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New Jersey State Library

New Jersey Supreme Court

Filed October 2, 1917.

MARY FLYNN, Petitioner-Defendant, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., Prosecutor.	On Certiorari. Notice of Appeal.

To Collins & Corbin, Attorneys of Prosecutor:

Take notice that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. Because the Supreme Court reversed the judgment of the Passaic Common Pleas, whereas it should have affirmed the same.

2. Because the Supreme Court did not affirm the judgment of the Passaic Common Pleas.

3. Because the Supreme Court decided that the Passaic Common Pleas was without jurisdiction in the proceedings brought before it by Mary Flynn.

4. Because the Supreme Court decided that James Flynn, deceased, at the time of his death was engaged in interstate commerce.

5. Because the Supreme Court decided that the finding of the Judge of the Passaic Common Pleas that James Flynn at the time of his death was engaged in interstate commerce was not a finding of fact, but a statement of law and not binding on the Supreme Court.

6. Because the Supreme Court disregarded the facts as found by the Judge of the Passaic Common Pleas.

7. Because from the facts as found by the Judge of the Passaic Common Pleas it appears that James Flynn at the time of his death was not engaged in interstate commerce.

8. Because the evidence does not show that James Flynn at the time he received his fatal injury was engaged in an act of interstate commerce.

EDWARD F. MERREY,
Attorney of Defendant.

Writ of Certiorari.

Allowed June 2, 1917.

NEW JERSEY, ss.:

The State of New Jersey, to the Judge of the Court of Common Pleas of the
[L. S.] County of Passaic, and John J. Slater, Clerk of said Court.

GREETING:

We being willing, for certain reasons, to be certified of and concerning a certain order, proceedings and determination made and rendered by Abram Klenert, Esquire, formerly Judge of the Court of Common Pleas in and for the County of Passaic, which determination was filed with the Clerk of the said Court, on December 21, 1916, in certain proceedings brought on behalf of Mary Flynn, petitioner, against New York, Susquehanna and Western Railroad Company, defendant, to recover compensation under an act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating compensation thereunder," approved April 4, 1911, do command you that the said order, proceedings, determination and judgment, together with all things touching and concerning the same, as fully as before you they remain or are in your custody or control, you do certify and send, together with this writ, to our Justices of our Supreme Court of Judicature, at Trenton, on the 12th day of June, 1917, that there-

in may be done what of right and according to law ought to be done.

WITNESS, William S. Gummere, Chief Justice of our Supreme Court, at Trenton aforesaid, this sixth day of June, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

COLLINS & CORBIN,
Attorneys.

ALLOCATUR RETURN

Allocatur.

I allow this writ. Let it be sealed.

JAMES F. MINTURN,
J. S. C.

Dated June 2d, 1917.

Return.

Filed June 14, 1917.

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

We, WILLIAM W. WATSON, President Judge of the Court of Common Pleas in and for said County, and John J. Slater, Clerk of said Court and County, do hereby, in the schedule hereto annexed, send to our Justices of our Supreme Court of Judicature at Trenton, the record and proceedings mentioned in the within writ of certiorari, together with all things touching and concerning the same, as we are within commanded.

IN TESTIMONY WHEREOF, we have hereunto set our hands and seal of said Court and County, at Paterson, this twelfth day of June, A. D. nineteen hundred and seventeen.

[SEAL.]

WILLIAM W. WATSON,
President Judge.

JNO. J. SLATER,
Clerk.

Petition.

Filed April 28, 1916.

PASSAIC COMMON PLEAS.

MARY FLYNN, Petitioner, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Defendant.	On Petition. Under Employers' Liability Act.

To the Honorable Abram Klenert, President Judge of the Passaic County Court of Common Pleas:

Your petitioner, Mary Flynn, residing at 276 Getty Avenue, in the City of Paterson, in the County of Passaic and State of New Jersey, respectfully shows unto your Honor:

1. That your petitioner was the wife of James Flynn, who was employed by the New York, Susquehanna & Western Railroad Company, a corporation owning and operating a railroad running from Jersey City through the City of Paterson.

2. On or before March 23, 1916, the said James Flynn was employed by the New York, Susquehanna & Western Railroad Company as a crossing watchman where the said railroad crosses Lyon Street at grade in the City of Paterson. That it was the duty of the said James Flynn as such crossing watchman to go upon the tracks of the said railroad company and to notify pedestrians and drivers of vehicles of the approach of trains.

3. That on the twenty-third day of March, 1916, in the course of his employment, the said James Flynn was upon the tracks of the railroad operated by the defendant and was struck by a train operated by the said defendant at said crossing and killed.

4. The said injury arose out of and in the course of the employment of the said James Flynn.

5. The employer had actual knowledge of the said accident and of the death of the said James Flynn immediately after the occurrence thereof through its agents and employes in charge of the operation of the said railroad.

6. The amount of wages received by the deceased at the time of the injury was at the rate of about nine dollars per week.

7. At the time of the death of the said James Flynn he left him surviving the petitioner, who is his widow, and a daughter, Katie Flynn, who is of the age of twenty years, and that the said Katie Flynn lives with this petitioner at 276 Getty Avenue in the City of Paterson, and that both petitioner and the said Katie Flynn were dependent upon the said James Flynn for support.

Your petitioner further shows that the said employer neglects and refuses to compensate your petitioner and the said Katie Flynn in any way for the death of the said James Flynn and has refused and neglected to pay the funeral expenses of the said James Flynn which exceed in amount the sum of one hundred dollars.

Your petitioner, therefore, prays that this Court fix, in manner required by law, how much the said petitioner and the said Katie Flynn are to receive

by reason of the death of the said James Flynn, and in what proportion to each of them the same is to be paid, and do what else in the premises may be just and equitable.

And your petitioner will ever pray, etc.

her
MARY X FLYNN,
mark
Petitioner.

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

MARY FLYNN, being duly sworn on her oath, says that she is the petitioner in the above petition named; and that the matters and things contained in the said petition are true.

her
MARY X FLYNN.
mark

Sworn to and subscribed before me
this 28th day of April, 1916.

EDWARD F. MURPHY,
Attorney at Law
of New Jersey.

Order for Hearing.

Dated and filed April 28, 1916.

Upon reading the petition of Mary Flynn filed in the above matter:

It is, on the twenty-eighth day of April, nineteen hundred and sixteen, ordered, that a hearing be had in the said matter before said Court of Common Pleas of Passaic County, in the Court House, in the City of Paterson, in said County, on Thursday, the twenty-fifth day of May, nineteen hundred and sixteen, at ten o'clock in the forenoon.

ABRAM KLENERT,
P. J.

Answer.

Filed May 13, 1916.

Defendant, New York, Susquehanna and Western Railroad Company, a corporation of the States of New Jersey and Pennsylvania, having its principal office in New Jersey on Pavonia Avenue, Jersey City, says that:

1. It admits the allegations of paragraph one, except that it has no knowledge that the petitioner is the wife of James Flynn, and leaves the petitioner to make such proof thereof as she may be advised.

2. It admits the allegations of paragraph two, and says that it was the further duty of the said James Flynn to warn and protect trains running upon the tracks of the defendant engaged in both interstate and intrastate commerce.

3. It admits the allegations of paragraph three.

4. It denies the allegations of paragraph four.

5. It admits the allegations of paragraph five.

6. The said amount of wages received by the deceased at the time of his injury were $1.20 per day.

7. It has no knowledge of the allegations of paragraph seven, and leaves the petitioner to make such proof thereof as she may be advised, and says that even if the said allegations of paragraph seven are true, yet, the daughter, Katie Flynn, is not entitled to any compensation under the act under which the petition herein is filed, for that she does not come within the term "dependent" within the meaning of Section 12 of said act under which petition herein is filed. And further says that it admits that it has refused to pay compensation as alleged in said paragraph.

Further answering this defendant says:

1. Said James Flynn was not killed by an accident arising out of and in the course of his employment by the defendant, for that the said accident was due to deliberate disobedience of orders on the part of the said James Flynn.

2. If it be determined that the tribunal, before which this proceeding is pending, has jurisdiction to entertain the petition filed herein and to make an order for compensation as therein prayed, notwithstanding the fact that at the time of the accident set forth in said petition the defendant was a common carrier by railroad engaging in commerce between and among the several states and territories of the United States, and also between the several states and territories of the United States and foreign nations, and that at the said time the said

James Flynn was employed by the said defendant as such carrier in such commerce—then the statute under which the petition herein is filed and by virtue of which said determination and order are made is in violation of the Constitution of the United States because:

(a) Said statute, if construed to permit said tribunal to entertain said petition and to make any determination or order thereunder permitting compensation as therein prayed, abridges the privileges and immunities of the defendant, and deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the laws, contrary to the Fourteenth Amendment of said Constitution.

(b) Said statute, if construed to permit said tribunal to entertain said petition and to make any determination or order thereunder permitting compensation as therein prayed, operates as a regulation of, a burden upon, and an interference with interstate commerce, contrary to Article 1, Section VIII, Paragraph 3 of said Constitution.

COLLINS & CORBIN,
Attorneys of Defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

DAVID BOSMAN, of full age, being duly sworn, according to law, upon his oath, says that he is the Secretary of the New York, Susquehanna & Western Railroad Company, a corporation, the defendant named in the above answer, and that the said

answer is true to the best of his knowledge and belief.

DAVID BOSMAN.

Subscribed and sworn to at City of New York this 8th day of May, 1916, before me, the subscriber, a Foreign Commissioner of Deeds for New Jersey, in and for said County and State, duly commissioned and sworn, as witness my hand and official seal.

A. L. TRAVIS,
[L. S.] A Foreign Commissioner of Deeds for New Jersey in New York.

Determination and Findings.

Filed December 21, 1916.

The above matter coming on for hearing, and having been submitted to me for decision, I hereby find and determine as follows:

1. This is a proceeding brought by Mary Flynn, widow of James Flynn, and against the above-named New York, Susquehanna and Western Railroad Company under an act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the acts amendatory thereof and supplemental thereto;

that a petition was filed on the twenty-eighth day of April, 1916, and an order was made setting the same down for hearing on the twenty-fifth day of May, 1916; and that process was served on the respondent on April 29, 1916, and the answer of the respondent was filed on the thirteenth day of May, 1916; consent to filing as of time having been given by attorney of petitioner, that the hearing was adjourned from time to time and finally brought on before me on the nineteenth day of October, 1916, in the presence of Edward F. Merrey, attorney of the petitioner, and Carl M. Herbert, for Collins and Corbin, attorneys for the respondent, on which day both parties produced witnesses who were examined in the presence of counsel, and it appears from the testimony of the witnesses and the stipulation of counsel,

2. That on or about the ninth day of March, 1916, James Flynn was employed by the respondent as a flagman to guard the grade crossing in the city of Paterson, in the County of Passaic and State of New Jersey at the intersection of Lyon Street and the railroad right of way of the respondent; that he continued in such employment up to the twenty-third day of March, nineteen hundred and sixteen; that the respondent is a common carrier and is engaged both in interstate and intrastate commerce; that the said James Flynn was not employed by the respondent in interstate commerce; that in the course of the employment of the said James Flynn on the approach of an eastbound train on the tracks of the railroad of respondent it was the duty of the said Flynn to cross said eastbound tracks and also the westbound tracks to warn persons traveling along said Lyon Street against getting upon the tracks of said railroad; that on the twenty-third day of March, 1916, the said James

Flynn, in the course of his employment, crossed over the eastbound tracks of the company on the approach of an eastbound train to flag said crossing and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breast piece on an engine drawing a train on the westbound tracks; this breast piece projected beyond the tracks.

3. That said accident arose out of and in the course of the employment of the said James Flynn. The said accident was not caused by the negligence of the respondent.

4. That said James Flynn at the time of said accident and his death was receiving wages amounting to eight dollars and forty cents per week.

5. That the funeral expenses and cost of burial of said James Flynn exceeded one hundred dollars.

6. That the petitioner, Mary Flynn, is the widow of James Flynn and at the time of his death was living with him and was supported by him and was dependent upon him. That James Flynn left no other person dependent upon him under the provisions of the acts set out in paragraph one.

7. The respondent had actual knowledge of the said accident and of the death of said James Flynn immediately after the occurrence thereof.

8. I find, therefore, that the petitioner, Mary Flynn, is entitled to compensation of five dollars per week for a period of three hundred weeks commencing with the thirtieth day of April, nineteen hundred and sixteen.

9. Costs will be allowed the petitioner and taxed by the clerk of this Court.

It is, therefore, on this 21st day of December, nineteen hundred and sixteen, ordered, that judgment final be entered in favor of the petitioner, Mary Flynn, and against the respondent the New York, Susquehanna and Western Railroad Company in the sum of five dollars per week for a period of three hundred weeks, beginning with the thirtieth day of April, 1916, and one hundred dollars for funeral expenses and cost of burial, together with costs to be taxed.

ABRAM KLENERT,
P. J.

Judgment.

Entered December 21, 1916.

This action was heard before Judge Abram Klenert, in the presence of the counsel of the respective parties, in the Common Pleas Court, on October 19th, 1916.

