

New Jersey Court of Errors and Appeals

WILLIAM E. HAVEY, Administra-
tor of Garret Havey, deceased,

Defendant-Respondent,

vs.

ERIE RAILROAD COMPANY,

Prosecutor-Appellant.

On
Petition, etc.

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BRIEF FOR DEFENDANT-RESPONDENT.

This is an appeal for a judgment entered in this cause by the New Jersey Supreme Court adjudging that the record in said cause be remanded to the Hudson County Court of Common Pleas, to be proceeded with in accordance with the views expressed in the opinion of the Supreme Court.

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POINT I.

The Supreme Court did not erroneously determine that the father and mother and minor sisters and brothers of Garret Havey, the deceased employe, were all legal and actually dependent upon him within the meaning of the Employers' Liability Act 1911.

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Chapter 95, Laws of 1911, The Employers' Liability Act as amended by Chapter 244, Laws of 1914, section 12, Par. 1, reads as follows:

"In case of death compensation shall be computed but not distributed as follows:

"1. ACTUAL DEPENDENTS.

* * *

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“If widow and father and mother fifty per centum wages.

“If grandparents, grandchildren, or minor or incapacitated brothers or sisters, twenty-five per centum of wages.”

Certainly the verdict of the Supreme Court in allowing twenty-five per cent was neither erroneous nor excessive when it is considered that under paragraph 12, fifty per cent is the basis of computation when a widow and father or mother survive the deceased. In the case at bar there is no widow, but there are a father and mother. This brings us under the average of two which is provided for in the act.

In the case of *Quinlan v. Barber Asphalt Paving Co.*, 87 Atl. Rep., 127, the Supreme Court sustained a judgment of 25 per cent of the wages where the only dependent was a mother.

The deceased had nine brothers and sisters, all of whom were under the age of sixteen years and it cannot be denied that the twenty-five per cent is in accordance with the Act of 1911, par. 12 which provides for minor brothers and sisters.

Chapter 242, P. L. 1914, Par. 11 prescribes:

“ACTUAL DEPENDENTS. MEANING OF TERM: Actual dependency means dependency in fact; and it must be established by proof that the persons included in the enumeration of this paragraph are ‘dependents in fact.’ ”

The statutes do not prescribe or maintain that the dependents must be in such a position as to be entirely dependent upon the wages of the deceased for their necessities of life, but says that they must be dependents in fact.

Miller v. Public Service Railway Company, 84 N. J. L., 174;

Muzik v. Erie R. R. Co., 85 Id. 131; 86 Id. 695;

Davidheiser v. Hay Foundry & Iron Works, 27 N. J. L., 120.

In the case of *Miller v. Public Service Railway Co.*, *ib.* the court in his opinion states:

“It appears that at least theoretical compensation is the object of the statute. * * * The statute plainly marks the contrast not between ‘dependents and no dependents’ but between ‘actual dependents and no dependents.’ ”

Following this theory, it can plainly be observed that the term “theoretical dependency” eliminates the possible intent of the legislature to be that the beneficiaries under the act must be entirely dependent upon the deceased, “theoretical” meaning, partially dependent, at least. 10

In *Muzik v. Erie Railroad Company*, *ib.* the Court ruled that:

“In an action under the Workmen’s Compensation Act by the administrator of a deceased railroad employe, it was no defense that the administrator and his family were not entirely dependent upon the deceased; where they were ‘dependents in fact.’ The words ‘actual dependents’ as used in such statute meaning ‘dependents in fact.’ ” 20

Justice Voorhees in his opinion states:

“The second point (raised by counsel for the prosecutor) is that the petitioner and his family were not entirely dependent upon the deceased. I do not think this is well taken. Our statute says, ‘Actual dependents,’ which must mean ‘dependents in fact.’ Here they were dependents in fact; so that if the injured person is entitled to recovery, it was proper under the authority of the Court to determine the facts underlying the compensation.” 30

Here, again, it is clearly shown that the dependents on whose participation the compensation is computed, need not be dependent entirely upon the salary of the deceased, but must be *dependents in fact* or partially dependent upon the 40

contribution of the deceased, as observed by the Court.

