, reasonably support and keep the in-

30 testate himself, why, of course, it could not be said then that she was dependent in a general sense upon him—it would not be said that she benefited any, or that her dependency was lessened by the payment of thirty dollars a month; it was all necessary for his maintenance and support. But, if, of course, the amount of his contribution was a greater sum than the amount reasonably necessary for his maintenance and support, such as was furnished to him by his sister, then I cannot say but what the jury might say there was a pecuniary loss.

MR. BROADHURST: I wish also to cite the case of *Illinois Central Railroad against Doherty*, 155 Southwest, 1119, which is along the same line.

THE COURT: What is the title of that case?

MR. BROADHURST: *Illinois Central Railroad against Doherty*, Administrator, 155 Southwest, 1119.

40 THE COURT: Is that case here?

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MR. BROADHURST: I haven't got it here no, sir; I just made a note of it. I cite it on the same proposition.

THE COURT: Have you anything you wish to say to me on the other two points, Mr. Broadhurst? Your other two points are, namely, that there is no evidence of negligence, and the second one is, that the evidence conclusively shows that the happening arose from a risk assumed. 10

MR. BROADHURST: No; I do not think so, your Honor. I think the evidence speaks for itself. I cannot do more than comment on it.

THE COURT: I think both of those questions are jury questions at the present time. I think also the third point that you raised does make for a jury question. I think I have expressed my opinion as tersely as I can on that point by what I have already said. 20

MR. BROADHURST: Your Honor will allow me an exception on the record?

THE COURT: Yes.

MR. BROADHURST: I close my case, and I move for a direction of verdict on the same ground that I have already urged.

THE COURT: I will decline to direct a verdict for the same reasons that I have declined to non-suit. 30

MR. BROADHURST: I take my exception.

Mr. Broadhurst summed up to the jury on behalf of the defendant.

Mr. Simpson summed up to the jury on behalf of the plaintiff.

Court's Charge to the Jury.

Gentlemen of the Jury:

This is an action by Bronislau Grijank as the representative of Michael Grijank, deceased, against the Director General of Railroads and the Hudson and Manhattan Railroad Company, in
 10 which the plaintiff is seeking to have a recovery for damages under the Death Act resulting to a sister, next of kin of the intestate, or the party who was injured and killed; and likewise the action is brought under what we know as the Federal Employers' Liability Act. It is an action based upon an allegation or allegations of negligence which it is charged is imputable to the defendant company. In other words, the plaintiff charges that the death of this intestate was caused
 20 proximately by negligence on the part of the servants of the defendant, and imputable to that company.

The first thing that you will have to consider and dispose of is this question: Has the plaintiff established to your satisfaction by a fair preponderance of the evidence that the defendant company through its agents and servants was negligent? The duty that rested upon the company by and through its agents and servants was to
 30 exercise reasonable care to provide and maintain a reasonably safe place in which its employees were to perform their labors.

Now, gentlemen, as to what is reasonable care, no specific definition can be handed to you; no specific, absolute rule can be handed to you by which you are to measure the situation in all cases; because each case must stand by itself. You must take into consideration in each particular case, and, of course, in this case, the situation and the surroundings of the particular happening. You
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Court's Charge to the Jury.

must consider the sort, kind, character of the place in which this intestate was performing his work, what it was used for. How it was used. You must also consider the kind, class and character of work that he was performing, and all those circumstances, all those conditions which go to make up the situation under which the happening took place. **10**

Now, when you have done that then you will apply this rule—and it is the only one I can give you—put to yourselves this question for answer: Has the plaintiff satisfied us by a fair preponderance of the evidence that this defendant company through its agents and servants did not under those conditions, under those circumstances, considering the place, the time, use reasonable care, that reasonable care which the law required of it to give and furnish and provide for this intestate and the other employees of the company a reasonably safe place in which to do and perform his and their work? **20**

If your answer to that is yes, the plaintiff has so satisfied us, then you will travel to other matters which will require your determination. If your answer to that question is, however, no, the plaintiff has not satisfied us by that degree of evidence upon that question, then you need not go any further, because then the plaintiff has not done that entitling a verdict in his favor. **30**

Mind you, I have said, gentlemen, the burden is upon the plaintiff. It is one of those things in a case of this character which the law says must be made out by the plaintiff—must be made out by this degree of evidence that I have told you of, namely, fair preponderance of the evidence. So that if you get to that point and your conclusion is that it has not been made out I say you need not go any further, because then your verdict must be for the defendant. **40**

Court's Charge to the Jury.

If it has been made out—and that only goes to the question of whether the agents and servants of the defendant were negligent—the next question is equally as important and must be made out by a fair preponderance of the evidence, and made out by the plaintiff: that is, was that negligence so established, if it has been, the proximate cause of the happening? Was it the thing which produced and caused this happening to this man now deceased? If your answer to that is no, then even if the answer to the first question has been yes, again your verdict cannot go to the plaintiff but must go to the defendant. If the answer to this last question is yes, then again you have travelled a step forward and then may consider the other questions that I am about to put to you; because, you see, there are two things that seem to stand at the very threshold of your consideration, and at the very threshold of the right of the plaintiff or any plaintiff in a case of this sort, to have a verdict. That is, they must establish that the defendant was negligent in the manner charged; secondly, if that has been established then that that negligence was the proximate cause of the happening. If those two things have been established then you will take up this which I am about to bring to your attention. If they have not been established, or either one of them has not been established, then your verdict must be for the defendant, and you will go no further with the consideration of any further issues in the case.

If both of those things have been established then your attention would next go to the acts and conduct of this deceased man himself; because he was not in law without a care for his own safety. The law also placed upon him a duty toward himself and his own safety, and that was likewise

Court's Charge to the Jury.

reasonable care, and that is to be measured and must be measured by you taking again into consideration all of the facts, the circumstances and conditions surrounding this particular occurrence and situation, the nature of the place in which he was working, what his knowledge, as a reasonable man, should have been of the movements and doings in and about that place—all of those things: and then you will ask yourselves: under all the circumstances and conditions, considering them all, did this intestate, this person who lost his life, did he act the part of a reasonably prudent man? Did he act as a prudent man, a reasonably prudent man would, and use reasonable care for his own safety? 10

The burden of satisfying you as to that, of course, is upon the defendant, and it must show you and satisfy you by a fair preponderance of all the evidence; not necessarily evidence that is produced through witnesses actually produced by them, but evidence that may be drawn by them by cross examination of witnesses produced by the plaintiff or evidence which may have come into the case from such witnesses by and through the direct examination of those witnesses. 20

If it has been shown by a fair preponderance of the evidence that this man, this intestate himself, was negligent and that that negligence contributed to the happening, then that defense has been established, and what the effect of it is and what the result of it is, if it has been established, I will bring to your attention later when I get to the point of telling you what a verdict in a case of this character may be for if one is to be had for the plaintiff. 30

Again it is alleged by the defendant that even if the defendant was negligent as charged, and even if that negligence was the proximate cause 40

Court's Charge to the Jury.

of this happening, still in law and in fact the defendant should not be held and the plaintiff should not have a verdict because the injuries to this intestate resulting in his death were the result of risks assumed by him, risks of his employment assumed by him.

10 What that means, gentlemen, I will get to immediately. If it has been established—and the establishment of it is upon the defendant, again by a fair preponderance of the evidence that you may have in the case—then the plaintiff would not be entitled to have a verdict, because then in law the verdict should be for the defendant.

20 Now, what is assumption of risk? The best way that I can speak to you about that is to read to you some short excerpts from what the courts of this state have said as to what that is and what it means, and it is this:

30 “The general rule is that a master is bound to use reasonable care to provide a safe place for his servant to perform his work and to furnish and adopt such means that he may be assured reasonable safety and protection in his work, and to exercise reasonable care to maintain the place and means reasonably safe. The qualifications are that the workman takes upon himself during the continuance of his employment all the risks and dangers which are obvious to him or which can be perceived by him in the exercise of his senses and the use of ordinary care and circumspection. The risk must be obvious and apparent and known to the servant, or such as he should have known and perceived with the exercise of reasonable care on his part.”

40 Again, “The servant assumes as well those risks which arise or become known to him during the

Court's Charge to the Jury.

service as those in contemplation at the original hiring.”

Now, if, gentlemen, this thing which occurred to this interstate was the result of a risk assumed, a risk assumed as defined by these cases from which I have read to you, then, as I have said to you before, if that has been made out by the defendant by a fair preponderance of the evidence before you, then even if all these other matters have been made out, still the plaintiff cannot have a verdict, because in law then the verdict must go to the defendant. 10

If that has not been made out and these other things, namely negligence as charged, and that that negligence was the proximate cause of this happening—have been made out—then the plaintiff may have a verdict. I say “may” gentlemen, because there are some things that I am about to say to you which may place the plaintiff in that position where, after all, a verdict will not be assessible by you. 20

A verdict in a case of this character is to a very great extent limited; that is, limited as to what it may be. It is assessible only and determinable only under what we know as the Death Act. In arriving at a verdict in a case of this character you are not permitted to take into consideration anything for loss of society or wounded feelings, grief that this sister may have suffered or is suffering because of the death of her brother—nothing of that character whatever can be taken into consideration. The verdict must be for and rests upon a pecuniary or money loss entirely, stripped of all sentiment. The reason for that, gentlemen, is that without the statute of which I have just spoken there could not be a recovery in a case of this character; so that you and I are absolutely 30 40

Court's Charge to the Jury.

and completely limited by what the statute permits a recovery to be for.