The cause having been heard and the Court having determined that the petitioner is entitled to the sum of five dollars ($5.00) per week for a period of three hundred weeks, beginning with the thirtieth day of April, nineteen hundred and sixteen, as compensation, the sum of one hundred dollars ($100) for funeral expenses and cost of burial, together with costs.

Whereupon, it is adjudged that the petitioner, Mary Flynn, recover of the respondent, New York, Susquehanna and Western Railroad Company, the sum of five dollars ($5.00) per week, for a period of three hundred weeks, beginning with the thirtieth day of April, nineteen hundred and sixteen, as compensation, the sum of one hundred dollars ($100.00) for funeral expenses and cost of burial, together with her costs, which are taxed at the sum of thirty-one dollars and eighty-seven cents ($31.87).

Judgment entered and signed December 21st, A. D. 1916, at 2.20 P. M.

JNO. J. SLATER,
Clerk.

TRANSCRIPT OF TESTIMONY.

Testimony.

PASSAIC COUNTY COURT
OF COMMON PLEAS.

MARY FLYNN, Petitioner, vs. THE NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, Defendant.	On Petition for Compensation.

Transcript.

Transcript of testimony taken in the above-entitled cause, before his Honor Abram Klenert, Judge of the Court of Common Pleas of the County of Passaic, on Thursday, the nineteenth day of October, A. D. one thousand nine hundred and sixteen.

Appearances:

CARL M. HERBERT, Esq., of the law firm of Collins & Corbin, representing the Defendant Company.

EDWARD F. MERREY, Esq., representing the Petitioner.

The following stipulation was entered into by counsel for the respective parties in interest:

It is hereby stipulated and agreed by and between the parties hereto, that Mary Flynn, the petitioner named herein, is the widow of James Flynn, de-

ceased, and that the said Mary Flynn was dependent upon him; that at the time of the death of the said James Flynn, said Mary Flynn was living with him and being supported by him. The said James Flynn was employed by the defendant company as a flagman at the grade crossing at the intersection of Lyon Street, in the City of Paterson, in the County of Passaic and State of New Jersey, and the right of way of the New York, Susquehanna and Western Railroad Company; that on March 23d, 1916, while employed as aforesaid, at about 5.20 P. M., said James Flynn, while engaged in flagging trains of the defendant company and in guarding people who were passing over the said crossing, was struck and killed by westbound train No. 907, running from Jersey City, in the State of New Jersey, to the town of Hanford, in the State of New Jersey, carrying passengers and baggage from the State of New York to various points in the State of New Jersey, and passengers from points within the State of New Jersey to other points within the State of New Jersey; that passengers from the State of New Jersey to points in the State of New Jersey purchased tickets from the agent of the defendant company from the State of New York for a continuous journey from New York to points in the State of New Jersey, and were transported with baggage from the State of New York to Jersey City, in the State of New Jersey, by a ferry of an independent corporation, where they boarded the train of the defendant company; that the transportation from the State of New York to Jersey City, in the State of New Jersey, by the said ferry was part of the contract of passage by this defendant with its passengers, and was furnished to the said passengers by this defendant without additional charge; that at the time of the

death of the said James Flynn, he was earning the sum of $1.20 per day for a week of seven days; that the funeral expenses and costs of burial exceeded $100.00; that the said James Flynn, at the time of his hiring by the defendant, was expressly instructed that when he was flagging the crossing he should stand clear of the westbound track when flagging eastbound trains, and clear of the eastbound track when flagging westbound trains; that the said James Flynn was struck while flagging train No. 907 on the westbound track.

It is also stipulated and agreed that the defendant company is a common carrier and engaged in interstate commerce.

LEONARD VON TILBURG, a witness produced on behalf of the petitioner, being duly sworn according to law upon his oath, testified as follows:

Direct examination by Mr. Merrey.

Q. Mr. Von Tilburg, where do you live? A. 163 Lyon Street.

Q. Did you know James Flynn in his lifetime? A. Well, no, sir; only by seeing him at the crossing there.

Q. That is, you saw him there at the railroad crossing acting as flagman? A. Yes, sir; he was flagman at the Lyon Street crossing there of the Susquehanna Railroad.

Q. At the Lyon Street crossing of the New York, Susquehanna & Western Railroad? A. Yes, sir.

Q. In the City of Paterson? A. Yes, sir.

Q. Do you remember him being killed in March last? A. Yes, sir; I certainly do.

Q. Where were you at the time? A. I was working at Pellegrino's store at 161 Lyon Street; I was painting the front of the store at the time.

Q. How far is that from the crossing at Lyon Street? A. Oh, I should judge about 600 feet.

Q. What time of the day was it that Flynn was killed; do you recall? A. It was—I can't exactly say, but it must have been about five or ten minutes to five; somewhere around there.

Q. At night? A. Yes, sir; at night.

Q. Did you see any train approaching at that time? A. Yes, sir, the switch engine stood on the siding there on the right-hand side, a little above the bell crossing; I saw Flynn, the flagman, come out of the shanty there and he ran down the little hill there to flag the eastbound train which was going towards New York.

Q. Was there an eastbound train coming? A. Yes, sir; the eastbound train was coming and the old man went to flag this eastbound train.

Q. What did you see him do? A. I seen him going down from the shanty there to flag this eastbound train.

Q. Did he cross the track or anything like that when he went to flag the eastbound train? A. He came out of the shanty there and came across the track, because you know the laws are that the flagman is to stand on the side of the track to flag the trains.

Q. He came out of the shanty and crossed over the westbound track in front of the train which was coming? A. Yes, sir.

Q. And then went on towards the westbound track; is that right? A. Yes, sir.

Q. He had to do that in order to clear the westbound track from where he stood—in order to clear the westbound track from where he stood, was it

necessary for him to cross both tracks? A. Yes, sir; he had to cross both tracks.

Q. Where is that shanty located? A. The shanty stood about ten feet from the eastbound track; he has got to go down a small hill like to reach the tracks—the eastbound tracks.

Q. Then the westbound tracks are beyond the eastbound tracks? A. Yes, sir.

Q. There is also a switch there, is there not? A. Yes, sir; there are three tracks there.

Q. When the flagman went towards the railroad, he was going away from you? A. Yes, sir.

Q. You were on the same side as the shanty, were you not? A. Yes, sir; the same side.

Q. Did you see the eastbound train pass the crossing there? A. Yes, sir; I heard the shrill whistle—that's what attracted my attention at the time, this whistle—the westbound train.

Q. You saw the eastbound train approaching the crossing? A. Yes, sir.

Q. Which train was it that got to the crossing first? A. The eastbound.

Q. When the eastbound train was passing, did you see Flynn, the flagman? A. No, sir; I didn't see him, because the coaches hid him from my view.

Q. That is to say, the eastbound train was between him and you? A. Yes, sir; it was between us.

Q. You say the eastbound train arrived first? A. Yes, sir.

Q. How soon was it after the eastbound train arrived, that the westbound train arrived? A. Oh, between three and four seconds, I should say.

Q. That is to say, you heard the westbound train whistle; that you say was what attracted your attention? A. Yes, sir; the whistle of the westbound train was what first attracted my attention;

I thought to myself, that's funny; he never whistled like that before, and so I looked towards the track and I saw the flagman go down from the shanty and these two trains go by there at the time, and I thought there must be something wrong; I went down. Before I went down I looked and saw the two brakemen run over. I thought there was something up, and when I went down the two brakemen were holding him. The train stopped a little ways beyond him, and then went on. I helped to carry him to the ambulance to take him to the hospital, but he died. I helped carry him in the shanty there. The doctor injected morphine into him while he was lying there.

Q. You saw him there before he was struck by this westbound train? A. Yes, sir.

Q. And he was performing his duties when you saw him, was he? A. I saw him leave the shanty and cross the tracks to flag the eastbound train; yes, sir.

Q. He was acting as flagman at this crossing? A. Yes, sir; he certainly was.

Q. Where you were painting, that you say was about 600 feet from this crossing at Lyon Street? A. Yes, sir; about 600 feet. I was at 161 Lyon Street and 171 is at the crossing; that is the corner lot there, 171.

Q. Where did you say you were painting? A. Mr. Pellegrino's store at 161 Lyon Street; it is a grocery store there.

Q. Were you looking at the crossing before the train came? A. It was the blast of the whistle of the westbound train that attracted my attention, and when I heard the whistle I looked.

Q. It was then that you saw the flagman Flynn at the crossing, was it? A. Yes, sir; I looked and as I did I saw Flynn leave the shanty to flag the eastbound train. I saw him come out of the shanty to

flag this eastbound train, and that was the last I seen of him until I went down to the track to look at him after he was struck.

Cross-examination by Mr. Herbert.

Q. You say the whistle of the westbound train is what attracted your attention? A. Yes, sir; it was the way he whistled. He never whistled like that before, and I thought it was rather funny.

Q. Did you see this man actually struck by the locomotive? A. No, I didn't; I told Mr. Merrey the eastbound passenger hid the engine from me so I couldn't see the man struck.

Q. You say the coaches on the eastbound train were still at the crossing and that they prevented or interfered with your view at the time he was struck by the westbound train; is that right? A. Yes, sir; the coaches on the eastbound interfered with me seeing him struck.

Q. Now, you say you saw him leave the shanty and go out to flag the train? A. Yes.

Q. You don't know as a matter of fact if he went out to flag the eastbound train any more than the westbound train, do you? A. Oh, yes; there's a signal bell on the corner there and every time the train is 150 or 200 feet away from the crossing that bell rings, and I saw this man go out to flag that eastbound train because the eastbound train was the first at the crossing.

Q. The westbound train arrived at about the same instant, did it not? A. The eastbound train got to the crossing first, but those two trains meet along there somewhere; they meet together near that crossing.

Q. They meet at the crossing? A. Not at the crossing, but pretty near the crossing.

Q. When you say he went out for the purpose of flagging the eastbound train you don't know as a matter of fact if he went out of there for the purpose of flagging the eastbound train or both trains at the same time, do you? A. That was his duty, wasn't it? I saw the eastbound train coming first and I saw him leave the shanty for the purpose of flagging that train.

Q. So when he went out there to flag you don't know if he went out for the sole purpose of flagging the eastbound train or whether he went out to flag both trains, do you? A. Well, if there was one coming east and another coming west at the same time he's got to flag both of them; he can't flag one and hold the other one up.

Q. How many cars or coaches were there on the eastbound train; about how many? A. Well, you know the Susquehanna is only a one horse road, and they never carry any more than four.

Q. Do you know how many cars of the eastbound train had passed over the crossing at the time the westbound train struck him? A. The cylinder of the westbound train struck him.

Q. Do you know how many cars of the eastbound train, the New York train, had passed over the crossing at the time it struck him? A. I don't believe the last car of the eastbound train going to New York had been two feet over the crossing when he was struck.

Q. The car still hid your view of him, did it? A. Yes, sir.

Q. So that you didn't actually see the accident?

Redirect examination by Mr. Merrey.

Q. Mr. Von Tilburg, the view towards the west is open, or is it a closed view of the track? Can you

see far up the track towards the west, that is, for any distance? A. No; the houses this side and the bank on the other side hides your view of the tracks towards the west.

Q. It is a grade crossing there, isn't it? A. Yes, sir.

Q. Horses and wagons cross over there at grade? A. Yes, sir.

Q. If the flagman standing in the center of the crossing, or near it, were to look towards the west, could he see for any distance? A. No, sir; your view is cut off by this high bank there.

Q. Is the track a straight track there? A. No, sir; it curves to the east.

Q. Could a flagman see the eastbound train at the River Street crossing or station? A. Yes, sir.

Q. How far could you see westward, towards New York—in city blocks, if you can give it? A. Well, let's see; there is Lyon, Putnam and Warren —he could see the train after it turns the curve there at Hill's coal yard. There is Cheap John's and then there is Miller Van Dyne's place (looking at a photograph of the crossing); the switch engine stood here (marked "X"); here is Charlie Dwinnie's house (marked "D"); it is about two blocks to the curve.

Q. Which would be about how far? A. About 600 feet, I suppose.

Q. He could see this westbound train if he looked about 600 feet? A. Yes, but that is an express train and it does not stop at River Street; there has never been any flagman there; they could see a westbound train coming on the Susquehanna.

COUNSEL FOR PETITIONER RESTS.

Defense Opens.

EDWARD GARRISON, a witness produced on behalf of the defendant company, being duly sworn according to law upon his oath, testified as follows:

Direct examination by Mr. Herbert.

Q. Mr. Garrison, by whom are you employed? A. New York, Susquehanna & Western Railroad Company.

Q. Do you recall the accident to Mr. Flynn on March 23rd, 1916? A. Yes, sir.

Q. Where were you at that time? A. At the time when the accident really happened—about that time I was about forty feet away from the crossing.