11. *Constanzo v. Hanover Brick Company*, 37 N. J. L. J. the Court says in regard to the question of dependency:

“The actual dependent of another within the meaning of the Act, is one who is dependent on such other for the ordinary necessities of life for a person of his class and position.

10 “If payment of son’s wages to parents were not made for the maintenance of the family such family are not dependents.”

In this case the Court also held on a rehearing:

“1. It must appear that the earnings of the deceased were given to the petitioner for relieving wholly or partially the petitioner of his financial necessities to bring the petitioner within the definition of ‘actual dependency.’

20 “2. Or at least the petitioner must have applied the earnings he received from the deceased to the defrayment of his obligation of a personal or family nature with respect to his or their necessary living expenses.”

This decision covers the issue raised in this case exactly. The Court in its decision goes even further in the matter of compensation and says that even if the petitioner “applies the earnings of the deceased to the defrayment of his obligation of a personal or family nature, with respect to his or their necessary living expenses”; the word “personal” here undoubtedly meaning a personal debt, contracted by the petitioner for the benefit of the family, it should be construed as a dependency in fact.

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POINT II.

The father and mother and minor sisters and brothers were each in all dependent upon the deceased within the meaning of the act.

That even a cursory persual of the evidence in this case at once convinces the reader beyond any doubt, that there was a common family fund composed of the earnings of the petitioner and that of the deceased, which was used by the *pater familias* to support and maintain a household and also to relieve wholly or partially, the petitioner, who in this case is the head of the family of his financial domestic necessities, and that such a fund was absolutely necessary for this particular family. 10

Eliminate from this family fund the contribution of either the deceased or that of the father and the result will be that from the small sum of money left, not even half of the family could have but a bare existence. The contribution of the deceased was absolutely essential for the maintenance and support of this household. The father and mother and minor sisters and brothers of the deceased Garret Havey together, were all jointly and severally, legally and actually dependent upon him within the meaning of the Act under which the compensation was awarded; and now that the mistake in the amount so awarded is about to be rectified in accordance with the views expressed in the opinion of the Supreme Court, we respectfully submit that there was no error in finding that each and every member of the petitioner's family were actually dependent upon him, the deceased, and the amount he weekly contributed to the family. 20 30

While the respondent does not admit that the dependency in this case was only partial, (maintaining that it was entire), even assuming that it 40

was, and this, it is to be observed, is admitted by the prosecutor in his reasons for appeal, the respondent argues that partial dependency is provided by the act mentioned, and that it has been many times adjudicated, that while the words of the act "*Actual dependency*" means *dependency in fact*, and it must be established that the persons included in the enumeration of this paragraph (11, section 12) are "dependents in fact", still the judicial decisions on this question are

10 that the distinction is not between "dependents and no dependents", but between "Actual dependents" and "No dependents." The word "actual" here meaning those who are really dependent, partially or wholly, on the contributions of the deceased.

POINT III.

There was sufficient evidence to warrant the

20 Court's finding for the petitioner and this is clearly and unequivocally shown by the testimony of the petitioner who was the father of the deceased and the head of the family of nine children, (besides the deceased) each of whom are under the age of twenty-one years; when he testified as follows (p. 19, State of the Case, line 21) :

"Q. Are you married? A. Yes.

"Q. How many in the family? A. Nine.

30 "Q. Nine boys and girls? A. There are five boys and four girls.

"Q. How many of these are working? A. One; the oldest girl.

"Q. Had your son Garret Havey been working prior to his death? A. Well, he didn't work steadily, off and on from the time he left school.

"Q. What did he do with his wages? A. He brought it home and gave it to me.