Now, under the very act under which this action is brought it is provided in this manner: "That every common carrier (I am paraphrasing in part
10 now)—every common carrier in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce. That is not the case here because the party who was injured is dead. The action is not being brought by him nor for him. Or, in the case of the death of such employee to his or her personal representative for the benefit of the surviving widow or husband or children of such employee. The action is not brought for that purpose because he
20 was not a married man, left no widow, no children. And, of none, then for such employee's parents. "This action is not brought for that purpose because his parents are both deceased, so far as the testimony goes, and if none, then for the next of kin dependent upon such employee. That is what this action is brought for, it being alleged—and as far as the testimony is concerned it has been established that he left a sister, and it is alleged that she was dependent to some extent upon this deceased brother; so that it is under that particular part of that act
30 that you are to travel in determining if a verdict is to be had what it is to be for."

There is testimony that this intestate paid into the hands of this sister a sum of, I believe, thirty dollars per month. You also have before you the testimony going to show what made up and constituted this family. As I remember it, it was the sister, this brother now deceased, the husband of the sister, and I think four children. It is said that the husband of the sister was a man in ill health,
40 and also that his ability of earning and earning

Court's Charge to the Jury.

continuously was more or less limited; and it is urged and insisted to some extent at least that this sister was dependent upon the money contributions made by her brother now deceased. Of course, gentlemen, you have in the evidence and uncontradicted the fact that this brother now deceased was a member of the family. It cost assuredly something for his maintenance in that family. If it cost all of that sum that he so contributed to keep and maintain him and the family—if it did, then, of course, I cannot but say to you that upon that showing there could not be said to be any monetary or pecuniary loss now because of his death having taken him from the family and cut off his contributions; because, not having met with this happening, if he had at any time voluntarily removed himself from the family and shut off his contributions, the sister would have been no worse off financially; because if it had taken all of the thirty dollars to maintain and support and keep him, with no duty on the sister to support and maintain and keep him, she would not have lost anything financially. So that, under any circumstances you must take into consideration what the reasonably fair cost would have been and was for the maintenance and support in the household and in the family of this brother now deceased; and if you find that there was a difference between that sum and the sum which you may find was contributed by him, then it would be only that difference which you may use in your consideration of what a verdict may be for. Of course, gentlemen, there are a great many other things which you must take into consideration. It might have been that but for this happening, this man, this brother, might have lost his life, might have died from natural causes, and at some date shortly after the time of this happening; and of course, had he, his con-

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Court's Charge to the Jury.

tributions whatever they were, would naturally have been shut off and this sister would not have had the benefit of them. He might have been taken down with disease, become infirm, become an invalid, unable to work and earn, and, of course, again his contributions would have been lessened. All those things you are to take into consideration, and any others which naturally would be matters of proper consideration in determining the probability of the continuation of his contribution to his sister.

Now, this sister is a married woman, and has a husband. It is said in the evidence that he, because of illness, as I have before said, was unable to continue as a laborer or at whatever work for which he could get a recompense, and that is urged as a reason for this dependency in part of the sister of this deceased brother. It may be that that inability on the part of the husband to perform work continuously and diligently and make a wage sufficient and proper for the support and maintenance of his wife might have ceased a short time after the occurrence in question, or may at some time in the future, and he again may be able to completely support and maintain his wife and family; and, had the brother lived and such a time had arrived, it would be entirely probable that he might have withdrawn his contribution for the maintenance and support of his sister. That is another thing you are to take into consideration.

What a verdict may be for, speaking generally, is simply this; For that pecuniary or money loss resulting from the premature death of this brother, and loss of a reasonable expectation of pecuniary contributions to this sister during her dependency, if any there was upon her part, or any in the future. And in determining that you must also

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take into consideration the age of the party. This deceased brother, I believe, was in the neighborhood of thirty-five or thirty-eight years of age. The sister, I think the testimony shows, was twenty-seven years of age. Whatever sum you may find, if you find any, which was and would be in your judgment and from the evidence the pecuniary loss which this sister has or will meet with because of his death, is not the sum which your verdict may be for; but, as has been said, it is that sum capitalized or that sum reduced to its present day worth. 10

Putting it another way, it is that sum of money which will produce an annuity equal to net contribution to this sister during the time that such contributions would continue, for that period of years; so that the sum, the capital sum would at the end of that period have exhausted itself. In other words, it is that capital sum which at interest would produce an income plus a depreciation of the principal itself—an income per year which would represent the net contribution that would have been made by the brother to the sister for and during that period of years when that contribution or income would have been made or paid, and at the end of that time leaving nothing by way of principal. It is a very difficult thing, of course, gentlemen, to explain to you, and it is a matter of calculation, which, as the attorney for the plaintiff has said, is a matter with which he is not going to and could not deal explicitly; and the same situation exists with me; because until you have settled upon certain facts and certain figures it would be entirely impossible for me to work out for you, even if I were able to, just what the result should be. 20 30

Again, gentlemen, there is this further thing to consider: I spoke to you further back in my 40

Court's Charge to the Jury.

charge upon the question of contributory negligence. I told you what it was and told you how it must be established, if it is established, and said to you that if it had been established I would speak to you at this time as to what the effect
10 would be.

If the plaintiff is entitled to have a verdict and you have concluded under the rules and the evidence which you have before you what that verdict should be for, then this will be the manner in which you will deal with the question of contributory negligence, if it has been established; and let me say to you at this time that the burden of satisfying you upon the question of what the verdict may be for rest upon the plaintiff; that is
20 also a burden which the law places upon the plaintiff to satisfy you by a fair preponderance of all of the evidence toward which you may apply the rules applicable to the admeasurement of such a verdict, and in order to establish the verdict.

If contributory negligence has been established then this is what our courts have said as to how it shall be applied to a verdict which a plaintiff would otherwise be entitled to have:

30 "At common law there could be no recovery in such a case"—that is, where contributory negligence has been established—"the contributory negligence being a complete bar or defense"—that is, if this action were not brought under this particular act and contributory negligence on the part of the intestate or deceased party had been established then there could not be a verdict at all at common law, and that is what this means.

40 "At common law there could be no recovery in such a case, the contributory negligence being a complete bar or defense. But this statute rejects the common law theory and adopts another deemed more reasonable by

Court's Charge to the Jury.

declaring 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."

The court has said that that statute means just this, and that this is the way in which you as jurors are to apply it:

"It means and can only mean, as this court has held, that where the casual negligence is attributable partly to the carrier"—that is, to the defendant company in this case—"and partly to the injured employee, he shall not recover full damages but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both."

So that, gentlemen, if you get to the point of assessing damages, if the evidence warrants that you should, and the rules of law that I have given you warrant that you should, and if likewise you have been satisfied in the manner I have indicated is required by law that you should be satisfied that this intestate, this deceased person, was guilty of contributory negligence, then that verdict that you would otherwise find you are to reduce in the manner and under the rules which I have just read to you.

With that, gentlemen, you may take the case.

JUROR No. 10: Your Honor, may I ask the date of death of the plaintiff?

MR. SIMPSON: October 29, 1918, is the date of death.

(The jury retired.)

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Exception to Charge.

MR. BROADHURST: I want to take an exception to that part of the charge where you instructed the jury that after considering the amount of the board if they considered that the cost of his board would not absorb the entire thirty dollars that
10 they were entitled to use that balance as a means of judging the amount of their verdict. I take an exception to that, my point being that under the act if that difference did not amount to a dependency there could be no recovery; that they would have to consider whether or not that difference, if the plaintiff proved one, amounted to a dependency.

THE COURT: In other words, whether that satisfied a dependency if one existed?

20 **MR. BROADHURST:** Yes.

THE COURT: All right.

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New Jersey Court of Errors and Appeals

BRONISLAW GRIJNUK, Adm. of
the estate of Michael Grijnuk,
deceased,

Plaintiff-Respondent,

vs.

WILLIAM G. McADOO, Director
General of Railroads,
Defendant-Appellant.

On Appeal.

BRIEF FOR PLAINTIFF-RESPOND- ENT

Statement

This was an action under the Federal Employer's Liability Act for damages for death by negligence. The jury might have found that the plaintiff's intestate was employed to take lamps from the rear end of trains and fill them with kerosene, and while attempting to take a lantern from the rear end of a train (p. 20, l. 26) was killed by reason of the fact that the train which was standing without warning was backed down upon him, and he was crushed against the bumper which was at the end of the place where the train was standing (p. 12, l. 18). The train was on a dead track and standing when he went behind it between what was a standing train and the

bumper (p. 21, l. 26). Reasonably he had a right to assume that the train would not be backed down further because it was motionless and backing it down would crush it against the bumper; and, if any motion was to be made it would be assumed to take the train away from the bumper. The train was backed down upon him without any warning or notice (p. 19, l. 12).

Amendment Proper

The amendment allowed by the Court was a proper amendment under Sections 112-113 of the Practice Act of 1912, giving the Court full power to allow such an amendment as was made at the trial in this case.

It was also proper under the case of *Missouri, Kansas & Texas Rwy. Co. v. Wulf*, 226 U. S., 570. In the *Wulf* case the plaintiff in her original petition sued in her individual capacity and based her right to recovery upon the Kansas statute, whereas, her action could legally rest only upon the Federal Employers' Liability Act, which requires the action shall be brought in the name of the personal representative of the deceased. Plaintiff's petition was amended and she was allowed to sue as administratrix not individually. The Supreme Court held that this was not error; that it was not the beginning of a new action by means of substituting one plaintiff for another, the Court holding that such a change is a change in form rather than in substance, citing cases. That is almost the identical situation in this case. The administratrix *ad prosequendum*, who began the action, was changed to administratrix in full; she was an administratrix still but with different powers; administration *ad prosequendum* being a creation of

statute, the administratrix was an administratrix as a personal representative so that the facts are identical with the facts in the *Wulf* case, where it was held the amendment was not error.