Q. Just prior to that time where had you been working? A. We came from Broadway station up there and went in the switch.

Q. What were you employed as with the company at that time? A. Brakeman.

Q. Of what? A. Drill engine; switch engine.

Q. And you had come with your engine from where? A. We came from Broadway station.

Q. And had come into the switch there? A. Yes.

Q. About what time did you go into the switch; do you know? A. Well, about eight or nine minutes after five.

Q. After arriving at the switch, what did you do? A. I closed the switch.

Q. What then? A. And then walked up and put on the "derail."

Q. Where is the "derail" with reference to the crossing? A. About thirty or forty feet from the crossing.

Q. To the east or west? A. To the west.

Q. After going to the derail there, what, if anything, did you do? I went over in the flag shanty.

Q. Is that the shanty of this flagman Flynn? A. Yes, sir; I was talking with him in the shanty.

Q. What, if anything, did he do at or about that time, or what did you do? A. He didn't do anything; we stood there and talked until we saw the train leave Riverside.

Q. Could you see the train leave Riverside? A. Yes, sir.

Q. Go ahead; then what did he do? A. Then I went out of the shanty and he followed me out and I remarked to him at the time, I said, "Look out now Pop, they are both due here at the same time."

Q. What did you mean by that? A. I meant that both trains were due about that time, the east and westbound trains. He followed me out and across the tracks and I paid no more attention to him just at that time. I walked down to the derail and when I got down there I happened to turn around and I saw him pretty close to the track.

Q. Which track? A. The westbound track. I saw the steam of 907 coming on the westbound track and I hollered to him, but I couldn't make him hear as the eastbound train was going over the crossing at the time. I started down and tried to get there before the westbound train, but I couldn't.

Q. At that time was the locomotive of the eastbound train passing over the crossing? A. Yes, sir.

Q. And he was still flagging, was he? A. Yes, sir. I don't know if the westbound train slipped his memory or he forgot where he was or not, but he was pretty close to both tracks, especially close to the westbound track.

Q. What part of the locomotive hit him, do you know? A. The breast piece.

Q. What is that? A. The front end of the locomotive.

Q. Upon which the pilot or cowcatcher is fastened? A. Where the pilot is fastened to another piece that goes across.

Q. That struck him? A. Yes, sir.

Q. Was he run over by the train? A. No, sir; it just struck him on the side and doubled him over on the breast piece and he fell off when they stopped.

Q. At the time he was still flagging and the eastbound train was going over the crossing, which way was he looking? A. Down on the ground.

Q. Did you notice if at any time he looked towards the westbound train? A. I didn't notice. He seemed to stand there in the one position all the time; I didn't notice any change in him.

Q. Did you hear the westbound train blow? A. Yes, sir.

Cross-examination by Mr. Merrey.

Q. The westbound train comes around a curve a short distance above this crossing at Lyon Street, does it not? A. Yes, beyond the coal yard.

Q. If he had looked he couldn't have seen it until it was within about 600 feet of him, could he? A. No, not when there are cars on the switch there.

Q. You say you saw the westbound train coming? A. Yes.

Q. You knew it was coming before you could see it, didn't you? A. Yes, and I tried to notify him too.

Q. It is a fast train, is it not? A. Yes, it is a through train.

Q. It is an express and carries the mail? A. Yes; it don't make many stops.

Further examination by Mr. Herbert.

Q. Do you know if those two trains generally passed over that crossing at about the same time?

A. No, I can't say that, but they passed between there and Riverside most generally—somewhere along about that spot.

Q. Do those two trains generally pass over that crossing at about the same time? A. Yes, sir, between there and Riverside.

DANIEL KELLY, a witness produced on behalf of the defendant company, being duly sworn according to law, upon his oath testified as follows:

Direct examination by Mr. Herbert.

Q. Where do you live? A. 912 East 19th Street, Paterson.

Q. By whom are you employed? A. The New York, Susquehanna & Western Railroad Company.

Q. Were you so employed on March 23rd, 1916? A. Yes, sir.

Q. In what capacity were you employed? A. Brakeman on drill engine.

Q. Do you recall the accident to Flynn about that time? A. Yes, sir.

Q. Where had you been shortly prior to that? A. We were sitting in the shanty with Flynn from about six or seven minutes past five; we were talking to him; it was a very chilly day.

Q. From where had you come with your engine? A. From Broadway.

Q. What time did you arrive at the crossing? A. About six minutes past five.

Q. What did you do after that? A. Pulled down on the switch there and laid there until 907 went by and followed her up on the westbound track.

Q. You were to follow her, were you? A. Yes, sir; to North Paterson.

Q. After your switch engine pulled up in the switch, what did you do? A. We backed in the switch and went over in the flag shanty.

Q. Is that the same shanty provided there for Flynn? A. Yes, sir.

Q. Flynn was the flagman at the Lyon Street crossing? A. Yes, sir.

Q. What did you do then? A. We sat in there talking and at the time I said to him: "Pop, them trains are coming now," and the eastbound train had stopped at the Riverside depot. When the bell rang, he walked out of the shanty and went across the tracks. Garrison went ahead of him, and I stood right at the door of the shanty; we had been talking at the shanty about both trains coming. When I spoke about the trains coming he said: "Yes, I know the two meet here about the same time." He then crossed over ahead of the eastbound train and stood on the westbound railing—just on the outside of the rail.

Q. Which track was that? A. The westbound track.

Q. Go ahead; what did he do? A. He stood with the flag in his hand flagging the crossing. The eastbound train, 284, went by and blocked my view, and with that I says to one of the men there: "My God, he is hit," and I got down and looked underneath the eastbound train and I saw the engine of the mail train hit him.

Q. You mean you stooped down and looked under the eastbound train? A. Yes, sir.

Q. At the time he was hit, was your vision still hid by the cars of the eastbound train? A. I couldn't see the westbound approach with the eastbound train going by.

Q. The minute he was struck by the westbound train, was your vision still hid except what you could see by stooping down and looking under the eastbound train? A. Yes, sir.

Q. Had the locomotive actually hit at the time you stooped down? A. Yes, sir; I expected it.

Q. Had it actually hit him? A. Yes, sir; I was stooped down before the locomotive hit him.

Q. What was he doing? A. He stood on the crossing waving his flag.

Q. Had the eastbound train passed over the crossing? A. One coach was over the crossing.

Q. That is, the locomotive and one coach? A. No, the locomotive and eight coaches.

Q. How many, or how much of the eastbound train had passed over the crossing prior to him being struck by the westbound train? A. The locomotive and eight coaches.

Q. That is, the locomotive and eight coaches of the eastbound train had passed the crossing before he was struck by the westbound train? A. Yes, sir; there were nine altogether, but eight had passed over.

Q. So that it was the last coach then that hid your view? A. Yes, sir.

Q. And you say you stooped down and looked under the last coach? A. Yes, sir.

Q. Do you know which way he was looking at that time? A. No, I couldn't say.

Q. How did you know the westbound train was about to hit him? A. Because I heard him blowing the regular danger whistle, a short sharp blast, which is something unusual, because the regular whistle he blows is two long and two short blows, a regular crossing whistle, and we expect that all the time, but when he blowed this blast of the whistle, I knew there was something wrong and

that is what drew my attention to Flynn on the tracks.

Q. How long have you been working in that vicinity? A. About eight years.

Q. Did you see Flynn working there before that day? A. He is only in that shanty about two weeks.

Q. Do you know whether the eastbound train and the westbound train were accustomed to pass at or about this crossing every evening? A. Yes, somewhere in between that crossing and Riverside Depot.

Q. I suppose the place where the two engines actually passed varies, as they were a few seconds ahead or behind, whichever it might be? A. Yes, sir.

Cross-examination by Mr. Merrey.

Q. You say you were standing talking to somebody at the time this accident happened? A. Yes.

Q. Who was it? A. DeGraw.

Q. What DeGraw? A. Ike DeGraw.

Q. Was he an employee of the railroad? A. Yes, sir.

Q. Is he still on the payroll of the railroad company? A. Yes, sir.

Q. Who was running the engine, your drill engine? A. I am not sure, but I think his name was Nalton.

Q. Where was he? A. He was on the engine; that was his station.

Q. Who is the brakeman? A. I am.

Q. Who was the fireman? A. Woodruff.

Q. Was he on the engine too? A. Yes, sir.

Q. You simply had this engine along without cars? A. No, we had four or five cars.

Q. What kind of cars? A. Box cars

Q. That somewhat blocked the view of the flagman of the approaching train, did it not? A. He could see about 500 feet down the tracks.

Q. You knew Flynn and seen him several times? A. Yes.

Q. I suppose every day you stopped at this point? A. Yes, sir.

Q. Flynn was an old man, wasn't he? A. Yes, sir.

Q. Was he a little infirm? A. He was somewhat stooped.

Q. Did you notice if he could hear very well? A. Yes, he could hear the bell. We sat in the shanty talking to him and he could hear the bell when it rang.

Q. But you had to talk a little loud to him to make him hear, did you not? A. No, just as we are talking here now.

Q. Could he walk very fast? A. He was not a very fast walker.

Q. Well, he was rather an infirm old man, wasn't he? A. Yes, he was quite old.

E. J. Dotter, a witness produced and sworn on behalf of the defandant, testified as follows:

Direct examination by Mr. Herbert.

Q. Where do you live? A. North Paterson.

Q. By whom are you employed? A. The New York, Susquehanna and Western Railroad.

Q. In what capacity are you employed by them? A. As crossing supervisor.

Q. Did you have anything to do with the hiring of Mr. Flynn? A. Yes, sir, I did.

Q. Kindly tell us what you had to do with the same. A. Well, he asked me for a job and I told him he would have to fill out an application and go down and stand examination, which he did.

Q. He passed the satisfactory examination, did he? A. Yes, sir.

Q. Do you know what that examination consisted of? A. Yes; eyesight and hearing and reading and writing.

Q. And you gave him a position? A. Yes, sir.

Q. Did you locate him at this crossing on Lyon Street? A. Yes, sir; the day before I put him to work, so that the man there could show him how to do the work.

Q. What instructions did you give him? A. I told him that when he was at a crossing where he used the flag, he should stand clear of the westbound tracks when flagging eastbound trains and clear of the eastbound track when flagging westbound trains.

Q. What is the purpose of that rule? A. Well, if a long freight train would be going east and you were on the east side and some fellow drives up on the crossing, or some gentleman or some lady should walk up and be standing on the track and be looking at the train and not notice the other train coming.

Q. After Mr. Flynn was employed, had you at any time prior to his death had your attention called or having any occasion at which you saw him and spoke to him about his method of flagging? A. Yes, sir; I was going down on the 1.20, leaving North Paterson at about 1.16 and getting there about 23 or 24 at Lyon Street and I saw Flynn. I was standing on the back of the coach and I saw him standing on the westbound track, just outside the railing, but not far enough away to be clear; he was

flagging the eastbound train. I noticed that and I got off the train at Broadway. I had to go up to Lafayette Street and I walked over to Lyon Street and I said to him, "Mr. Flynn, when I came down on this last train I saw you standing still there on the westbound track to flag the eastbound train"; I said, "You know, some of these days a train will come down on the westbound track and hit you," and he said, "My son, I am on the lookout for that. I'll do that hereafter." I said to him, "The best thing you can do is to stand over here," and he walked over with me, and I said to him, "If you stand there, no matter what comes, nothing will hit you if you stand over there." He said, "All right, my son, I stand there hereafter." I said to him that spryer men than he could be caught in just the same way.

Q. What point did you indicate when you indicated "standing here"? A. That was to stand clear of the westbound track when flagging eastbound trains.

Q. Did you indicate that point to him, where to stand? A. Yes, sir; I took him aside both over the eastbound and westbound tracks.

Q. Did you indicate a point where he should stand, which would be clear of any train approaching on the westbound track? A. Yes, sir; and he said to me, "My son, I'll do that."

Q. Was that the only occasion that you had to instruct him as to what he should do? A. Yes, that is the only time I seen him standing on the track flagging.

Cross-examination by Mr. Merrey.

Q. You were the one that hired him? A. Yes, sir.

Q. And were the only one that spoke to him about his duties? A. Yes.

Q. And what you have told now is what you instructed him? A. Yes, sir.

Q. You say spryer men than he could be caught; did you mean he was not very spry? A. No; but young fellows sixteen or twenty and eighteen; I have told them fellows the same thing.

Q. You say you have an examination for flagmen? A. Yes, sir; but I don't examine them.

Q. The examination is not very rigid, is it? A. Of course, they must read and write and hear and see pretty good.

Q. It is quite difficult to get active, spry men for a dollar and twenty cents a day, is it not? A. Well, it don't make much difference, as long as they have good eyesight and hearing and read and write.

Q. And if their eyesight and hearing is good, you employ them; is that right? A. Yes.

Q. Under the present situation your orders required him to stand clear of the eastbound track when flagging westbound trains and on the other side when flagging eastbound trains? A. Yes; to clear the tracks.

Q. He was obliged under those orders to cross the point where he was struck, was he not? A. Yes, cross there, the westbound track.

By Mr. Herbert.

I desire to move to dismiss the petition upon the ground that the defendant is a common carrier by railroad, engaged in interstate commerce, and that at the time of the accident the petitioner was employed by it as such carrier engaged in such commerce; therefore, the provisions of the Federal em-

ployees under the Act of 1908 are applicable and are exclusive of the State act.

I also desire to move to dismiss the petition upon the ground that the petitioner was guilty of disobedience of orders, and, therefore, he was not killed by an accident arising out of and in the course of his employment.

Motion denied.

Certificates to Testimony.

I, S. J. TURNER, stenographer, duly designated by Hon. Abram Klenert, Judge of the Passaic County Court of Common Pleas, before whom the foregoing proceeding was had, to report stenographically the evidence taken therein, do certify that the foregoing is a transcript of the evidence given on October 19, 1916, before Hon Abram Klenert, Judge of the Passaic County Court of Common Pleas, upon the hearing of the petition filed by Mary Flynn against the New York, Susquehanna & Western Railroad Company.

IN WITNESS WHEREOF, I have hereunto
(SEAL) set my hand and seal this 8th day of
June, nineteen hundred and seventeen.

S. J. TURNER.

I, WILLIAM W. WATSON, President Judge of the Court of Common Pleas, in and for the County of Passaic, do hereby certify that the foregoing is a transcript of the evidence given upon the hearing of the petition of Mary Flynn against the New York, Susequehanna & Western Railroad Company,

on October 19, 1916, certified by S. J. Turner, stenographer, designated to report such evidence stenographically.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 11th day of June, nineteen hundred and seventeen.

WILLIAM W. WATSON,
President Judge.

Reasons.

NEW JERSEY SUPREME COURT.

Filed June 14, 1917.

MARY FLYNN, Petitioner-Defendant, vs. NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, Defendant-Prosecutor.	On Certiorai. Reasons.

The prosecutor presents the following reasons why the determination and judgment of the Passaic County Court of Common Pleas and the Judge thereof should be reversed:

1. The Passaic County Court of Common Pleas and the Judge thereof had no jurisdiction to entertain the petition in this matter or make any order or enter judgment thereunder, because the legal rights of the petitioner and defendant are determined exclusively by the Act of Congress of the

United States, entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, and the supplements and amendments thereto.

2. Because it appears by the evidence that at the time of the accident as alleged, the defendant was engaging in commerce between and among the several states and territories of the United States and foreign nations, and that James Flynn, for whose death compensation is sought, was employed as such carrier in such commerce.

3. Because James Flynn, for whose death compensation is sought, was acting in disobedience of orders at the time of the accident as alleged, and that therefore he was not killed in an accident which arose out of and in the course of his employment.

COLLINS & CORBIN,
Attorneys of Prosecutor.

Opinion.

Filed September 14, 1917.

NEW JERSEY SUPREME COURT.

Filed September 14, 1917.

MARY FLYNN, Petitioner-Defendant, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO., Prosecutor.	On Certiorari.

Submitted June 6, 1917. Decided September 14, 1917.

1. A crossing flagman employed by a Railroad Company engaged in interstate and intrastate commerce was struck and killed, by the engine of a train, engaged in interstate commerce; held, that the Court of Common Pleas of New Jersey is ousted of jurisdiction to award compensation under the New Jersey Workmen's Compensation Act. The Federal Employers' Liability Act is exclusive.

2. Although the findings of the Court of Common Pleas, as to the facts in workmen's compensations cases, are conclusive on appeal, nevertheless, the law arising upon undisputed facts is a question of law for the Court reviewing the decision to decide.

Before Justices SWAYZE, BERGEN and BLACK.

For Prosecutor, Messrs. COLLINS & CORBIN.

For Defendant, EDWARD F. MERREY, Esq.

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

The writ of certiorari in this case, is to review a determination of the Court of Common Pleas of Passaic County, in a proceeding under the New Jersey Workmen's Compensation Act, brought by Mary Flynn, the widow of James Flynn, deceased.

The Trial Court determined that the petitioner is entitled to five ($5) dollars per week for a period of three hundred weeks, beginning on the 30th day of April, 1916. The Trial Court further found, the prosecutor is a common carrier and is engaged both in interstate and intrastate commerce, that James Flynn was not employed by the prosecutor in interstate commerce, and thereupon the Federal Employers' Liability Act does not apply. It is to review this latter finding that the controversy is brought under review in this Court.

The pertinent facts are, the deceased, James Flynn, on March 23, 1916, was enployed by the prosecutor, as a crossing flagman, at the Lyon Street crossing, in the City of Paterson, while thus engaged in the performance of his duties as a flagman, with respect to a passing train, which was carrying passengers and baggage, from points in the State of New York, to various points in the State of New Jersey, he was struck and killed by the engine of the train in the course of his employment. Flynn crossed over the eastbound tracks of the prosecutor, on the approach of an eastbound train, to flag the crossing, and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breastpiece of an engine drawing a train, on the westbound tracks, which was an interstate train. The question therefore for solution, and the only one, is, was the deceased at the time of his death engaged in an

interstate act? If so, it is firmly settled by the recent decisions of our Court of Errors and Appeals, in the case *Rounsville* v. *Central R. R. Co.,* 101 *Atl.,* 182; and by the United States Supreme Court, in the case of *Erie R. R. Co.* v. *Winfield,* decided May 21, 1917, 243 *U. S.,* reversing 88 *N. J. L.,* 619; that the Federal Employers' Liability Act of 1908 is exclusive of the State act and ousts the Courts of Common Pleas of the State of jurisdiction, under the New Jersey Workmen's Compensation Act.

The Courts, thus far, apparently have been unable to formulate any rule, sufficiently exact, comprehensive and exclusive, by which to test the quality of an act or series of acts, as falling within, or without, the domain of interstate business. Upon reflection, it would seem almost impossible to formulate a rule applicable to the almost endless variety of circumstances and facts springing out of the intricacies of every-day modern life, that will be of much practical use or aid. The application of the principle must be made to particular facts, as they arise, and by a process of exclusion and inclusion, a rule may perhaps be formulated in time, from the decision of such cases. There is already a long line of cases, in the Federal and States Courts, showing the application of the principle to the facts under discussion. It would serve no useful purpose to collate or cite these decisions. The decisions in the United States Supreme Court, the ultimate authority on the point, are quite uniform, when stating the principle, to use such language as this, the employee must be engaged in interstate business, or in an act which is so directly and immediately connected with such business, as substantially to form a part or a necessary incident thereto, *New York, &c., R. R. R. Co.* v. *Carr,* 238 *U. S.,* 260; or

in work so closely related to it (*i. e.,* interstate transportation) as to be practically a part of it, *Shanks* v. *Delaware, &c., R. R. Co.,* 239 *U. S.,* 556, so, *Louisville, &c., R. R. Co.* v. *Parker,* 242 *ib.,* 13.

We have been unable to find any case in the Federal Courts, where this precise question has been passed upon. We are referred to two cases, however, in the California Supreme Court, both of which held, that crossing flagmen engaged in flagging, on a railroad, where interstate trains were being operated were engaged in interstate commerce. *Southern Pacific Co.* v. *Industrial Accident Commission,* 124 *Cal.,* 161 *Pac. Rep.,* 1139; *Southern Pacific Co.* v. *Industrial Accident Commission,* 174 *Cal.,* 161 *Pac. Rep.,* 1142. These cases, of course, are not binding precedents upon this Court, but we think these decisions are in harmony and accord with the spirit and principle of the cases decided by the Supreme Court of the United States. Notwithstanding this situation, it is now urged by the defendant that the statute makes the judgment of the Court of Common Pleas conclusive and binding, as to all questions of fact. P. L. 1911, p. 134, Sec. 18; *Nevich* v. *Delaware, &c., R. R. Co.,* 100 *Atl.,* 234; *Hulley* v. *Moosburger,* 88 *N. J. L.,* 161. The judgment of the Common Pleas must be upheld if there is any evidence in the case to support it. This, of course, must be accepted as the law of the State, but in the case of *Hulley* v. *Moosburger,* 88 *N. J. L.,* 161, it was said by Chancellor Walker, speaking for the Court of Errors and Appeals, "Although the finding of the Court of Common Pleas as to the facts of the case are conclusive, according to Section 18 of the act, and the decision of the Supreme Court * * * and, therefore, are conclusive here, yet, nevertheless, the law arising upon ascertained facts is a question for the Court reviewing the decision."

The finding of the Trial Judge, that the deceased, James Flynn, was not employed by the prosecutor in interstate commerce is not a finding of fact, it is a statement of law; the facts in the case are entirely undisputed, it is a pure question of law arising upon facts that are not disputed. We think James Flynn at the time of his death was engaged in an act, to use the words of the Supreme Court of the United States, directly and immediately connected with interstate business, as substantially to form a part or a necessary incident thereto, under the decision of the Supreme Court of the United States, in the *Winfield* case, *supra,* that fact ousted the Common Pleas Court of Passaic County of jurisdiction.

The judgment, therefore, of the Passaic Court of Common Pleas is reversed, with costs.

Rule for Reversal.

Filed September 18, 1917.

NEW JERSEY SUPREME COURT.

MARY FLYNN, Petitioner-Defendant, vs. NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, Defendant-Prosecutor.	On Certiorari from Hudson County Court of Common Pleas. Rule of Reversal.

This cause having been duly argued at the June Term, 1917, of this Court by Collins & Corbin, of counsel with the defendant-prosecutor, and by Ed-

ward F. Merrey, of counsel with the petitioner-defendant, and the Court having inspected the proceedings of the judgment returned with the certiorari in this cause and the reasons assigned for reversal;

It is thereupon, on this eighteenth day of September, 1917, Ordered that the judgment of the Passaic County Court of Commons Pleas be, and it is hereby in all things, reversed, set aside and for nothing holden, and said record is herby remitted to the court below to be proceeded with according to law.

It is further Ordered that costs be allowed to the defendant-prosecutor.

Entered September 18th, 1917.

On motion of

COLLINS & CORBIN,
Attorneys for Defendant-Prosecutor.

A True Copy.

WM. C. GEBHARDT,
Clerk.

New Jersey Court of Errors and Appeals

MARY FLYNN, Appellant, vs. NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Respondent.	On Appeal from Supreme Court.

BRIEF OF EDWARD F. MERREY, of Counsel with Appellant.

I. Statement of Case.

James Flynn, a crossing watchman employed by the respondent, was killed while on duty at the Lyons Street crossing, Paterson, on March 23, 1916. His widow, Mary Flynn, filed a petition in the Passaic Common Pleas under the New Jersey Workmen's Compensation Law (P. L. 1911, p. 134; Case, pp. 6, &c.).

The respondent answered (Case, pp. 9, &c.), denying liability under the statute, claiming:

1. That the accident to Flynn was due to deliberate disobedience of orders.

2. That at the time of the accident Flynn was engaged in interstate commerce.

The Common Pleas found (Case, pp. 12, &c.) (1) that Flynn was injured by an accident that *arose out of and in the course of his employment,* and

(2) That Flynn was not employed in interstate commerce at the time he received his fatal injury.

Compensation was awarded to petitioner.

The respondent caused the determination of the Common Pleas to be reviewed by the Supreme Court, which set the same aside, holding that deceased was engaged in interstate commerce at the time he was killed.

II. Grounds of Appeal.

We claim that the Supreme Court erred

(1) in disregarding the finding of facts by the Court of Common Pleas.

(2) In finding that deceased was engaged in interstate commerce at the time he received his fatal injury.

The Common Pleas found as follows (Case, p. 14, lines 1, &c.):

> "Flynn, in the course of his employment, crossed over the eastbound tracks of the company on the approach of an eastbound train to flag said crossing, and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breast piece on an engine drawing a train on the westbound track."

We claim the Supreme Court disregarded this finding and decided the case on a different set of

facts, as appears by its opinion (Case, p. 41, lines 22, &c.) reading (italics are ours):

> "The pertinent facts are, the deceased, James Flynn, on March 23, 1916, was employed by the prosecutor as a crossing flagman at the Lyon Street crossing, in the City of Paterson; *while thus engaged in the performance of his duties as a flagman, with respect to a passing train which was carrying passengers and baggage from points in the State of New York to various points in the State of New Jersey,* he was struck and killed by the engine of the train in the course of his employment. Flynn crossed over the eastbound tracks of the prosecutor, on the approach of an eastbound train, to flag the crossing, and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breastpiece of an engine drawing a train on the westbound tracks, which was an interstate train."

The difference between the finding of fact by the Common Pleas and statement of fact by the Supreme Court, in so far as it affects our case, is that the Supreme Court states that deceased at the time of his death *"was engaged in the performance of his duties as a flagman with respect to a passenger train, which was carrying passengers and baggage from points in the State of New York to various points in the State of New Jersey,"* while in the evidence and in the finding of fact by the Common Pleas there is nothing whatever to show that deceased at the time of his death was performing any duty whatsoever with respect to the interstate train that struck him.

POINT I.

Under the decisions Flynn was not engaged in interstate commerce when he received his fatal injury.