In the *Wulf* case, 226 U. S., p. 577, the Court said:

“It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in *American R. Co. vs. Birch*, 224 U. S., 547, 56 Law. Ed. 879, 32 Sup. Ct. Rep., 603. But in that case there was no offer to amend by joining or substituting the personal representative, and this Court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us—an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within Sec. 954, Rev. Stat., U. S. Comp. Stat., 1901, p. 696.”

In the case of *Giardini vs. McAdoo*, 107 Atl., 437; it was held that it was proper even after the trial at the circuit on appeal to allow amendment substituting the widow as plaintiff instead of as administratrix. How much more was it proper, therefore, to allow such a substitution or change in the trial Court.

In the *Giardini* case, the Chancellor speaking for the Court of Appeals, said:

“We incline to the opinion that under the provisions of the Practice Act of 1903, concerning amendment as interpreted in the City of Hoboken against Gear and other cases, an amendment of this proceeding might be ordered by substituting the name of Adele Giardini, the widow, as plaintiff and striking out the description of her representative character.”

There is no ground of appeal objecting to the judgment as entered in favor of either plaintiff and this was not argued in the Supreme Court.

This Court refused to disturb a verdict where in the Supreme Court no ground of appeal was filed questioning the alleged error now attempted to be established in this Court.

Tansey v. Tedesco, 107 Atl., 419.

Negligence

The jury under these facts might have found negligence either in the defendant in failing to give him a safe place in which to work or of the persons backing the train backing it into the bumper, under these circumstances, without warning or notice to him.

See:

Chesapeake & Ohio R. R. v. Prophet,
241 U. S., p. 460.

The defendant was bound to use reasonable care to give the intestate a safe place in which to work. The jury might have found it did not do so when without warning it backed him against a bumper with a train of cars that had been standing without notice to him, and crushed his life out.

The *Aerkfetz* case relied upon by the appellant is a case holding what conduct was contributory negligence and thus bar the action. Under this statute, now discussed, that is, the Federal Employers' Liability Act, contributory negligence is not a defense and therefore the *Aerkfetz* case is not in point.

Dependency

The statute in question gives a right of action to next of kin such as this, the sister, only for dependency, but in this case dependency was a question for the jury.

See:

Seaboard Air Line v. Kenny, 204 U. S., 497.

Also

Richey on Federal Employers' Lia., last edition, p. 223.

In construing this act the Supreme Court of the United States in *Vreeland v. Michigan Central*, 227 U. S., p. 70, says:

“There must however appear some reasonable expectation of pecuniary assistance or support, of which they have been deprived,”

making the test not sole dependency but support. Under these circumstances the jury might have found that the sister with whom the brother was living was partially dependent upon him for support; her husband was sick (p. 27, l. 10) and her brother turned his entire earnings to the household, and out of these earnings, the brother, the husband, the sister and the children were supported so that the sister was partially dependent up-

on him for support, or at least the jury might so have found, and this would satisfy the requirements of the statute.

See:

Farrier v. Schroeder, 11 Vroom., 601.

The recovery in the case, \$3,000 was small, considering the earning capacity of the deceased and the life expectancy of the defendants, and at the present value of the dollar compared with the anti-war value of the dollar would be a recovery of about \$1,500 in value, under those cases decided heretofore by the Courts as to adequacy or excessiveness of damages.

Charge of Court

The excerpt from the Charge objected to as error, simply advised the jury as to how in some way they might use a standard in endeavoring to fix the sum. It did not declare the legal rule to be as stated, but stated that in a case of this kind they might well reason as to what the residuum of the money received by the dependent was after she had paid the expense of keeping the intestate, not as a correct measure of damages but simply as a fact to aid them in making a computation. Surely this could not be assigned as legal error.

Respectfully submitted,

ALEX. SIMSON,
Attorney for Plaintiff-Respondent.

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New Jersey Court of Errors and Appeals.

BRONISLAW GRIJNUK administrator
ad prosequendum of the estate
of Michael Grijnuk, deceased,
et al.,

Plaintiffs-Respondent,

vs.

WILLIAM G. MCADOO, Director Gen-
eral of Railroads, Hudson and
Manhattan Railroad Company,

Defendant-Appellant.

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Action at
Law.

On Appeal
from Su-
preme Court.

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**BRIEF IN FAVOR OF DEFENDANT-
APPELLANT.**

(1)

Statement of the Case.

Defendant appeals from a judgment of the New Jersey Supreme Court, affirming a judgment of the Hudson Circuit Court in favor of plaintiffs, in an action brought under the Federal Employers' Liability Act, to recover the pecuniary loss alleged to have been sustained by a sister of the decedent, by reason of his death through negligence of the defendant while employed as a laborer on October 29, 1918, in defendant's yard, Jersey City (pp. 1, 5).

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There are two plaintiffs, Bronislaw Grijnuk, administrator ad prosequendum of the estate of Michael Grijnuk, deceased, who brought the suit;

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and Bronislaw Grijnuk, *general administrator* of the same estate, who was added as a new party on the trial, over objection of counsel for the defendant (p. 17 et seq.).

At the close of plaintiff's case, counsel for defendant moved for a non-suit on several grounds. The motion was denied and exception noted (p. 10 41, l. 25). Defendant then rested and moved for a direction of verdict on the same grounds. This motion was also denied and exception noted (p. 41, l. 35).

The jury brought in a verdict in favor of both plaintiffs for \$3,000. (p. 14). Rule to show cause was allowed with reservations of all exceptions. The only reason filed in support of the rule was that the verdict was excessive. The trial judge refused to set aside the verdict (p. 15). Defendant 20 then appealed to the Supreme Court (p. 7). That court affirmed the judgment (p. 2). Thereupon this appeal was taken (p. 1).

(2)

Grounds of Appeal.

The grounds of appeal relied on are the following (p. 5):

1. The trial judge erred in permitting the general administrator to be added as a new party plaintiff.
- 30 2. The trial judge erred when he refused to non-suit the plaintiffs or to direct a verdict in favor of the defendant when thereunto moved, whereas one or the other of said motions should have been granted on one or more of the following grounds urged in support thereof:
 - (a) There was no evidence of negligence on the part of the defendant.
 - (b) The plaintiff's intestate assumed the risk of the injury which he received.

(c) There was no evidence that the deceased's sister was dependent upon him, within the meaning of the Federal Employers' Liability Act.

3. The trial judge charged the jury:

"So that, under any circumstances you must take into consideration what the reasonably fair cost would have been and was for the maintenance and support in the household and in the family of this brother now deceased, and if you find that there was a difference between that sum and the sum which you may find was contributed by him, then it would be only that difference which you may use in your consideration of what a verdict may be for." 10

(3)

Brief of the Argument.

I. 20

The trial judge erred in permitting the general administrator to be added as a new party plaintiff.

This suit was instituted by Bronislaw Grijnuk, administrator ad prosequendum of the estate of Michael Grijnuk, deceased. He was so appointed under Chapters 180 and 181 of the Laws of 1917, which are supplements to the Death Act and which provide that "every action brought under and by virtue" of that Act shall be brought by such an administrator. The summons (p. 9) and the complaint (p. 10) named him as the sole party plaintiff. The judgment was entered in his favor, and it was also entered in favor of Bronislaw Grijnuk, general administrator (p. 14, ll. 1-20). 30

Bronislaw Grijnuk, administrator ad prosequendum had no right to bring this suit. The action is not and could not be, brought under the New Jersey Death Act. It is brought under the 40

Federal Employers' Liability Act. The complaint alleges that the decedent was killed while employed on a railroad operated by the defendant at a time when they were both engaged in interstate commerce (p. 11, ll. 1-10). The answer admits that allegation (p. 13, l. 10). The Federal Act is therefore exclusive.

- 10 *New York Central R. R. Co. vs. Winfield*,
244 U. S. 147; 61 L. Ed. 1045.
Erie Railroad Co. vs. Winfield, 244 U. S.
170; 61 L. Ed. 1057.

The only other cause of action that might have arisen by reason of the death of the plaintiff's intestate would have been under the New Jersey Workmen's Compensation Act, and in that event no action could be maintained in a common law court unless there was an agreement to pay compensation under the New Jersey Act.

- 20 *Holzappel vs. Hoboken Manufacturers R.*
R. Co., 92 N. J. L. 193.

The Federal statute provides that in the event of death of an employee the liability of the carrier, if any, is "to his personal representative" and that language has been construed by both the United States Supreme Court and the New Jersey Supreme Court to mean his executor or *general* administrator.

- 30 *American R. R. Co. vs. Birch*, 224 U. S.
547; 56 L. Ed. 879;
Swank vs. P. R. R. Co., 104 Atl. 26.

In the case last cited, the New Jersey Supreme Court following a number of decisions of the United States Supreme Court, in speaking through Gummere, C. J., held:

- 40 "The statute appealed to by the defendant is a supplement of our 'Death Act' (2 Comp. St. 1910, p. 1907, sections 7-9), and provides

that every action instituted under and by virtue of its provisions 'shall be brought in the name of an administrator ad prosequendum.' It is, of course, apparent that if this action was brought for the enforcement of a remedy given by our 'Death Act' the procedure must be that provided by the statute and its supplements. The trouble with the defendant's case, however, is that the remedy sought to be enforced is not provided by our state statute, but is conferred by federal legislation; and in the enforcement of a remedy thus conferred the method of procedure provided by Congress must control. The language of the federal act is that the liability of the carrier in case of the death of the employee is 'to his or her personal representative for the benefit of the surviving widow,' etc.; and that language has been construed by the United States Supreme Court to mean the executor or general administrator."

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Furthermore, the plaintiff, Bronislaw Grijnuk, administrator ad pros. failed to offer in evidence his letters of administration (p. 21, l. 30), so that we have the rather novel situation of a judgment in favor of a plaintiff who has no right thereto, in a case where it does not even appear that he is the person he says he is.

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We now come to the next phase of the question, that is, the right of the trial judge to admit a new and entirely different party plaintiff when it appears that the party who brought the suit had no right to bring it. The trial of the case had begun. No motion had been previously made to amend so as to bring in a new party. The summons was filed on January 23, 1919; the answer on January 24, 1919, and in the answer objection in point of law was made as follows (p. 13, ll. 35-40):

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"Defendant will object that the complaint discloses no cause of action. It fails to show that the plaintiff has any legal right to maintain the cause of action set forth in the complaint."

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The case was not tried until April 23 (p. 16), or three months after the filing of the answer, yet no step was taken at any time by the attorney of the plaintiff to bring in any new party until the trial had begun. The situation presented is the same as though John Jones had brought a suit against the Director General of Railroads, and after the case had been at issue for three months, the attorney for the plaintiff should say, "This suit should not be brought by John Jones but by William Smith, and therefore I move to amend so as to make William Smith the party plaintiff." If the trial court has the right to bring in one new plaintiff in that fashion, it has the right to bring in ten new plaintiffs. Objection was made to the motion to amend exception noted to the ruling permitting the amendment (p. 19, ll. 35-40).

The law in this State is well settled that such an amendment is not allowable.

Lower vs. Segal, 60 N. J. L. 99;

Fitzhenry vs. Consolidated Traction Co.,
63 N. J. L. 142;

Rankin vs. Central R. R. Co., 77 N. J. L.
175.

In the case of *Lower vs. Segal*, *supra*, suit was brought by an administratrix to recover damages for the death of her intestate, who was her husband. The death occurred in the State of Pennsylvania and recovery was sought under the death act of that State. It appeared that under the Statutes of that State the action must be brought by the widow as such, and not as administratrix. The declaration was demurred to and plaintiff's counsel moved to amend his declaration so that the action would appear to be one brought by the widow of the deceased. This Court denied the

motion to amend. Magee, J., speaking for the Court, said (p. 101):

“Furthermore I am of opinion that we are not required to make such an amendment by the provisions of section 138 of the Practice Act (Gen. Stat., p. 2556), which directs us to make all amendments necessary for the determination in an existing suit of the real question in controversy between the parties. In considering whether these provisions require the amendment now asked for, it is obvious that the question presented is the same as would be presented if the present plaintiff were John Doe, administrator of the deceased, and cannot be affected by the fact that the plaintiff is both the administratrix and the widow of deceased. The right of the widow to turn this action into one in her own behalf cannot be greater than her right to intervene with a similar motion in an action brought by some other person as the personal representative of her husband. 10

“The 138th section has been liberally construed by our courts. It has been held to justify and require amendments (when the real question in controversy has been fully and fairly tried and correctly settled), to adapt pleadings to the issue really tried, although not that originally upon the record, to change the form of action so as to present the issue really tried, and that by a court of review, to change the plaintiff where her action was tried upon sealed instruments, by which it was deemed defendant’s liability was shown to be, not to her, but to her agent, and to make such agent the plaintiff on the record, and to add a wife as plaintiff on the record when the damage done to property of which she and her husband (the original plaintiff) was seized by a conveyance to both, had been fully and fairly settled on a trial by arbitrators. *City of Hoboken vs. Gear*, 3 Dutcher 265; *Price vs. New Jersey Railroad & Transportation Co.*; 2 Vroom 229; *American Life Insurance Co. vs. Day*, 10 Id. 89; *Farrier vs. Schroeder*, 11 Id. 601; *Guild* 20

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vs. Parker, 14 Id. 430; *Ware vs. Millville Insurance Co.*, 16 Id. 177; *Vunk vs. Raritan Railroad Co.*, 27 Id. 395; *Excelsior Electric Co. vs. Sweet*, 28 Id. 224.

10 "But the real question in controversy between the personal representative of the deceased and defendant has never been tried. On the contrary, *this court has declared that, upon the statements of the declaration, no such question existed.* Nor has the real question in controversy between the widow and the defendant ever been tried but she seeks by this amendment to intervene in this suit and present that question which she might have presented in an action brought by her. In my judgment the provisions of section 138 do not apply to such a case and do not require the amendment to be made. The amendment would not continue the existing suit except in mere form, but would create and institute a new suit with a new question and in a controversy between different parties."

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In *Fitzhenry vs. Consolidated Traction Co.*, *supra*, a father as such brought action for damages resulting to him by the death of his son. The cause of action arose in New Jersey and was governed by our Death Act. Motion was made to amend by adding the words "Administrator of the Estate of John Fitzhenry, Jr., deceased," after the name of the plaintiff in the summons and declaration. This court denied the motion to amend

30 following the case of *Lower vs. Segal* discussed *supra*.

In *Rankin vs. Central R. R. Co.*, *supra*, a judgment of non-suit had been entered in favor of the defendant because of the failure to notice the cause for trial, and the cause was brought before this court on a rule to show cause why the judgment should not be vacated. The suit was originally instituted by a Widow as Administratrix of her husband to recover damages for his death

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caused by an accident in the State of Pennsylvania. This court discharged the rule to show cause and refused to open the judgment of non-suit, saying:

"If the declaration should be amended, and the statute of Pennsylvania set up in the pleadings, it would appear that the right of action is visited *in the widow*, and not in the personal representative (citing authority). Therefore, if a case of surprise and merits had been disclosed *and this judgment opened*, the plaintiff having brought her suit as the personal representative of the deceased and not as widow she would not recover without an amendment of her pleadings, so in order that the plaintiff might proceed with her action it would be necessary to amend all of the pleadings that it might appear that she was prosecuting her action *as widow*, and not as the personal representative of the deceased. Such an amendment was refused in a similar case in *Lower vs. Segal*, 31 Vroom 99. The determination in that case would be controlling in this, and if no non-suit had been granted, and the plaintiff was now moving for the amendment necessary to state her cause of action in a form necessary for recovery, *it would be refused* (page 178). It thus appear that for want of an amendment *which the court would not allow*, if applied for, the plaintiff has not stated a cause of action *and a non-suit would ultimately follow* and under such circumstances the present judgment of non-suit ought not to be opened" (p. 177).

A recent case involving the question under discussion is *Giardini vs. McAdoo, Director General of Railroads*, decided by the Court of Errors and Appeals and reported in 107 Atl. 437. In that case suit was brought by a widow as administratrix of her husband for damages caused by his death in an accident occurring in the State of Pennsylvania. *No objections were made as to*

parties or pleadings, the case being tried on the merits and judgment rendered against the defendant. On appeal for the first time the point was raised that the administratrix was an improper party plaintiff, under the statutes of Pennsylvania. Chancellor Walker after review the cases discussed *supra* at some length said (at page 440):

“The cases of *Lower vs. Segal*, 60 N. J. L. 99, 36 Atl. 777, and *Fitzhenry vs. Consolidated Traction Co.*, 63 N. J. L. 142, 42 Atl. 416, are ones in which the questions raised were decided upon demurrer; and there can be little, if any, doubt but that, if a motion to strike out *had been interposed in limine in the case at bar, it would have been granted.* But the question is: Are we precluded from permitting a proper amendment at this time, and must we reverse the judgment resulting from a trial upon the merits, *because on appeal for the first time, the defendant raises the jurisdictional question?*”

and again at p. 441,

“And these statutes as is known, are to be liberally and beneficially expounded; and every intendment that can be, should be, made in aid of a judgment and verdict thereon. where the parties have gone to trial upon the merits of the case *and where no attack has been made upon the pleadings and procedure prior to appeal.*”

The court allowed the amendment and reversed the case on the damages only.

It is to be observed that the Court of Errors based its decision on the fact that *no objection was made to the parties or pleadings until after appeal had been taken* and that the scope of the decisions in the cases discussed *supra* decided by this court were in no wise altered.

See also cases of:

Maitland vs. Worthington, 59 N. J. L. 114;

Hubbard vs. Montrose Metal Shingle Co.,
79 N. J. L. 208.

In the case of *Maitland vs. Worthington*, 59 N. J. L. 114, *supra*, this Court, speaking through Gummere, C. J., held (headnote) :

“After the defendant named in a summons has been regularly brought into Court, the writ cannot be amended by substituting the name of another person as defendant, and altering the return day, for the purpose of procuring the re-issuing thereof and its service upon the substituted defendant.” 10

If it is true that the name of the defendant as set forth in the summons cannot be amended by substituting the name of another person as defendant, it is equally true that the name of a plaintiff cannot be substituted.

In *Hubbard vs. Montross Metal Shingle Co.*, 79 N. J. L., 208, *supra*, this Court, speaking through Minturn, J., held (headnote) : 20

“A judgment entered against one who is not a party to the record but who is made a party in open Court upon the trial, by amendment and substitution against his protest and without his consent, is not only in violation of the defendant’s common-law rights but is also in violation of the constitutional guarantee requiring ‘due process of law.’”

A fortiori a person who is not in any way connected with the litigation cannot be brought in as a party plaintiff after the trial of a case has begun without the service of summons and complaint against the defendant as required by law and the chance to file answer as against the new party. 30

This is not the case of mere misnomer but, on the contrary, the situation presented is that of bringing in an entirely new party whose only right to bring the suit depends on whether a cause 40

of action exists under a federal statute. There was only one plaintiff in the suit as instituted and that plaintiff had absolutely no right to bring the suit, so that there was no cause of action stated in the complaint that was served. A general administrator has to put up a bond; an administrator ad pros. provides no security of any kind and his sole right is to bring a suit. Under the Act of 1917, which created the office of administrator ad pros., he has not even the right to make a settlement. The Supreme Court in its opinion with regard to this point says: "We think the amendment allowed to the petition (complaint) did not change in any material aspect the gravamen of the case so as to prejudice defendant in any material manner, and that the amendment in such circumstances is entirely a matter of sound discretion", citing *Seaboard Air Line vs. Koennecke*, 239 U. S. 352.