Since the decisions rendered by the United States Supreme Court on May 21, 1917, in the cases of *Erie Railroad* v. *Winfield* and *New York Central Railroad Company* v. *Winfield,* 243 *U. S.,* , it must be conceded that if the deceased, James Flynn, was engaged in interstate commerce at the time of his death his widow could recover nothing under the New Jersey Workmen's Compensation Law. The above decisions hold that the Act of Congress approved April 22, 1908, entitled "An Act Relating to the Liability of Common Carriers to their Employees in Certain Cases," is regulative of the carrier's liability or obligation in every instance of the injury or death of one of its employees in interstate commerce, and establishes a rule or regulation which is intended to operate uniformly in all the states, as respects interstate commerce, and in that field it is both paramount and exclusive.

These decisions overrule the New Jersey case of *Winfield* v. *Erie,* 88 *N. J. L.,* 619.

The question as to when an employee is deemed to be engaged in interstate commerce has been presented to the Courts over a hundred times since the passage of the Federal Act in 1908. There is much conflict in the lower courts, but the question has been presented to the Court of Last Resort so frequently that it seems unnecessary to consider any but the decisions of the United States Supreme Court.

It will be noted by these decisions that it is not important to determine whether the employee was injured by an instrument employed in interstate

commerce or by another employee engaged in interstate commerce; nor is it important that the general duties of the injured employee were concerned in interstate commerce; the important question is, was the particular task in which the employee was engaged at the time of his injury a part of interstate commerce.

In the case of *Pederson* v. *D., L. & W. R. R. Co.*, 229 *U. S.*, 146, decided May 26, 1913, it was held that

> "an employee of an interstate railway carrier, killed while carrying a sack of bolts or rivets to be used in repairing a bridge which was regularly in use in both interstate and intrastate commerce, was employed in interstate commerce within the meaning of the Employers' Liability Act of April 22, 1908."

In this case Mr. Justice Lamar filed a strong dissenting opinion, which was concurred in by Mr. Justice Holmes and Mr. Justice Lurton.

Mr. Justice Lamar said:

> "I am unable to assent to the proposition that a man carrying bolts to be used by him in repairing a railroad bridge was employed in interstate commerce.
>
> * * * * * *
>
> The defendant, though engaged in both interstate and intrastate commerce, was also engaged in many other incidental activities which were not commerce in any sense. The railroad had to be surveyed, bridges had to be constructed and renewed, cars had to be manufactured and repaired, warehouses had to be built and painted; but these transactions, though incident to it, were not trans-

portation, and, therefore, not within the purview of the statute limited to persons employed in commerce. Otherwise, the law would embrace 'all of the activities in any way connected with trade between the states, and exclude state control over matters purely domestic in their nature.'

Acts burdening interstate commerce can, of course, be prohibited by Congress.

But when Congress itself limits the operation of the statute to persons injured while employed in interstate commerce, the statute does not extend to its incidents and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents. It is conceded that a line must be drawn between those employees of the carrier who are employed in commerce and those who are engaged in other departments of its business. It must be drawn so as to take in, on one side, those engaged in transportation, which is commerce, otherwise there is no logical reason why it should not include every agent of the company; for there is no other test by which to determine when he must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts are similarly engaged."

While this opinion of Mr. Justice Lamar did not prevail, yet its effect is apparent in later decisions of the Court.

In the case of *Illinois Central Railroad Company* v. *Behrens,* 233 *U. S.,* 473 (decided April 27, 1914), the Supreme Court pointed out that Congress had power to regulate the liability of interstate carriers to members of train crews whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce, but had not fully exercised that power.

In that case the foreman of a switching engine was killed. The crew of which he was a part handled interstate and intrastate traffic indiscriminately, frequently moving both at once. At the moment of his fatal injury he was moving intrastate freight.

The Court said:

> "Giving to the words 'suffering injury while he is employed by such carrier in interstate commerce' their natural meaning, as we think must be done, it is clear Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce.
>
> Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate

commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

Ill. Central R. R. v. *Behrens,* 233 *U. S.,* 473.

The following quotations are from later cases:

"The scope of that statute is so broad that it covers a vast field about which there can be no discussion. But owing to the fact that, during the same day, railroad employees often and rapidly pass from one class of employment to another, the courts are constantly called upon to decide those close questions where it is difficult to define the line which divides the state from interstate business."

N. Y. Central R. R. v. *Carr,* 238 *U. S.,* 260, at 262.

"The facts in the present case are these: The railroad company was engaged in both interstate and intrastate transportation and was conducting an extensive machine shop for repairing parts of locomotives used in such transportation. While employed in this shop Shanks was injured through the negligence of the company. Usually his work consisted in repairing certain parts of locomotives, but on the day of the injury he was engaged solely in taking down and putting into a new location an overhead counter shaft—a heavy shop fixture—through which power was communicated to some machinery used in the repair work.

The question for decision is, was Shanks at the time of the injury employed in inter-

state commerce within the meaning of the Employer's Liability Act?

Having in mind the nature and usual course of the business to which the act relates and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co.* v. *U. S.*, 196 *U. S.*, 375, 398); and that the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

* * * * * *

Coming to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation."

Shanks v. *D., L. & W. R. R. Co.*, 239 *U. S.*, 556.

"The switching crew of which Harrington was a member did not work outside of the State and was engaged at the time of his death in switching coal belonging to defendant, and which had been standing on a storage track for some time, to the coal shed, where it was to be placed in bins or chutes and supplied as needed, to locomotives of all classes, some of which were engaged in interstate and some in intrastate traffic.

With the movement of coal to the storage tracks, however, we are not concerned; that movement had long since ended, as it is admitted that the coal was owned by the com-

pany and 'had been in storage in its storage tracks for a week or more prior to the time it was being switched into the coal chutes on the morning of the accident.'

So, also, as the question is with respect to the employment of the decedent at the time of the injury (*Illinois Central R. R.* v. *Behrens,* 223 *U. S.,* 473, 478), it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed or chutes, and the only ground for invoking the Federal Act is that the coal thus placed was to be used by locomotives in interstate hauls.

As we have pointed out, the Federal Act speaks of Interstate Commerce in a practical sense, suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it.' *Shanks* v. *D., L. & W. R. R.,* 239 *U. S.,* 556, 558, and cases there cited.

Manifestly there was no such close or direct relation to interestate transportation in the taking of coal to the coal chutes. This was nothing more than the putting of coal in a convenient place from which it could be taken as required for use.

It has been held that an employee of the carrier while he is mining coal in the carrier's colliery intended to be used by its interstate locomotives is not engaged in inter-

> state commerce within the meaning of the Federal Act (*D., L. & W. R. R.* v. *Yukonis,* 238 *U. S.,* 439) and there is no distinction in principle between the two cases."
>
> *Chi., Bur. & I. R. R.* v. *Harrington,* 241 *U. S.,* 177; decided May 1, 1916.

In *Minn. & St. Louis Railroad Co.* v. *Winters* it was held that a machinist's helper, engaged, while making repairs in the roundhouse, upon an engine which had been last used in hauling interestate freight, and which was next used in the same way after the accident, was not then employed in interstate commerce. In this case the engine was not interrupted in an interstate haul to be repaired, but had finished one such haul and had not begun on another.

> *Minn. & St. Louis Railroad Co.* v. *Winters,* 37 *Sup. Ct. Reporter,* 170; decided January 8, 1917.

In *Erie Railroad Co.* v. *Welsh* it was held that a yard conductor on an interstate railway, injured while alighting from a slowly moving freight engine for the purpose of reporting to the yard master's office for further orders, having executed all previous orders, was not employed in interstate commerce.

> *Erie Railroad Co.* v. *Welsh,* 37 *Sup. Ct. Reporter,* 116.

Under the above decision Flynn was not engaged in interstate commerce or an act incident thereto when he received his fatal injury.

As we point out below, he was performing a duty imposed upon the railroad company to safeguard persons using the grade crossing.

In cases under the Federal Employers' Act some of the Courts have framed a test question to determine whether or not an employee was engaged in interstate commerce at the time of his injury.

In *Lamphere* v. *Oregon R. & N. Co.*, a much-cited case, reported in 196 *Federal,* 336, and 47 *L. R. A.* (N. S.), 1, the test is stated as follows:

> "As indicated in the opinion" (Second Employers' Liability Cases, 223 *U. S.,* 1) "the test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act" (Federal Employers' Liability Act), "is, What is its effect on interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? As applied to the present case, it is this: Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?"

In *Horton* v. *Oregon-Washington R. & N. Co.,* 72 *Wash.,* 503, 130 *Pacific,* 897, 47 *L. R. A.* (*N. S.*), 8, the test is thus stated:

> "Tested by the criterion laid down in the Second Employers' Liability Cases, and exemplified in the foregoing decisions, namely by the effect of the injury upon interstate commerce, it seems to us too plain for cavil, that deceased when killed was employed in such commerce within the meaning of the act. Was the relation of his employment to interstate commerce such that an injury to him tended to delay or hinder the movement of trains engaged in such commerce?

> There is but one answer to the question. Water to supply the engines pulling such trains had to be pumped as a necessary incident to the movement of trains. If when he was killed, his place had not been supplied by another, the movement of trains engaged in interstate commerce conducted by his master as well as the local trains must have ceased altogether."

In *Montgomery* v. *Southern Pacific Co.*, 64 *Or.*, 597, 131 *Pac.*, 507, 47 *L. R. A.* (N. S.), 13, the test is stated as follows:

> "Suppose that all the agents engaged in providing oil to be used as fuel in interstate commerce, as this oil was destined to be used, should cease to act, for instance on account of a boycott, or by reason of an injunction order issued by a state court for some purpose conceived to be good and there were a failure of the supply of fuel, and both the switch and interstate trains were compelled to stop, the stream of interstate commerce would also stop or be lessened to the same extent."

The test in this last case would include even the collier in *Yukonis* v. *D., L. & W. R. R.* and so would include more employees in interstate commerce than the U. S. Supreme Court decisions, and yet, broad as it is, would not include a crossing flagman.

The withdrawal of such flagman would not hinder or delay interstate commerce. Even were Flynn not replaced by another flagman, interstate commerce over defendant's road would proceed as regularly as when Flynn was on guard.

THE CALIFORNIA CASES REFERRED TO IN THE OPINION OF THE SUPREME COURT SHOULD NOT BE FOLLOWED.

The cases have the same title, *Southern Pacific Co.* v. *Industrial Accident Commission,* and are reported in 161 *Pacific Reporter,* pages 1139 and 1142. They were decided at the same term.

1. *These cases are not in harmony with the decisions of the United States Supreme Court.*

This is strongly pointed out in the dissenting opinion of Judge Lawlor.

The prevailing opinion is based on the theory that a crossing watchman's duties are similar to a track walker who duty it is to see that the track is in safe condition, or an employee in a signal tower whose duty it is to supervise and give the signals for the passage of trains.

But this is not so; the duty of the track walker is to keep the track in repair for the passage of trains while the duty of the gateman is to warn drivers and pedestrians of the approach of trains. The duty of the track walker is primarily in the interest of the safe passage of trains, while that of the gateman is primarily towards the pedestrian or driver.

It is true that a negligent performance of the gateman's duty to the pedestrian might result in an accident and a consequent slight delay to a train; but this might be said of the negligent performance of duty on the part of any employee. An engineer of an intrastate train might negligently run into and damage an interstate train. At an ordinary crossing the negligence of a gateman would only be the remote cause of an accident, the proximate cause being the negligence of the person crossing.

Employees operating intrastate trains on interstate railroads have been held by the United States Supreme Court not to be engaged in interstate commerce. The logic of the California decision would put all railroad employees of an interstate railroad in the interstate class. The California Court's decision is also out of harmony with the Federal Courts in that the Federal Courts hold that an employee may be employed at one time in interstate commerce and at another in intrastate, passing rapidly from one class to another many times a day.

N. Y. Central R. R. v. *Carr*, 238 *V. S.*, 260.

At the time the California flagman was injured if he was protecting any train it was an intrastate one. Yet the Court held he was engaged in interstate commerce because at some other period of the day he might have protected an interstate train, totally ignoring the Federal decisions.

Judge Lawlor points out that there was no evidence to show that an injury to the train in question would have resulted in any delay to interstate commerce.

That the general duties of the injured employee are not important in fixing his status under the Federal Act is strikingly pointed out in the *Behrens* case. In the lower court (*Behrens* v. *Illinois C. R. Co.*, 192 *Federal*, 581), the District Court said:

> "I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad, and the mere fact that the accident occurred while he was engaged in

> work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions, and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."

This matter going to the United States Supreme Court (223 *U. S.*, 473) it was held that the employee was not engaged in interstate commerce:

> "Here, at the time of the fatal injury the intestate was engaged in moving several freight cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in interstate commerce and so the injury and resulting death were not within the statute. That he was expected upon the completion of the task to engage in another which would have been a part of interstate commerce is immaterial under the statute."