We submit that the question of whether or not the court had the right to make the amendment and bring in an entirely new plaintiff in a case where there was no proper plaintiff does not depend on whether the defendant was prejudiced, but depends on whether the court has the inherent power by main strength to compel a defendant to accept as a party plaintiff, and the only lawful party plaintiff, a person who had absolutely no connection with the case before the time when the amendment was made, after the case as brought was in process of being tried. If this is the law then it should be stated in such a way as to be unmistakable. After a very thorough examination of the law we have been unable to find any case that goes so far. The case of *Seaboard Air Line vs. Koennecke*, 239 U. S. 352, did not so hold. The headnote is as follows:

"The allowance by the trial court after the testimony was in, and over defendant's ob-

jection, of an amendment to bring the case specifically under the Employers' Liability Act, held not to have exceeded the discretionary power of the court, or to have been so arbitrary as to amount to denial of due process of law."

An examination of the facts with regard to the amendment shows that no new party was brought in, the amendment merely referring to the question of whether or not the plaintiff was entitled to exemplary damages. Such damages were allowable under a state statute but not under the federal act, and the case came under the latter act. The effect of the amendment that was allowed was merely to strike out the demand for exemplary damages. Such damages were allowable under a state statute, but not under the Federal act, and the case came under the latter act. The effect of the amendment that was allowed was merely to strike out the demand for exemplary damages. Furthermore, the right to bring in and substitute, during the trial, as a sole party plaintiff, a third person not before mentioned, must necessarily depend on the law of the state, and the cases cited *supra* show that the law of this state is contrary to such a holding. The opinion of this court in *Giardini vs. McAdoo*, 107 Atl. 437, is directly in point and holds that if objection is timely made, a new party cannot thus be brought in. Section 9 of the Practice Act of 1912 is not applicable. That section merely deals with the misjoinder or nonjoinder of parties. In the case at bar there was neither, because there could not be a misjoinder or nonjoinder unless there are at least two or more parties, one of whom has properly brought the suit. In the case at bar there was only one plaintiff who had the right to bring the suit and he did not bring it. In short, there cannot be any misjoinder or nonjoinder of one party.

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II.

The trial judge erred when he refused to non-suit the plaintiffs or to direct a verdict in favor of the defendant when thereunto moved, whereas one of said motions should have been
 10 **granted on one or more of the following grounds urged in support thereof:**

(a) There was no evidence of negligence on the part of the defendant.

(b) The plaintiffs' intestate assumed the risk of the injury which he received.

(c) There was no evidence that the deceased's sister was dependent upon him within the meaning of the Federal Employers' Liability Act.

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(a)

There was no evidence of negligence on the part of the defendant.

The plaintiffs' intestate was employed by the defendant as a laborer and according to the complaint he was killed by a train backing down upon him while he was fitting a lamp to the rear of a car. The complaint further alleges that he was crushed between the rear of the car and the bumper at the end of the track.

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The only witness called by the plaintiff to prove defendant's negligence was a foreigner by the name of Stanislaw Chrinuch, who spoke through an interpreter. *The testimony of this witness demonstrates that he did not see the accident or know anything about it until some time after it had happened when his attention was attracted by persons running towards the scene of the accident.* At the time of the accident, which hap-

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pened on track 5 in defendant's Jersey City yard, he was eating his dinner in a car on track 2, eight car lengths away from the car that was supposed to have struck the plaintiffs' intestate (p. 28, l. 20). Track 2 is near Steuben Street, while track 5 is near Newark Avenue. There were two tracks known as tracks 3 and 4 between tracks 2 and 5 (p. 28, l. 30). There were cars standing on tracks 3 and 4 (p. 29, ll. 10-20). As this witness was eating his lunch, he saw a number of persons running past the car where he was, and thereupon he left that car and also started running to the scene of the accident (p. 29, ll. 30-35). Asked on direct examination (p. 26, ll. 10-20): "But before the accident when the man was taking the lamp and before he was struck, did you see with your eyes anyone standing upon the rear platform of this train of cars?" he answered, "No, sir; I did not see. The only thing that attracted us was the noise, and we all ran there," thereby showing conclusively that he knew nothing about the accident until after it happened. It is perfectly obvious that so far as relates to the circumstances of the accident this witness spoke entirely from hearsay. The remainder of his testimony must necessarily, in the light of the testimony referred to supra, be the result of inference drawn by him from what he saw or was told by someone else when he finally reached the scene of the accident, or what he might have imagined happened. *He says that he knew nothing of the accident until he heard the noise and saw a number of people running.* He was, according to his own testimony, a distance of eight car lengths from the scene of the accident. These cars are at least 50 feet long and therefore he was 400 feet away. Also there were cars on the two tracks between the track on which the accident happened and the track where this witness was. It was a physical impossibility for him to see unless he did go to

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the scene of the accident and crossed over the other cars and tracks in between. Since this witness was the only witness produced, and since the burden was on the plaintiff of showing that the defendant was negligent, by witnesses having personal knowledge of the facts, the conclusion inevitably follows that there was no evidence of negligence.

The negligence charged in the complaint is as follows (p. 11, ll. 10-25) :

"5. The negligence of the defendant consisted in this:

"While the intestate of the plaintiff was doing his work for the defendant, fitting lamps to the rear of a train, the agents and servants of the defendant, without using due care to ascertain the position of plaintiff's intestate, backed the train down upon the intestate of the plaintiff, and crushed him against a block stop; and it did not use reasonable care to give the plaintiff's intestate any warning of the intention to move said train and did not use reasonable care to provide him with a safe place in which to work or to promulgate rules for the protection of such employees, and by reason of said negligence the intestate of the plaintiff was killed."

It does not appear from the testimony of the one witness called by the plaintiff that the decedent was fitting lamps to the rear of a train, or that the defendant, without using due care to ascertain the position of plaintiffs' intestate, backed the train down upon the intestate. When Chrinuch was asked on direct examination (p. 23, ll. 15-20), "Well, was anything done with the two single cars to connect them with the train that he was working on?" the answer was, "I do not know what they did with those cars." He was then asked to describe how the deceased was killed and he proceeded to describe how the accident hap-

pened but it is clear from reading his testimony, that the description given was the result of what somebody told him or what he imagined. He did not know what care was exercised by the defendant in moving the cars because he was not there. He was asked the question, "Did you or did you not hear any whistle blown or signal given before these cars moved down on the man that was struck?" and he answered, "No, sir; there was no signs or signal given, no bell rang, no whistle blew" (p. 25, ll. 15-20). But this testimony is worthless when it is remembered that the same witness testified that he was eight car lengths away in another car eating his lunch with a number of cars on the track between the track on which he was and the track where the accident happened, with a continual movement of cars in the yard (p. 30, ll. 15-20). Of course, he did not hear any sign or signal. It would be just the same as asking a man five miles from a railroad crossing whether he heard the crossing bell.

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The Supreme Court in its opinion does not touch on this phase of the case. It seems to proceed on the assumption that the facts stated in the complaint are supported by the evidence. It will be noted that the Supreme Court says (p. 2, l. 35, to p. 3, l. 10):

"The plaintiff was employed by defendant company to remove lamps from the rear of trains. While engaged in this work, on a standing train at the depot in Jersey City, the train was suddenly and without any notice to the employees pushed back against the bumper and plaintiff's intestate was killed. This clearly indicated negligence in operation, because the deceased had a right to assume that the train being in the depot at rest and practically up against the bumper would go forward rather than backward, if it moved at all; and in any event would not be moved back without notice of some kind

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to an employee like deceased, who it must be assumed would be expected there to perform his work."

10 There is no evidence that the deceased at the time of the accident was employed in removing lamps from the rear of a train of cars, or that he had been directed to do so. The only witness called by the plaintiff when asked the question, "Do you know of your own knowledge whether his (deceased's) foreman told him to go and get that lamp or not?" answered "I don't know whether he went there at his own free will or not" (p. 26, ll. 25-30).

20 There is no evidence that the deceased was engaged in work on a standing train. The train was not at a depot but in a railroad yard where it is undisputed cars were being continually moved in and out. There is no evidence that the train was suddenly and without any notice to the employees pushed back against the bumper. It does not appear whether the deceased was supposed to look out for himself or whether he was supposed to have a warning. We respectfully submit that the Supreme Court lost sight of the fact that the only witness called by the plaintiff was at the time of the accident eating his lunch in a car which was on a track four tracks from the track on which the accident happened and eight car lengths distant therefrom, and that this witness testified that he did not know the accident had happened until his attention was attracted there-
30 to by persons running toward the scene of the accident. Not only was he this great distance from the scene of the accident, but there were cars on the two tracks between the track on which the accident happened and the track upon which the witness was, which also made it impossible for him to see, assuming for a moment that he was near enough to see if there had been no cars
40 obstructing his view.

With regard to the allegations of negligence in the complaint, namely, that the defendant failed to give the deceased warning of the intention to move the cars, or failed to promulgate rules for the protection of such employees, these are not to be considered in view of the judge's charge which limits the defendant's negligence, to the sole question of whether defendant had used reasonable care to furnish a reasonably safe place to work (p. 42, l. 30; p. 43, l. 20). *Fritz vs. Sayre & Fisher Co.*, 77 N. J. L. 236 and cases cited. But if it can be said that the questions of warning and promulgation of rules could be considered by the jury under the instruction that the defendant was to use reasonable care to provide a reasonably safe place for the deceased, it was not shown that it was customary to warn or that the defendant did not promulgate rules to be followed in its yards. The defendant's yard at Jersey City was a large yard in the open where it stored, cleaned, repaired and oiled cars. Plaintiffs' intestate was a workman in that yard. There was absolutely nothing in the case to show that the yard was operated in any different manner at the time of the accident than it was ordinarily operated; or that it was operated in any different manner than similar yards were operated by other railroad companies; that the train crew did not perform its work in the same manner as it always performed it; there was no witness who was in the vicinity of the accident who was called who testified that warning was or was not given. The only witness is that of a witness who knows nothing about the accident of his own personal knowledge. He spoke through an interpreter and, of course, had difficulty in making himself understood. However, there can be no question as to his position at the time of the accident for he testified to it in a way that cannot be misunder-

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stood. We therefore respectfully submit that for this reason motion for non-suit or for a direction of verdict should have been granted.

Assuming, but not admitting, that it can for a moment be said that this testimony is of such a character as to entitle it to any weight at all, it simply amounts to an assertion of the fact that
 10 the deceased was killed by a train backing down, when, according to this witness who does not know anything about it because he was not there at the moment of the accident, no warning was given to the deceased of the approach of the train. *His testimony at the very most shows that the deceased was struck by a train but does not show the circumstances under which the train was moved, nor whether any warning was given of such movement, even assuming such warning was required.* On this theory the case of *Will-*
 20 *ever vs. Delaware, etc. R. R. Co.*, 89 N. J. L. 697, 99 Atl. 321 (reversing), 87 N. J. L. 348, 94 Atl. 595 may be cited for the plaintiff. In that case a section foreman was struck in a railroad yard by a train which was backing down the track; no warning was given him of its approach. This court held that under these circumstances there was no duty to give warning and that therefore there was no negligence on the part of the company. The Court of Errors and Appeals (by a vote of 7 to 5) reversed this judgment, but did so
 30 *solely on the ground that there was evidence of a rule of the company requiring warning to be given of a movement of the kind in question; that decedent had a right to rely on such warning and that, therefore, the question of negligence by reason of the failure to give same was for the jury*

The rule in question required an employee to take a position on the front of the head car when cars were being pushed and give signals to the engineers "in case of need". This case is clearly dis-
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tinguishable from the present case, because no such rule or custom was alleged or proven to exist upon which the plaintiff's intestate had the right to rely, and the charge of the Trial Court limited the question of defendant's negligence solely to the point of failure to provide a safe place to work (p. 37, ll. 20-24).

The case is also different from *McNally vs. Pennsylvania R.R. Co.*, 88 N. J. L., 277; 95 Atl., 975, where plaintiff (an employee of another company) was injured by being caught between a coal car and a bumper in the railroad yard of the defendant. It appeared, from the testimony, *that it was customary, when cars were to be moved or shifted in the yard for the defendant to give notice to the workmen employed near the cars of such intended movement*, and the court affirmed a judgment for the plaintiff *on that ground alone*, stating at page 279:

"Where it is shown that there was a custom to give notice of the movement of trains, a workman engaged in working around or on the cars, is entitled to rely upon *such custom*, and to assume that if trains are to be moved he will be given the customary warning."

In the case at bar there was absolutely no evidence of any custom of warning workmen employed in defendant's yard.

The case of *Aerkfestz vs. Humphreys*, 145 U. S., 418, 36 L. Ed. 758, is, we contend, controlling in the case at bar. In that case plaintiff, while working on one of the tracks of the defendant, was run over and injured by a freight car, moved by a switch engine. Plaintiff was working on the track with his back to the cars which were being backed toward him about as fast as a man walks. The court said, at page 421:

"Under such circumstances, what negligence

10 can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employee, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were not strangers whose presence was to be guarded against. *The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards would have simply tended to confusion.*"

To the same effect see *Connelly vs. Penn. R.R. Co.*, 228 Fed., 322.

(b)

The plaintiff's intestate assumed the risk of the injury which he received.

20 It is settled that in an action under the Federal statute assumption of risk remains as a defense in all cases except those where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of the employee, as specified in Sec. 4 of the Federal statute.

30 *Gila Valley &c. R.R. Co. vs. Hall*, 232 U. S. 94; 58 L. Ed. 521;
Seaboard Air Line vs. Horton, 233 U. S. 492; 58 L. Ed. 1062; see also 234 U. S. 595; 60 L. Ed. 458;
Crockett vs. Southern R. Co. 234 U. S. 725; 58 L. Ed. 1564;
Y. & M. V. R. Co. vs. Wright, 235 U. S. 376; 59 L. Ed. 277;
McGovern vs. Philadelphia &c. R.R. Co. 235 U. S. 389; 59 L. Ed. 283;
Seaboard Air Line vs. Padgett, 236 U. S. 668; 59 L. Ed. 777;

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- Central Vt. R.R. Co. vs. White*, 238 U. S. 507; 59 L. Ed. 1433;
Jacobs vs. So. R. Co., 241 U. S. 229; 60 L. Ed. 970;
Baughan vs. N. Y. C. R.R. Co., 241 U. S. 237; 60 L. Ed. 977;
Chesapeake & O. R.R. Co. vs. De Atley, 241 U. S. 310; 60 L. Ed. 1016; **10**
Bower vs. Chicago & M. R. Co., 241 U. S. 470; 60 L. Ed. 1107;
Baltimore & O. R. Co. v. Whitacre, 242 U. S. 169; 61 L. Ed. 228;
Seaboard Air Line vs. Lorick, 243 U. S. 572; 61 L. Ed. 907;
Erie R.R. vs. Purucker, 244 U. S. 320; 61 L. Ed. 1166;
Boldt vs. Pennsylvania R.R., 245 U. S. 441; 62 L. Ed. 385;
Kanawha Railway Co. vs. Kerse, 239 U. S. 576; 60 L. Ed. 448. **20**

The legal principle being thus settled, the question for consideration is whether under the circumstances of any particular case the point as to assumption of risk is to be decided as a matter of law by the court, or by the jury under appropriate instructions. In the present case, there being no contention that any statute was violated by the defendant, we submit that the facts and reasonable inferences therefrom being undisputed, the question of assumption of risk was one of law. **30**

The plaintiff's intestate was employed by the defendant as a laborer, to take care of lamps and to fill them with kerosene (p. 16, ll. 27-28). He had been doing this kind of work for at least a month before the accident occurred (p. 20, ll. 33-35). The yard where he performed his work was used for storing, cleaning and repairing cars (p. 21, ll. 5-10). Cars are at all times being put into

and taken out of this yard to and from the tunnel (p. 24, ll. 17-20). The accident happened at 12:30 in the afternoon (p. 24, ll. 14-16). Plaintiff's intestate went in between a car and a block, to fill a lamp on the rear of the car (p. 17, ll. 17-25). The space into which he went between the car and the block was only about two feet wide (p. 21, ll. 26-28), and, while standing in that space, he was injured.

There is no allegation in the complaint and no evidence was offered at the trial of any customary warning upon which the plaintiff's intestate might be presumed to have relied. There was no proof that the movement of the cars was anything but the ordinary operation of connecting cars.

Under these circumstances, we submit that the assumption of risk was so clear as to remove that question from the domain of fact and make it incumbent upon the trial court to hold that the risk was assumed as a matter of law.

Illustrations of the application of the principle of assumption of risk to yard movements may be found in the following cases:

In *Boldt vs. Penn. R.R. Co.*, 218 Fed., 367, a switchman who was working between two freight cars in a yard was held to have assumed the risk of injury from such cars being struck by other cars, when run over a "hump", where such movements were of almost daily occurrence.

In *Fort Worth & R.R. Co. vs. Copeland*, 164 S. W., 857, a switchman who was injured by a cut of cars being shunted against a car on which he was adjusting a coupler was held to have assumed the risk where the shunted cars were moved in the customary manner.

In *Connelley vs. Penn. R.R. Co.*, 228 Fed., 322 (Circuit Court of Appeals, 3rd Circuit), decedent, employed to watch and repair small defects in

yard tracks was killed by a train backing along the track on which he was working. There being no evidence that the train was not operated in the customary manner, decedent was held to have assumed the risk as part of his employment.

In *Louisville & N. R.R. Co. vs. Johnson's Admx.*, 171 S. W., 847 (Federal Act), where one working around a railroad yard was standing between box cars and could not be seen by employees in cars moving on the same track, was held to have assumed the risk of injury by the movement of the other cars. 10

Other cases to the same effect are:

Smartwood vs. Lehigh Valley R.R. Co.,
169 App. Div., 759; 155 N. Y. Supp., 778;
Charleston & W. R.R. Co. vs. Sylvester,
86 S. E., 275. 20

(c)

There was no evidence that the deceased's sister was dependent upon him, within the meaning of the Federal Employers' Liability Act.

The only person who claimed that she was dependent on the deceased was a sister, and she alone testified to her alleged dependency.

The Federal Employers' Liability Act provides that, in case of the death of an employee under the conditions described in the act, the personal representative may bring an action— 30

“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 (35 U. S. Stat. 65), Act April 22, 1908, Ch. 149, Sec. 1, U. S. Comp. Stat. Ann. 1916, Vol. 8, Sec. 8657.”

It will be observed that the Federal Statute creates three classes of beneficiaries which are separate and distinct from one another. First, widow or husband and children; second, parents; third, next of kin dependent. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If
 10 any member of the last class does not come under the provision "*dependent upon such employee*", then such person is excluded from that class, and if such exclusion applies to the whole class, then *there can be no recovery.*

Moffett vs. Baltimore & O. R.R. Co., 220 Fed., 319;

Allen J. Dooley vs. Railroad, 163 N. C., 464; 79 S. E., 970; L. R. A. 1916 E, 185;

20 *In re Stone*, 91 S. E., 852;

Southern Ry. Co. vs. Vessell, 68 So., 336;
 Roberts on Federal Liability of Carriers,
 Vol. 1, Sec. 593.