2. *The facts proved in the California cases differ materially from the one at bar.*

161 *Pacific*, page 1140, Col. 1:

> "There was evidence introduced before the Commission to the effect that the employment of crossing gatemen and flagmen was as much for the protection of the railroad company as for the public; that protection of a crossing meant safety to the train as well as the travelor on the highway; that such an employee facilitated the movement

> of trains by keeping the track clear, the slightest accident demanding a stop and investigation; that a derailment of a train might well be caused by striking an automobile or motor truck; that a derailment interferes with the traffic not only at the place of derailment but also all along the line; and that main line schedules are built up in part, as far as speed is concerned, on the character of crossings, as to whether they are protected by gatemen or flagmen or not. No evidence was given in conflict with this."

No such evidence was offered in the case at bar, and there is no finding of any such facts by the Court of Common Pleas. The decision in the California case seems to depend on this evidence.

POINT II.

The findings of facts by the Court of Common Pleas was in accordance with the evidence.

The Common Pleas found the facts to be as follows (Case, p. 13, lines 20, &c.):

> "That on or about the ninth day of March, 1916, James Flynn was employed by the respondent as a flagman to guard the grade crossing in the City of Paterson, in the County of Passaic and State of New Jersey, at the intersection of Lyon Street and the railroad right of way of the respondent; that he continued in such employment up to the twenty-third day of March, 1916; that the respondent is a common carrier and is engaged both in interstate and intrastate commerce;

> that the said James Flynn was not employed by the respondent in interstate commerce; that in the course of the employment of the said James Flynn, on the approach of an eastbound train on the tracks of the railroad of respondent, it was the duty of the said Flynn to cross said eastbound tracks and also the westbound tracks to warn persons traveling along said Lyon Street against getting upon the tracks of said railroad; that on the twenty-third day of March, 1916, the said James Flynn, in the course of his employment, crossed over the eastbound tracks of the company on the approach of an eastbound train to flag said crossing, and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breastpiece of an engine drawing a train on the westbound tracks; this breastpiece projected beyond the tracks" (Case, pp. 9-10).

This finding shows that it was the duty of Flynn to guard the crossing; it does not find that he performed any duty whatever to the train that struck him; it appears that he left his flag shanty on the approach of an eastbound train; there is no evidence that this train was an interstate train; there is no evidence to show that his duty was other than the protection of people crossing the tracks; the evidence does show that the train which struck Flynn was an interstate train.

The witness Von Tilburg testifies (p. 22). This witness was a painter and was at work near the crossing; he saw Flynn leave his shanty to flag the eastbound train; the flagman crossed the track on which the train was approaching and it passed between him and the witness; while so doing the west-

bound train (interstate) came on the crossing and struck the flagman.

The witness says (p. 22, line 39):

> "A. Yes, sir; I looked, and as I did I saw Flynn leave the shanty to flag the eastbound train. I saw him come out of the shanty to flag this eastbound train, and that was the last I seen of him until I went down to look at him after he was struck."

On cross-examination, page 23, line 13, he says:

> "Q. Did you see this man actually struck by the locomotive? A. No, I didn't; I told Mr. Merrey the eastbound passenger hid the engine from me so I couldn't see the man struck.
>
> Q. You say the coaches on the eastbound train were still at the crossing, and that they prevented or interfered with your view at the time he was struck by the westbound train; is that right? A. Yes, sir; the coaches on the eastbound train interfered with me seeing him struck.
>
> Q. Now, you say you saw him leave the shanty and go out to flag the train? A. Yes.
>
> Q. You don't know, as a matter of fact, if he went out to flag the eastbound train any more than the westbound, do you? A. Oh, yes, there's a signal bell on the corner, and every time the train is 150 or 200 feet away from the crossing that bell rings, and I saw this man go out to flag that eastbound train, because the eastbound train was the first at the crossing."

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Edward Garrison, a railroad employee, testified, pages 26, etc., that he was at the flag shanty when the eastbound train approached and warned the flagman both trains were due (not that they were approaching).

It appears that Garrison and deceased both saw the eastbound (intrastate) train approach (Case, p. 27, lines 4, &c.), Garrison then remarked two trains were due and both men then crossed the eastbound track; the eastbound train was on the crossing and Garrison saw the smoke of the westbound (interstate) approaching; he looked and saw the flagman in a dangerous position and apparently unaware of the approach of the interstate train; he tried to warn the flagman but could not, and he was struck. Two other railroad employees testified to practically the same facts.

In none of the testimony offered was there anything to show that deceased was aware that the interstate train was approaching; he only knew that it was due, an entirely different matter.

In a stipulation between counsel, the following appears: Said James Flynn was struck while flagging train No. 907 on the westbound track." This does not accord with the testimony, the stipulation was dictated to a stenographer and not signed by counsel. It was undoubtedly inserted through inadvertence or may have been a mistake of the stenographer. But taking the same as true, the statement does not necessarily import that the flagman performed any duty towards the interstate train. Flagging a train in this instance meant the giving warning to the passerby of its approach.

The finding by the Common Pleas that deceased at the time of his death was engaged in flagging the crossing, and the absence of any finding that he was performing any duty with respect to an interstate train was in accordance with the evidence.

POINT III.

The facts as found by the Supreme Court were not in accordance with the evidence.

The Supreme Court states the following as a fact (Opinion, Case, p. 41, lines 22, &c.):

> "The pertinent facts are, the deceased, James Flynn, on March 23, 1916, was employed by the prosecutor as a crossing flagman at the Lyons Street crossing, in the City of Paterson, while thus engaged in the performance of his duties as a flagman, with respect to a passing train, which was carrying passengers and baggage from points in the State of New York to various points in the State of New Jersey, etc."

This last statement is entirely without any support in the evidence. There is nowhere in the evidence anything tending to show that the deceased was placed at the crossing for the purpose of warning or giving any signal to any train. There is nothing to show that his position there assisted in the operation of interstate trains. We cannot import facts from outside the record. Perhaps there are crossings in the State where flagmen do assist in the operation of trains, but there is nothing in this case so that this watchman performed any such duties. But even if this flagman did give signals to interstate trains, the evidence distinctly shows that at the time of his death he was unaware of the approach of the interstate train, and therefore at that particular moment could not have been performing any duty with respect to it.

Under the cases cited above it is necessary for respondent to show that the deceased at the very

moment of his injury was engaged in interstate duties; that employees many times a day rapidly pass from one kind of employment to another.

The Supreme Court was in error, therefore, in finding that deceased was performing duties with respect to an interstate train at the time he was killed.

POINT IV.

The determination of the Judge of the Common Pleas as to facts is conclusive and binding. And from the facts as found the conclusion follows that deceased was not employed in interstate commerce at the time he was killed.

The statute makes the judgment of the Judge of the Court of Common Pleas conclusive and binding as to all questions of fact (P. L. 1891, p. 142).

> "In case of a dispute over, or failure to agree upon, a claim for compensation between employer and employee, or the dependents of the employee, either party may submit the claim, both as to questions of fact, the nature and effect of the injuries, and the amount of compensation therefor, according to the schedule herein provided, to the judge of the court of common pleas of such county, as would have jurisdiction in a civil case, or where there is more than one judge of said court, then to either or any of said judges of such court, which judge is hereby authorized to hear and determine such disputes in a summary manner, and his decision as to all questions of fact shall be conclusive and binding."

Laws of 1911, page 141, Section 18.
Nevitch v. *D., L. & W. R. R.*, 100 *Atlantic*, 234.
Sexton v. *Newark D. T. Co.*, 84 *N. J. L.*, 85.
Hulley v. *Moosbrugger*, 88 *N. J. L.*, 161.

The Supreme Court in its opinion concedes that the finding of the Common Pleas as to facts is conclusive and binding, where there is any evidence to support it. It held that "the finding of the Trial Judge, that the deceased, James Flynn, was not employed by the prosecutor in interstate commerce, is not a finding of fact, it is a statement of law" (Opinion, Case, p. 44, lines 1, &c.). Then follows "the facts in the case are entirely undisputed, it is a pure question of law arising upon facts that are not disputed."

For the purpose of argument we concede that the finding that deceased was not engaged in interstate commerce was a statement of law and not a finding of fact.

The finding of fact that we insist is conclusive is the statement of the duties of Flynn.

Such finding is as follows (Case, p. 13, lines 36, &c.):

> "it was the duty of the said Flynn to cross said eastbound tracks, and also the westbound tracks to warn persons travelling along said Lyon Street against getting upon the tracks of said railroad."

Following is the finding that Flynn was killed in the performance of above duty (Case, p. 13, lines 40, &c.):

> "that on the 23rd day of March, 1916, the said James Flynn, in the course of his em-

> ployment, crossed over the eastbound tracks of the company, on the approach of an eastbound train *to flag said crossing, and while so engaged* * * * was struck and killed."

In this finding there is nothing to show that Flynn was performing any duty with respect to an interstate train.

In the absence of a finding that deceased was performing any duties with respect to an interstate train, the conclusion follows that he was not employed in interstate commerce at the time he was killed.

POINT V.

The burden of proof is upon the railroad company to show that Flynn at the time he received his fatal injury was engaged in interstate commerce.

> "The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. In refusing the request asked, and leaving the issue to the jury, the trial court committed no error, and the Supreme Court of the State rightly affirmed the judgment in that respect."
>
> *Southern Railway* v. *Lloyd*, 239 *U. S.*, 496, at 501.

Until the contrary is alleged or shown, it will be presumed in an action for injuries to a railroad employee through the negligence of his employer in the use or operation of its railway within the State, that he was engaged in intrastate commerce, and

that he is seeking a remedy under the laws of the State.

Bradbury v. *Chicago, R. I. & P. Ry. Co.,* 149 *Iowa,* 51.
Erie R. Co. v. *Welsh,* 89 *Ohio,* 81; 105 *N. E.,* 190; affirmed by U. S. Supp. Ct., 37 *Supt. Ct. Rep.,* 116.
Chicago, R. I. & P. Ry. Co. v. *McBee, Okla.,* ; 145 *Pac.,* 331.

The burden of proof is upon the railroad company to show that Flynn at the particular moment that he received his fatal injury was engaged in interstate commerce.

It is not sufficient to show

1. That the railroad company was engaged in interstate commerce.

2. That the train which struck him was engaged in interstate commerce.

3. That some or even the major part of his duties were concerned with interstate commerce.

Ill. Cent. v. *Behrens,* 233 *V. S.,* 473, 478.
C., B. & I. R. R. v. *Harrington,* 241 *U. S.,* 177.

It is necessary for the railroad company to show that at the time Flynn was struck the particular act he was performing was a part of interstate commerce. It was shown that the train which struck him was engaged in interstate commerce, but it does not appear that anything he did facilitated the passage of that train. Had he failed to perform his duty, had he even left his post the train would have

gone on just the same as it passed hundreds of other crossings that were not guarded by flagmen.

Nowhere in the evidence does it appear that this crossing watchman at the time he was struck was giving any signal to the train which struck him, or even that it was his duty to do so. Other crossings are guarded by gates. In such cases the gateman does not go upon the crossing nor take any position from which he could signal a train.

The only witness who spoke of the duties of the deceased was E. J. Dotter (Case, p. 30). He hired Flynn and instructed him in his duties. His only instructions were that "he should stand clear of the westbound tracks when flagging eastbound trains and clear the eastbound tracks when flagging westbound trains" (Case, p. 30, line 18).

That the witness did not mean by "flagging a train" that the deceased was to give any signal to the train crew, is evident from his further testimony, where he explained the purpose of the rule referred to in his instruction to the deceased.

> "Q. What is the purpose of that rule? A. Well, if a long freight train would be going east and you were on the east side and some fellow drives up on the crossing, or some gentleman or some lady should walk up and be standing on the track and be looking at the train and not notice the other train coming."

It may be seen from this that a crossing watchman is said to flag a train when he stands at a crossing waving his flag to give warning to pedestrians and drivers that the train is approaching.

It will be noticed that the witness Kelly speaks more accurately of Flynn's occupation when he was struck by the train. His description was: "He

stood with the flag in his hand flagging the crossing" (Case, p. 36, line 30).

It does not appear anywhere in the evidence that the deceased had anything to do with the operation of trains; that he was placed in his position to give any signal to a passing train. His duties were to warn people of the approach of trains. This is a duty imposed upon the railroad under the police power of the State.

Compiled Statutes, page 4237, sec. 36, and
P. L. 1911, Chap. 195, sec. 22, page 383.

Although it is not disclosed by the evidence it may be part of the duty of a crossing flagman to stop a passing train in an emergency. If it were he would be engaged in interstate commerce when stopping an interstate train and in intrastate commerce in stopping an intrastate train.

But when he was merely guarding pedestrians and drivers he was engaged in intrastate commerce.

In cases of this kind the burden is upon the company to show that the employee at the time he was injured was engaged in interstate commerce. It does not appear that the present case is one of that nature.

In the absence of the watchman the train would have gone over the crossing. His presence there was in no sense necessary for the operation of the trains. His duties were simply to guard the public.

The prosecutor did not offer any evidence to show that the duties of deceased had any connection with the operation of trains, interstate or otherwise. There is no evidence to show that the placing of a flagman at a crossing facilitated the passage of trains. So far as the evidence shows, this flagman was no more engaged in interstate commerce than a carpenter who placed plank on a crossing to make

it more convenient for the passage of vehicles. It is not sufficient to argue that the deceased protected trains in the absence of evidence to that effect.

POINT VI.

The accident to Flynn arose out of and in the course of his employment.

The third reason assigned in the Supreme Court for the setting aside of the determination of the Court of Common Pleas is

> "Because James Flynn, for whose death compensation is sought, was acting in disobedience of orders at the time of the accident as alleged, and that therefore he was not killed in an accident which arose out of and in the course of his employment."

This is not a good reason for setting aside the determination of the Court of Common Pleas.

Even were it true that the defendant was killed while acting in disobedience of orders, still it does not follow that he was not killed in an accident which arose out of and in the course of his employment.

It has been held by this Court that under our Workmen's Compensation Act,

> "Where it appears that the accident occurred while the servant was in the doing of an act which he was expressly forbidden by his master to do, recovery cannot be had."
>
> *Reimers* v. *Proctor Publishing Co.*, 85 *N. J. L.*, 441.
>
> *Smith* v. *Corson*, 87 *N. J. L.*, 118.

It is not suggested anywhere in the present case that Flynn was killed while doing an act that he was forbidden to do. The claim was set up that he was killed while doing something he was ordered by his employer to do, but which he did, not as his employer directed that it should be done.

The railroad company claims that under his orders Flynn was directed to stand clear of the westbound track when flagging an eastbound train. In order to do so, it was necessary for him to cross the westbound track. It was while standing clear of this track he was killed. While he was clear of the track he was not clear of the engine running on it. This was probably an error of judgment on his part and not a wilful disobedience of orders.

The witness Garrison, who wsa about forty feet from him when he was struck and who was the only witness who was on the same side of the eastbound train when it struck him, said (Case, p. 23, line 21):

> "I walked down to the derail, and when I got down there I happened to turn around and I saw him pretty close to the track.
>
> Q. Which track? A. The westbound track. I saw the steam of 907 coming on the westbound track and I hollered to him, but I couldn't make him hear, as the eastbound train was going over the crossing at the time. I started down and tried to get there before the westbound train, but I couldn't.
>
> Q. At that time was the locomotive of the eastbound train passing over the crossing? A. Yes, sir.
>
> Q. And he was still flagging, was he? A. Yes, sir. I don't know if the westbound train slipped his memory or he forgot where

> he was or not, but he was pretty close to both tracks, especially close to the westbound track."

Flynn was ordered to stand clear of the westbound track, and he probably thought he was obeying that order. At the most his action was an error of judgment. It was much different from going upon a scaffold which he was ordered not to ascend or taking an automobile that he was ordered not to use.

If the principle in the *Reimers* v. *Proctor Publishing Company* and *Smith* v. *Corson* cases is to be extended to cover cases like the present, the New Jersey Workmen's Compensation Act will be very much lessened in value. An employer might adopt a very elaborate set of rules governing workmen which would practically nullify the act.

These New Jersey cases were founded upon the English case of *Barnes* v. *Nunnery Colliery Co.* (1912), *A. C.*, 44. But the English authorities point out the difference between the doing an act negligently or in a manner contrary to orders and the doing of an act directly forbidden. In the first class of cases the employee is entitled to compensation, and in the second class not.

In the *Barnes* case Lord Atkinson said:

> "In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment."

A boy engaged in rolling ventilator tires, who knew that it was forbidden to sit down while en-

gaged in the work, was nevertheless not out of his employment in sitting down to his work, and is entitled to compensation for injuries received while so sitting, although the accident could not have happened if he had been standing instead of sitting.

> *Chilton* v. *Blair,* affirmed by House of Lords in 1915, 31 *Times L. R.,* 437, 8 *B. W. C. C.,* 1.

In the above case in the Court of Appeals Cozens-Hardy, *M. R.,* said:

> "It is well established that a workman who is seriously and permanently disabled by an accident may recover compensation if he was doing the work he was employed to do, though doing it negligently and contrary to rules laid down.
>
> On the other hand, a workman cannot recover compensation if he was not doing the work he was employed to do, but was doing something substantially different, although intended to produce the same result.
>
> An instance of the first class is where a man's duty was to oil machinery and was told not to do it when the machinery was in motion. He did, while the machinery was in motion. The employer was held liable, although there was serious and wilful misconduct."

In the same case Swinfen-Eady, *L. J.,* said:

> "In one sense the injury was caused by an added peril which the boy took upon himself, a peril which his contract of service did not oblige him to encounter; but, on the other hand, the added peril did not take the boy away from the very work he was engaged to

> perform; it added danger to the performance of that work."

Pickford, *L. J.*, said the boy

> "was actually turning the wheel it was his duty to turn at the moment when the accident happened, but he was doing it while sitting down, which was forbidden, instead of standing up, as was his duty, with the result of making an ordinary incident of his work a danger to him, which it would otherwise not have been,"

and that this was

> "doing his work in a wrong way, but not doing something outside the sphere of his employment."

In Lawyer's Report, Annotated 1916, A, page 52, a number of English cases along the same line are noted where workmen recovered compensation, among others, where a workman crossed railroad tracks, contrary to orders, while shunting operations were in process.

> *Sanderson* v. *Wright,* 30 *Times L. R.,* 279 (1914).

Where a workman entered door he was forbidden to use and was caught in a revolving shaft.

> *McNicholas* v. *Dawson,* 15 *Times L. R.,* 242 (1899).

Where a collier left a mine by a shaft which the men were prohibited to ascend and was injured.

> *Douglas* v. *United Mineral Min. Co.* (1900), 2 *W. C. C.,* 15.

Where a second engineer lit a fire in his cabin in violation of orders, but in which a fire was necessary, owing to intense cold.

Edmunds v. *The Peterston,* 28 *Times L. R.,* 18.

Where a collier went to work in a place about three yards distant from where he had been directed to work; he recovered, although he had been warned that the place to which he went was dangerous.

Jackson v. *Denton Colliery Co.,* 7 *B. W. C. C.,* 92 (1914).

Where a miner went into a forbidden area to get a pick he needed.

Conway v. *Pumpherston Oil Co.,* 4 *B. W. C. C.,* 392 (1911).

In *Watkins* v. *Guest* (1912), 5 *B. W. C. C.,* 307, it was held a collier riding to work on a train furnished by the employer, who, as it approached the station, got out on the footboard, contrary to orders, and was pushed off, was injured by accident arising out of and in course of his employment. This is a later case than *Barnes* v. *The Nunnery Colliery,* which the Court distinguished.

POINT VII.

In conclusion we submit that the Supreme Court should be reversed and the order of the Judge of the Passaic Common Pleas declared valid.

EDWARD F. MERREY,
Of Counsel with Appellant.

New Jersey Court of Errors and Appeals.

MARY FLYNN, *Appellant.* *vs.* NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY, *Respondent.*	On Appeal from Supreme Court.

BRIEF FOR RESPONDENT.

(1)

Statement of Case.

This is a matter arising under the New Jersey Workmen's Compensation Act of 1911. It involves a railroad employee. While the general question of the exclusive application of the Federal Employers' Liability Act of 1908, when in conflict with the New Jersey Workmen's Compensation Act of 1911, has been settled by the United States Supreme Court in the case of *Erie Railroad Company vs. Winfield,* decided May 21, 1917, yet in many cases the question as to whether a particular employee is engaged in interstate commerce at the time of an accident so that he comes within the Federal Act, remains to be decided.

In the case at bar, which is a death case, the deceased was employed as a crossing flagman by the railroad company at the Lyon Street crossing in the City of Paterson, and while engaged in carrying out his duties as flagman was struck and

killed by a train. His widow thereupon filed a petition praying compensation, under the Workmen's Compensation Act of 1911. This resulted in an award in her favor by the Judge of the Passaic County Court of Common Pleas.

The matter was then taken to the Supreme Court on certiorari, where the judgment below was reversed upon the ground that the deceased "at the time of his death was engaged in an act, to use the words of the Supreme Court of the United States, directly and immediately connected with interstate business, as substantially to form a part or necessary incident thereto" (p. 44, ll. 10-17). From this decision the petitioner has taken this appeal.

(2)

Grounds of Appeal.

The appellant's grounds of appeal may be summarized as follows:

1. The Supreme Court disregarded the finding of facts by the Judge of the Court of Common Pleas which, under the provisions of section 18 of the Compensation Act, is final.

2. The Supreme Court erred in finding that the deceased was engaged in interstate commerce at the time of his death.

I.

The facts as found by the Supreme Court were in accordance with the evidence and not in conflict with the finding of facts of the Judge of the Court of Common Pleas.

Counsel for appellant throughout his entire brief enters into a more detailed discussion of facts than would ordinarily seem justified in an appeal to this Court; but inasmuch as the error alleged is that the Supreme Court disregarded the provisions of the Compensation Act prescribing the effect of the finding of facts by the tribunal having original jurisdiction, we deem it necessary to point out wherein he is in error.

Counsel for appellant quotes the finding of the Court of Common Pleas with respect to what the deceased did at the time of his death and then contrasts it with the finding of the Supreme Court. In order to bring the situation clearly before this Court, we beg to repeat the quotations employed by him.

The Common Pleas Court found, among other things, as follows (p. 14, ll. 1-11):

> "Flynn, in the course of his employment, crossed over the eastbound tracks of the company on the approach of an eastbound train to flag said crossing and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breast piece on an engine drawing a train on the westbound tracks; this breast piece projected beyond the tracks."

The Supreme Court, among other things, found as follows (p. 41, ll. 22-38):

> "The pertinent facts are, the deceased, James Flynn, on March 23, 1916, was em-

ployed by the prosecutor, as a crossing flagman, at the Lyon Street crossing, in the City of Paterson, while thus engaged in the performance of his duties as a flagman, with respect to a passing train, which was carrying passengers and baggage, from points in the State of New York, to various points in the State of New Jersey, he was struck and killed by the engine of the train in the course of his employment. Flynn crossed over the eastbound tracks of the prosecutor, on the approach of an eastbound train, to flag the crossing, and while so engaged was standing near the westbound tracks and was struck and killed by the outer edge of the breast piece of an engine drawing a train, on the westbound tracks, which was an interstate train."

The argument of appellant is that the Common Pleas' finding was in accordance with the evidence and that the Supreme Court found something different which was not in accordance with the evidence, and that inasmuch as under the Compensation Act, the determination of the Judge of the Court of Common Pleas upon the facts is conclusive, the Supreme Court was without authority to find the facts set forth above.

An examination of the two findings reveals that the finding of the Court of Common Pleas is rather meagre in its extent and that the finding of the Supreme Court merely amplifies the finding of the Court of Common Pleas. The Supreme Court recognizes all of the facts set forth in the finding of the court below, but in addition states that Flynn was performing his duties with respect to the interstate westbound train which struck him, as well as with respect to the eastbound train which arrived at the crossing first. It is alleged by appellant that there is no evidence to show that deceased at the time of his death was performing any duty whatever with respect to the interstate train that struck him.

The first question is: Can the Supreme Court find matters of fact which are undisputed, in addition to those found by the court below?

The Supreme Court regards the facts in this matter as undisputed, as is shown by the conclusion of the opinion (p. 44, l. 10), and this conclusion is entirely justified by the most important part of the testimony which is a stipulation (pp. 17-19), in which counsel agree "that the said James Flynn was struck while flagging train 907 on the westbound track" (p. 19, l. 13). This train, in another part of the stipulation, is admitted to be an interstate train.

Counsel for appellant, however, seems to feel that this stipulation goes further than he intended it should. On page 20 of his brief he points out that it was dictated to a stenographer without signing, and that the clause just mentioned was inserted through inadvertence or a mistake of the stenographer. It is not the recollection of counsel for respondent that such was the case, but that it was inserted intentionally by agreement of the parties. Our contention in this regard is borne out by the prior part of the stipulation where it is agreed as follows:

> "Said James Flynn while engaged in flagging *trains* of the defendant company, and in guarding people who were passing over the said crossing, was struck and killed by westbound train No. 907" (p. 18, ll. 15 to 19).

It seems strange that if appellant had intended to argue that James Flynn was guarding an eastbound train only, that he should have stipulated that he was flagging "trains" at the time he was killed. If appellant's contention is correct as to the defect in the stipulation, the recital which we have just mentioned would naturally have been about as follows:

"While engaged in flagging an eastbound train, concerning which it does not appear as to whether or not it was engaged in interstate commerce," &c.

We insist that the stipulation is correct, as it appears in the state of case and was dictated with the full consent of counsel for appellant and in his presence.

However, if we disregard the clause in the stipulation objected to by the appellant, the situation is not changed. The undisputed evidence is that two trains were approaching the crossing at the same time. The eastbound train arrived first and the deceased passsed in front of it, crossed over to the furthest side of the westbound track, as he was required to do, in order to flag for this eastbound train. He was aware that there was a westbound train due about the same time (p. 30, ll. 21-25). The westbound train struck and killed him while flagging.