Plaintiff's intestate, at the time of his death, was not married, and his father and mother were both dead (p. 30, ll. 9-12). The only next of kin of the deceased was his married sister, Hernie Sadowska, and his brother, Bronislaw Grijnuk, the plaintiff in this cause. There is no evidence that deceased ever contributed anything to his brother, and,
 30 therefore, no pecuniary loss was sustained by him by reason of his brother's death. His sister, Hernie Sadowska, the only other next of kin, testified on the question of pecuniary loss as follows:

She has been married for the past eight years, and from the time of her marriage until the time of his death, her brother lived with her and her husband and children (p. 26, ll. 34-39). The decedent paid to his sister \$30 a month (p. 25, ll.

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10-14). The remainder of the testimony is as follows (p. 25, l. 20 to p. 26, l. 15):

"Q. And did he ever give you anything more than thirty dollars a month at any time during the year? A. He always assisted me. He was very good to me. He always aided me.

"Q. Do you know what you received from him a year, besides thirty dollars a month, if you can tell? A. Any time that I needed money for rent my brother was ailing. 10

"MR. SIMPSON: Sick, does she mean?

"THE INTERPRETER: Sick.

"A. (Continuing.) And he always gave me enough for my rent."

Decedent had a room in the home of his sister and she provided him with his meals (p. 28, ll. 5-8).

This was all the testimony as to the pecuniary loss sustained by the sister. 20

It appeared, therefore, that decedent contributed thirty dollars a month, or about a dollar a day, to his sister, in return for which he obtained his meals and lodging, and that occasionally he assisted her financially, the frequency or extent of such assistance not being shown.

It is well settled that there must be proof of pecuniary loss, and the damages awarded to the beneficiary must be limited to the pecuniary loss so proven. 30

Michigan Central R. R. vs. Vreeland,
227 U. S., 59; 57 L. Ed., 417.

American R. R. Co. vs. Didricksen, 227
U. S., 145; 57 L. Ed., 456.

Gulf, etc., Ry. Co. vs. McGinnis, 228 U.
S., 173; 57 L. Ed., 785.

In the present case the only beneficiary was one of the third class mentioned in the statute, and it was necessary for the plaintiff to show that 40

the beneficiary was actually *dependent* upon the decedent in order to permit a recovery for her pecuniary loss.

Moffett vs. Baltimore & O. R. Co., 220 Fed., 39; 135 C. C. A., 607.

Smith vs. Pryor, 190 S. W., 69.

10 *Collins vs. Penn. R. Co.*, 163 N. Y. App. Div., 452; 148 N. Y. Supp., 777.

Dooley vs. Seaboard Air Line R. Co., L. R. A., 1916 E. 185; 79 S. E., 970.

Evidence of occasional contributions to the sister does not establish dependency within the meaning of the act.

Smith vs. Pryor, 190 S. W., p. 69;

Roberts' Federal Liability of Carriers, Vol. 2, Sec. 627;

20 *Hodnett vs. Boston & Albany R. R. Co.*, 156 Mass., 86;

8 Am. & Eng. Enc. of Law, (2nd Ed.), p. 904.

In the case of *Smith vs. Pryor*, *supra*, the Court in a case under the Federal Employers' Liability Act similar to the present case said (p. 71):

30 "Now, the mere fact that deceased had at different times sent her *an occasional sum does not establish dependency*. The evidence, at most, shows only that she would probably have received other sums as gifts in the future, had he lived. In other words, she may have suffered a possible pecuniary loss in the death of her brother, but nothing more than that. *But, while it is necessary to show only pecuniary loss in the case of a husband, wife, children or parents, yet, in the case of one who is not in the above category, dependency must be shown and proved like any other fact*" (citing cases).

Roberts on Federal Liability of Carriers, Vol.

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2, Sec. 627, speaking of this section of the Federal Statute, states the rule as follows:

“Since the beneficiaries of the third class must be dependent upon the decedent at the time of his death, mere proof that the decedent contributed sums of money at various times to the beneficiaries is not sufficient to establish dependency.”

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In 8 Am. & Eng. Enc. of Law, (2nd Ed.), p. 904, supra, speaking of a similar statute, the correct rule is stated as follows:

“The mere fact that deceased occasionally contributed to the support of such party in an irregular way *is not* sufficient where fact of *dependency* alone confers the right of action.”

This quotation has been adopted with approval as a correct interpretation of the Federal Statute in *Southern Ry. Co. vs. Vessell*, 68 So., p. 337.

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The only other evidence of pecuniary loss was the payment of \$30 per month. The sister was a married woman living with her husband, and decedent, in return for this contribution, obtained his board and lodging from her. We submit that the payment of a dollar a day, to say the least, was hardly enough for the maintenance of decedent himself, and this evidence was not sufficient to show that the sister was actually dependent upon plaintiff's intestate within the meaning of the Federal Employers' Liability Act.

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Collins vs. Penn. R. R. Co., 148 N. Y. Supp., 777; 163 App. Div., 452.

Southern Ry. Co. vs. Vessell, 68 So., 336.

Illinois Cent. R. Co. vs. Doherty's Admr., 153 Ky. 363; 47 L. R. A., (N. S.), 131; 155 S. W., 1119.

In *Collins vs. Penn. R. R. Co.*, 148 N. Y. Supp.;

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777; 163 App. Div., 452, plaintiff's intestate was unmarried and his only next of kin were two brothers and two sisters. The two brothers were married and had their homes. Intestate lived with his two sisters, one of whom was the plaintiff. Intestate was earning \$5 or \$6 per week at the time of his death, all of which he gave to his
 10 sister, the plaintiff, who pooled it with her earnings, and from this common fund supported in-
 testate, herself and the other sister, who was sickly. From the general fund, intestate received his board and lodging.

The Court, after quoting Sec. 1 of the Federal Act, said:

20 "Said section, it will be seen, thus provides that the recovery is for the benefit of the 'next of kin dependent', and thus it would seem that none of the next of kin of plain-
 tiff's intestate would be entitled to share in the recovery, if any was had, except such of them as were *actually dependent* upon him. The *evidence would not seem to indicate that any of said next of kin were dependent upon plaintiff's intestate*, and that, as before stated, his wages were hardly sufficient for his own maintenance."

30 In *Southern Ry. Co. vs. Vessell*, 68 So., 336, it was held that under the Federal Employers' Liability Act, giving a right of action for wrongful death for the benefit of the *dependent* next of kin, an elder sister of a deceased employee, suing as his administratrix, who was married, and who had boarded deceased, in return for which he had made monthly contributions for two years prior to his death *was not dependent* upon deceased and could not recover.

40 It therefore seems clear that as to a next of kin who comes within the third class named within the federal statute, that is, "next of kin dependent upon such employe", actual dependency

must be proven and the burden to prove that fact is on the plaintiff. As to the next of kin in the first class, namely, "widow or husband and children", and the next of kin in the second class, "employe's parents", it may be that actual dependency in certain cases may be presumed from the fact of the close relationship, and the further fact that a pecuniary contribution is made to them, but when the statute goes on and says that if there are no persons surviving the deceased in the first class or second class, that then the action shall be for the benefit "of the next of kin *dependent* upon such employe", the conclusion is inevitable that the next of kin in the third or last class (who only have the benefit of the statute in the event that there are no persons of the first and second class), must prove actual dependency, for, otherwise, no meaning could be attributed to the word "dependent" used in the statute with reference to the third class but not with reference to the first and second classes. For example, two brothers and a sister live together and each of the three have an income of \$5,000 a year and therefore no one of the three needs or is entitled to any contribution from any one of the other two. Notwithstanding that fact, one of the brothers gives to the sister \$25. weekly from his income of \$5,000. The brother who makes this contribution is killed while employed in interstate commerce by a railroad company. The sister would have no cause of action, for certainly she is not dependent on the deceased brother when she has an income equal to his, merely because he voluntarily contributed to her a part of his \$5,000. The case put is parallel to the case at bar for in the case at bar the sister, according to her own testimony, and she was the only witness called, received only \$30. a month from her deceased brother and out of this she

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provided him with room and board as shown *supra*. She was married and living with her husband who supported her. The contribution amounts to a dollar a day for lodging and meals. The evidence does not show that the contribution of a dollar a day was more than sufficient to pay for the room and meals, and common experience teaches that it was probably insufficient. At any rate, the burden of showing that it was more than sufficient was on the plaintiff and there is no such proof in the case. The sound rule is that enunciated by this Court in *Havey v. Erie R. R. Co.*, 88 N. J. L. 684, where Black, J., at p. 685, speaking with reference to the question of *dependency* of brothers and sisters under the New Jersey Compensation Act said:

“It is argued in the appellant’s brief, and we think that the argument is sound, that the brothers and sisters were not legally dependent upon the deceased—they were not dependent upon him in fact, merely because their father was helped by him to support them, they are not within the class provided for by the statute. They, doubtless, did derive some benefit from their brother’s wages, through the father’s disbursements of the family fund, but that does not make them dependent in fact upon their brother. Benefit and dependence are not synonymous words. The fact that the father used the son’s wages to help support the family did not make the family any the less dependent, both legally and actually, upon the father.”

Likewise in the case at bar, mere benefit, assuming that the sister did receive any benefit from the brother’s contribution of \$30. a month, does not show dependence because benefit and dependence are not synonymous words. There was no legal obligation to support the sister, and there was no actual dependency. The Supreme Court in its opinion says, “the jury might have found

the plaintiff to have been dependent so as to bring her within the provisions of the (federal) act"; citing *Michigan Central R. R. Co. vs. Vreeland*, 227 U. S. at p. 70. Referring to that case and page the following will be found:

"The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived." 10

Reading this paragraph in connection with its context in the opinion of Mr. Justice Lurton, speaking for the United States Supreme Court, it will be found that it does not support the contention that the mere fact that contributions were made necessarily means that there is dependency as to persons falling in the third class of next of kin, who might be entitled under the federal act. At page 72, the Court expressly says (*italics ours*): 20

"The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of the husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled'." 30

Again at page 71, the Court says:

"A pecuniary loss or damage must be one which can be measured by some standard."

In the case at bar, there is no standard that can be applied to the alleged contribution of the deceased to his sister which will show than any part of the contribution was for her benefit. There is nothing in the mere fact that \$30. a 40

month was paid for board and lodging to a married sister which shows that she was dependent on the deceased brother. The facts are undisputed in the case at bar, and on the undisputed facts we submit there was no actual dependency within the meaning of the federal statute which says that in case of the death of an employe, the
 10 personal representative may bring an action (first), "for the benefit of the surviving widow or husband and child of such employe; and (second), if none, then of such employe's parents; and (third), if none, then of the next of kin *dependent* upon such employe".

III.

The Trial Judge erred in his charge.

20 The Trial Judge charged the jury (p. 43, ll. 25-30):

"So that, under any circumstances, you must take into consideration what the reasonably fair cost would have been and was for the maintenance and support in the household and in the family of this brother now deceased, and if you find that there was a difference between that sum and the sum which you may find was contributed by him, then it would be only that difference which you may use in your consideration of what a verdict may be for."

30 Exception was taken to this part of the charge (p. 48, ll. 5-15); see Grounds of Appeal No. 5 (p. 2, ll. 20-30).

We submit that the above charge was erroneous according to the express wording of the Federal Act, and the cases construing the same referred to at length in Point II, Sub (c), of this brief.

IV.

For these reasons the judgment of the Hudson County Circuit Court and the judgment of affirmance of the Supreme Court should be reversed and a new trial ordered.

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June Term, 1920.

COLLINS & CORBIN,
Attorneys for Defendant-Appellant.

GEO. S. HOBART,
EDWARD A. MARKLEY,
Of Counsel.

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IV.

For these reasons the judgment of the
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For the Court,
GEO. S. HUNTER,
THOMAS A. MERRILL,
Of Counsel.

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NEW JERSEY
Court of Errors and Appeals.

BRONISLAW GRIJNUK, adminis-
 trator ad prosequendum of the
 estate of MICHAEL GRIJNUK, de-
 ceased et al.,

Plaintiffs-Respondents,

vs.

WILLIAM G. MCADOO, Director-
 General of Railroads, HUDSON
 AND MANHATTAN RAILROAD
 COMPANY,

Defendant-Appellant.

Action at Law.

On Appeal

from

Supreme Court.

**Supplemental Brief in Favor of the
 Defendant-Appellant.**

On the argument of this appeal, permission was given to file a supplemental brief on the question whether the Trial Judge erred in permitting the general administrator to be added as the party plaintiff. During the course of the argument, Parker, J., referred to the case of *Farrier vs. Schroeder*, 40 N. J. L., 601 (cited in the last line on page 7 of our main brief), as an authority sustaining the bringing in of a general administrator in the case at bar. An examination of that case will reveal that what the Court did was to change the plaintiff where the sealed instruments sued on showed that the defendant's liability under the instruments was not to the plaintiff, but to her agent. All that the Court did was to substitute the plaintiff's agent simply because the sealed instruments were in the name of the agent. That is quite different from the situation presented in this

case, for here the plaintiff had absolutely no right in law or in equity to bring the suit. See the opinion of this Court in *Swank vs. Pennsylvania R. R. Co.*, decided March term, 1920. At the time when the suit was brought and for several months thereafter, there was no such person in being as a general administrator. See also argument advanced at the bottom of page 11, et seq.

Also, on the argument, Parker, J., called attention to the fact that in our statement of the questions presented in the three cases cited on page 6 of our brief, we in each instance said "this Court denied" presumably meaning the Court of Errors and Appeals, and therefore, he concluded that in each of the three cases cited the motion to amend was made in this Court after an appeal had been taken. Through inadvertence, the words "this Court" were used. As a matter of fact in *Lower vs. Segal*, 60 *N. J. L.*, 99, the question was presented to the Supreme Court on a motion by the plaintiff to amend the summons and declaration, and the motion was denied. In *Fitzhenry vs. Consolidated Traction Co.*, 63 *N. J. L.*, 142, the question was presented on motion to amend the summons and declaration before trial, after the declaration had been demurred to. In the case at bar the question was raised as an objection in point of law in the fourth defence to the complaint. This is the practice now in lieu of demurrer under rule 40 of the Rules of the Supreme Court published in 1913, to take effect September 1 of that year. In *Rankin vs. Central R. R. Co.*, 77 *N. J. L.*, 175, the question was raised on rule to show cause in the Supreme Court. These three cases are followed in the recent case of *Giardini vs. McAdoo*, 107 *Atl.*, 437, decided by this Court. See our main brief, page 9, line 30. We respectfully submit that a careful

reading of the three cases cited will show beyond question that the Trial Judge had no right to add the general administrator as the sole party plaintiff when there was no proper party plaintiff after the case was in course of trial. In the case at bar, there was no motion made prior to trial as in the Lower and Fitzhenry cases to amend. See page 5 of our main brief, line 25. If the Court has no right to bring in a party as a sole party plaintiff on a motion to amend *a fortiori*, the Court has no right to do so after the case is in course of trial.

As stated on the argument by counsel for the appellant, the judgment as printed at page 14 of the case, is not a true copy thereof, because it says that judgment was in favor of both plaintiffs, that is, the general administrator and the administrator ad pros., whereas the judgment was only entered in favor of the administrator ad pros. In order to clear up this error in the state of case, we have printed as a part of this supplemental brief the judgment as entered and the rule for judgment which the Clerk of the Court used in making up the judgment. It will be noted that in each of these documents the only named plaintiff is the administrator ad prosequendum. It therefore appears that a judgment has been entered in favor of the plaintiff, who has absolutely no right thereto in an action where it does not even appear that he is the person he says he is, namely, an administrator ad prosequendum.

The case of *Missouri, etc., Railway Co. vs. Wulf*, 226 U. S., 570, cited on page 3 of the respondent's brief, is not an authority in point because that case was tried in the Circuit Court of the United States for the Eastern District of Texas, and the right of that Court to permit an amendment of the complaint depended on Section 954 of the Revised

Statutes of the United States as pointed out by Mr. Justice Pitney, speaking for the United States Supreme Court at page 576, where he said "the amendment was clearly within Section 954, Rev. Stat."

June Term, 1920.

Respectfully submitted,

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

GEORGE S. HOBART,
EDWARD A. MARKLEY,
Of Counsel.

JUDGMENT.

(Filed April 25, 1919.)

HUDSON COUNTY CIRCUIT COURT.

BRONISLAW GRIJNUK, Administrator, ad prosequendum of the Estate of MICHAEL GRIJNUK, deceased,

Plaintiff,

vs.

WILLIAM G. MCADOO, Director General of Railroads, HUDSON AND MANHATTAN RAILROAD COMPANY,

Defendant.

Action at Law.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson County Circuit Court, April 23-24, 1919.

The cause having been heard and submitted to the jury they returned their verdict as follows:

They say that they find for the plaintiff, and

against the defendant, and they assess the damages of the plaintiff on occasion of the premises at the sum of three thousand (\$3,000.00) dollars.

Whereupon, it is adjudged that the plaintiff recover of the defendant, the sum of three thousand (\$3,000.00) dollars and his costs which are taxed at fifty five dollars and sixty-five cents (\$55.65) making in the whole the sum of three thousand and fifty-five dollars and sixty-five cents (\$3,055.65).

Judgment entered this twenty-fifth day of April, 1919.

LUTHER A. CAMPBELL,

Attest:

Judge.

JOHN J. MCGOVERN,

[SEAL]

Clerk.

RULE FOR JUDGMENT.

(Filed April 25, 1919.)

HUDSON COUNTY CIRCUIT COURT.

BRONISLAW GRIJNUK, Administrator ad prosequendum of the Estate of MICHAEL GRIJNUK, deceased,

Plaintiff,

against

Action at Law.

WILLIAM G. MCADOO, Director General of Railroads, Hudson and Manhattan Company,
Defendant.

The issue in the above entitled action having come on regularly to be tried before Hon. Luther A. Campbell and a jury, on the 23d and 24th days

of April, 1919, and the evidence of the plaintiff and the defendant having been heard and submitted to the jury, and after due deliberation thereon the jury having returned its verdict in favor of the plaintiff and against the defendant in the sum of three thousand (\$3,000) dollars, together with the the costs to be taxed.

Now, on motion of Alexander Simpson it is hereby

Ordered and adjudged, that the plaintiff, as administrator, have and receive from the defendant the sum of three thousand (\$3,000) dollars damages as awarded, together with the costs to be taxed.

Let judgment absolute be entered accordingly this twenty-fifth day of April, 1919.

LUTHER A. CAMPBELL,

Judge Circuit Court.

ALEX. SIMPSON,
Plaintiff's Attorney.

New Jersey Court of Errors and
Appeals

IN SENATE

January 18, 1888

THE STATE OF NEW JERSEY, by and on behalf of

the Plaintiff,

vs.

THE STATE OF NEW JERSEY, by and on behalf of

the Defendant.

IN SENATE

Southern Bond