In the face of this testimony, which is entirely undisputed and unchallenged, appellant argues that the Supreme Court had no authority, in the absence of a finding by the Court of Common Pleas, to find that the deceased was engaged in flagging for the westbound train which was admittedly engaged in interstate commerce. The deceased apparently thought that he was clear of the westbound track upon which the train was running which struck him, or in his zeal in flagging the train which arrived first he underestimated the nearness of the approach of the other train, or forgot about it. He was almost clear of the crossing and was struck merely by the corner of the breast beam of the locomotive, as is found by the Judge of the Court of Common Pleas (p. 14, ll. 8-10). He had been in the habit of not standing far enough away from the train he was flagging (p. 34, l. 30 et seq.). Whether he knew

that the interstate train was so close at the time he was killed, or not, the mere fact he was out there protecting the crossing and performing his duty (although in a negligent manner) is sufficient evidence to support a finding that he was engaged in flagging for the interstate train. But further than this the question is really a conclusion of law. The facts are all undisputed. The Supreme Court calls it a "pertinent fact" but the conclusion is actually one of law. Here we have a man actually performing his duty as crossing flagman with respect to a passing interstate train, which he knew was due, and which he may, or may not have known was approaching; and he is killed by that train; the conclusion as to whether or not he is engaged in flagging for that train seems to us clearly a matter of law.

From the foregoing argument, we submit that James Flynn, appellant's decedent, was engaged in keeping clear the Lyon Street crossing at Paterson for the passage of a train engaged in interstate commerce.

If, as maintained by appellant, the question of his engaging in interstate commerce depends upon whether or not an intestate *knows* that the interstate train which strikes him is coming, a situation immediately arises wherein it is impossible in most cases to grant any relief, under the act of Congress, to dependents of employees killed while so engaged, since it is usually impossible to tell whether the employee is aware of the approach of the train by which he is killed. In fact the presumption would always be the other way, for it stands to reason that he would protect himself from danger if aware of it. So long as he is engaged in the course of his duties he is performing them with respect to the train, although he is not immediately aware of its approach.

The recent case of *Brinsko vs. Lehigh Valley R.R. Co.* decided by this court, may possibly be

cited by appellant in an effort to sustain his contention that the Supreme Court erred by disregarding the finding of facts of the Court of Common Pleas. The case referred to turned upon an entirely different point; there the Court of Common Pleas found that in a case where the defense of interstate commerce had been set up, it was not necessary to determine the question in order for the deceased to recover. The Supreme Court held that inasmuch as the finding of facts by the Judge below showed that the car was not engaged in interstate commerce, nor was the deceased, that the award of compensation was not vitiated on account of the omission cited.

This Court held that such an omission was error, as the finding on the subject was necessary in order to determine the petitioner's right to recover.

In the case at bar, the Court of Common Pleas did consider this subject and found that the decedent was not engaged in interstate commerce, and therefore there was no error in the present case on account of the absence of such a finding. The finding referred to, however, is a finding of law and not a finding of fact, as the question of interstate commerce is a question of law upon the ascertained facts. This Court says in the case of *Hully vs. Moosbrugger,* 88 N. J. L., 161, that "the law arising upon the ascertained facts is a question for the court reviewing the decision". To the same effect is the case of *Dunnewald vs. Steers,* 99 Atl., 345. The Supreme Court recognized this rule in determining the issues in this matter (p. 43, ll. 32-41).

II.

A crossing flagman when keeping clear a highway crossing for the passage of interstate trains is engaging in interstate commerce.

There is no case involving a crossing flagman which has yet been decided by the U. S. Supreme Court. It is settled in the case of *Erie R. R. Company vs. Winfield,* decided in May, 1917, by the U. S. Supreme Court that if an employee is engaged in interstate commerce, the Federal Act is exclusive of the New Jersey Workmen's Compensation Act.

There are numerous cases decided by that Court, in which employees not directly engaged in the handling of trains have been held to be engaged in commerce, so as to come within the act. A leading case is *Pederson vs. D. L. & W. R. R. Co.,* 229 U. S., 146, where an employee engaged in repairing a bridge which carried both interstate and intrastate commerce was held to be engaged in interstate commerce. Appellant endeavors to escape the effect of this case by quoting at length the dissenting opinion therein, but the case still stands as the law as pronounced by the majority of the court.

In the case of *N. Y., C. & H. R. R. vs. Carr,* 238 U. S., 260, 59 L. Ed., 1298, a brakeman on a freight train running between points in the same state but containing some cars loaded with intrastate freight, was injured while engaged in the course of his employment in setting the brake of an *intrastate* car which had been cut out of the train and backed on to a siding. The Court held that the injured was an employe in interstate commerce within the meaning of the Federal Employers' Liability Act, because the

setting of such brake was necessary in order that the engine to which the car was attached might, when uncoupled, proceed to the train and proceed on its journey. The Court says (p. 263):

> "Each case must be decided in the light of the particular facts with a view of determining whether at the time of the injury, the employe is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or a necessary incident thereof."

Following the case of *N. Y., C. & H. R. R. vs. Carr,* supra, the United States Supreme Court decided in *Pennsylvania Company vs. Donat,* 239 U. S., 50, 60 L. Ed., 139, that an employe who was removing empty cars from a private switch track in order to place loaded cars arriving from a point without the state on that track, was engaged in interstate commerce.

In *Shanks vs. D., L. & W. R. R.,* 239 U. S., 556, 60 L. Ed., 436, the Court said (p. 558) that the true test is: "Was the employe at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." In applying this test it held that a mechanic engaged in repairing heavy machinery in a locomotive shop where interstate locomotives were repaired, was not so engaged.

In *Seaboard Air Line vs. Koennecke,* 239 U. S., 352, 60 L. Ed., 324, an employe engaged in distributing the cars from an interstate train and clearing the track for another interstate train was held to be engaged in interstate commerce.

In the recent case of *Louisville & Nashville R. R. Co., vs. Parker,* 242 U. S., 13, the United States Supreme Court held that where the deceased was engaged at the moment in transferring an empty car not moving in interstate commerce, but for the purpose of reaching and mov-

ing an interstate car, the purpose would control and the business would be interstate. The Court points out that a difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in *Illinois Central R. R. Co., vs. Behrens,* 233 U. S., 473, 478, 58 L. Ed., 1051, and doing the act for the purpose of furthering the latter work. *N. Y. C. & H. RR. vs. Carr,* supra.

In the Behrens case the employee, who was killed, was aiding in moving cars loaded entirely with intrastate freight between two points in the same city, although the crew to which he was attached, upon the completion of that work, was to have gathered up and taken to other points several other cars as a step or link in both interstate and intrastate commerce. In that case the employe was held to be engaged in intrastate commerce solely, and it was pointed out that it was the intention of Congress to confine its action to injuries occurring where the particular service in which the employe is engaged is a part of interstate commerce.

Appellant has made much of this decision in his argument. . The situation there existing differs radically from the case at bar where an interstate train is directly involved. . But whether an interstate train were involved or not, the duties of a crossing flagman are different from those of a brakeman solely engaged in intrastate work and are interrelated with the operation of the entire line as is hereafter pointed out. There are other cases cited by appellant which are clearly inapplicable to the case at bar. For instance, appellant cites the case of *Chicago, Burlington & Q. R. R. vs. Harrington,* 241 U. S., 147, where it was held that the removal of coal from storage tracks to a coal shed or chutes was not engaging in interstate commerce, as it was only putting the

coal in a convenient place to be used thereafter for locomotives in interstate hauls. This is not in point in the present case where the flagman was actually engaged in furthering the passage of an interstate train. The present case meets the very test which failed to include the employe in the case cited. The cases of *Minneapolis & St. Paul R. R. vs. Winters,* 37 Sup. Ct. Rep., 170, and *Erie R. R. vs. Welsh,* 37 Sup Ct., Rep., 116, cited by appellant both involved an injury to a person engaged in an employment *after the interstate work involved had been completed. This* clearly was not the situation in the case at bar. We shall not stop to consider the other cases cited from jurisdictions other than the United States Supreme Court, except the ones bearing directly upon the cases of crossing flagman. There are three of these in all, viz: California, Illinois and Georgia.

In the first two of these jurisdictions it has been held that a crossing flagman is engaged in interstate commerce and in the third it was held to the contrary, but upon a state of facts which makes that case distinguishable from the case at bar.

In *Southern Pacific Co. v. Industrial Accident Commission,* 161 Pac. Rep., 1139, and *Southern Pacific Co. v. Industrial Accident Commission,* 161 Pac. Rep., 1142, the Court held that crossing flagmen engaged in flagging on a railroad where interstate trains were being operated, were engaged in interstate commerce. .

These two cases go further than it is necessary to go in order to decide the case at bar. In each of them the deceased was engaged as a crossing flagman in the surburban territory around San Francisco and at the time of his death was protecting the crossing for the passage of an intrastate local passenger train, which was not en-

gaged at all in interstate commerce. But the Court held that inasmuch as the evidence showed that the gateman was located for the protection of the railroad company as well as for the public in oder to safeguard the train from striking vehicles, that he was put there for the purpose of keeping open the lines, inasmuch as "the slightest accident" would demand "a stop and investigation." It was therefore held that the employe was engaged in interstate commerce. The duties of crossing gatemen were classified with those of track walker, towerman and signal repairman, all of whose duties are concerned with keeping the line of the railroad in suitable condition for use.

In the case of *Dunlavey v. Chicago, Burlington & Quincy R. R.*, 200 Ill. App., p. 75, a crossing flagman was struck and killed by a railroad car which was engaged in interstate commerce while he was endeavoring to stop a horse and vehicle which was trying to cross the track. With respect to his duties the Court merely says "his duty was the usual one of a railway flagman at a street crossing;" and then reviews at length the various decisions of the U. S. Supreme Court affecting employes who were not directly engaged in the operation of trains such as a man repairing a switch, a carpenter repairing a bridge, section men and track laborers, fireman preparing his locomotive, and yard crews while inspecting and making records of cars. When the agency is used or about to be used in interstate commerce, all are held to be engaged in interstate commerce, and the Court then reaches the following conclusion (p. 81): "We are of opinion that deceased was employed in interstate commerce at the time of his injury if appellant was then so engaged, and that in so holding, under the facts in this case, we are not in conflict with the

holdings of the Courts in *Patry v. Chicago & W. I. R. Company,* 265 Ill., 310; and in *Illinois Central R. R. Company v. Behrens,* 233 U. S., 473 under the facts in those cases."

The other case referred to, which we understand counsel for appellant will cite in his reply brief to sustain his contention is *Louisville & Nashville R. R. Company v. Barrett,* 85 So. Eastern Rep., 923. This case, while in conflict with the California cases just cited, in each of which the train that killed the crossing flagman was engaged in intrastate commerce solely although upon a line carrying interstate commerce, is not controlling in so far as the case at bar is concerned, because it turned upon the fact that it did not appear that the trains in question, or either of them, was actually engaged in interstate commerce. The court comes to this conclusion (p. 926): "In the second place it does not appear that the freight train, on account of the approach of which the watchman was warning pedestrians not to come upon the tracks, was engaged in carrying freight to points beyond the limits of this state, or that the passenger train which inflicted the injury was engaged in interstate commerce. On these facts the case is not controlled by the ruling in the cases cited, and the doctrine of those cases will not be extended."

Appellant argues in discussing the California cases that we cannot say that James Flynn was engaged in interstate commerce because we do not show the result which might arise from a neglect of his duties which would in some way interfere with interstate commerce by a stoppage of the line, as was testified to in the California cases. This detailed testimony was not deemed essential by the Illinois Courts in passing upon the case of *Dunlavey v. Chicago, Burlington & Quincy*

R. R., supra, and we do not think it is necessary in this case. The courts of this state will take judicial notice of facts of every day occurrence such as the ordinary duties of a crossing flagman with which everyone is familiar. It is perfectly apparent that his duty is to keep vehicles and pedestrians from being struck by railroad trains, and it is also perfectly apparent that a heavy vehicle is liable to wreck an interstate train. The mere fact that the train would go on if the crossing flagman were not there does not necessarily lessen the fact that his duties are in aid of interstate commerce. The same is true of the duties of many other employes whose connection with interstate commerce is not questioned, such as repairmen on tracks and bridges. It is possible for instrumentalities of commerce of that character to be used for many years after being in need of repair without actually resulting in such a failure as to wreck a train. Indeed, the duties of a crossing flagman extend much further with respect to trains than what we have just called attention to as was pointed out by Mr. Justice Parker on the oral argument. It is the custom of crossing flagmen when trains stop near their crossings to go out with red flags to protect them from trains following. Another example would be the case of an automobile or other similar vehicle that might become stalled on the track. In such case, it would be the duty of a flagman to attempt to stop approaching trains and thus avoid an accident.

The Supreme Court came to the conclusion that the duties of a crossing flagman were such that "James Flynn at the time of his death was engaged in an act, to use the words of the Supreme Court of the United States, directly and immediately connected with interstate business, as substantially to form a part or a necessary incident thereto."

We submit that the foregoing conclusion is correct, and that therefore the Common Pleas Court of Passaic County and the Judge thereof was without jurisdiction in the premises.

III.

The judgment of the Supreme Court reversing the judgment of the Court of Common Pleas should be affirmed.

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