"Q. What part of it? A. All of it.

40 "Q. What was done with it, used in the maintenance of the family? A. Yes.

"Q. You used that in the maintenance of

yourself and your children, and your wife?
A. Yes."

On cross examination petitioner testified as follows:

"Q. Is your wife alive? A. Yes.

"Q. All your children go to school? A. All that is old enough; yes, there is three, that is not.

"Q. How many are under fourteen years? A. Eight.

"Q. All under 14? A. Yes. 10

"Q. Only one over 14? A. Yes.

"Q. That one never did any work, the one that is over fourteen? A. She is working now.

"Q. She was working before Garret died? A. No."

That the entire family of eleven were almost entirely or as set forth in Par. 4 of the petition: "mostly dependent on the said Garret Havey for support, and having very little other means of support except that derived from the wages of the deceased." 20

That is clearly substantiated by the cross examination by Mr. Bain of Mr. William Havey in which he testified that the oldest girl, Rosalie, the only child over fourteen years of age, has, since the death of the deceased, been forced to leave school and go to work to help maintain the family, and that before the said Garret Havey met his death, she was not compelled to work. 30

That the testimony previously quoted conclusively indicates competent evidence of dependency of the petitioner and his family upon the said Garret Havey within the meaning of the said act.

POINT IV.

As to reason number six in the prosecutor's grounds for appeal, the respondent argues that even though this contract for hiring was through a misrepresentation of the Christian name and age of the applicant, still such misrepresentation did not amount to such a fraud, if fraud it really was, as to vitiate the entire contract.

- 10 When Garret Havey applied for this position, he was hired not because he gave his name as John Joseph, or because he said he was twenty-one years of age, but because he was physically able to do the work expected of him as a brakeman. It is a fair inference to assume that the employing agent first quizzically inspected the applicant, observing his height, weight, strength, health, etc., and then, and not only until then, did he accept him. The name or age played no
- 20 material part, if any at all in this contract for hiring and it is a well known principle of law that fraud in order to vitiate a contract must be of some material point.

- It is not enough that a mere allegation of fraud, unsupported by any testimony whatever, should vitiate a contract. Clearly it was incumbent upon the defendant to produce evidence at the trial of the cause and endeavor to show that they acted solely upon his representations, and now,
- 30 since they seek to avoid the contract, they must also show that they suffered injury.

There is no evidence to support either of these contentions and it does not appear that there was any casual connection between the misrepresentation and the contract or that the prosecutors were induced to enter into the contract upon misrepresentation.

- 40 A fraud is defined by Webster in the Standard Dictionary as follows:

"Any artifice or deception practiced to

cheat, deceive or circumvent another to his injury; any act or omission or concealment that involves a breach of duty, trust or confidence and which is injurious to another or by which an undue advantage is taken of another."

By Cyc. Vol. 20, page 8 as follows:

"Fraud as a generic term, established as the word is used in courts of equity properly includes all acts, omission and concealment which involves a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to others." 10

Cyc. Vol. 20, p. 108:

"Fraud is never presumed but must be affirmatively proven. On the contrary the presumption, if any, is in favor of innocence and in accordance with the general principles elsewhere discussed the burden falls on him who asserts fraud, whether he be plaintiff or defendant, of establishing it by proving every material element of the cause of action by a preponderance of evidence. Thus the burden rests on him to prove the falsity of the representations, the scienter, the intent to deceive, and his reliance on the representations 'TO HIS DAMAGE.' " 20

See *Byard v. Holmes*, 34 N. J. L., 296.

The complaint must allege that plaintiff sustained damage by reason of the fraud and should show that the relation of the cause and effect existed between the fraud and the damage alleged. 30

See also

Boyd v. Schussler, 81 N. J. L., p. 275.

The startling reason here given and a serious precedent which they seek to have established, is to set aside a contract after it has not only been agreed to by both parties concerned, but performance has already been completed by one of them. 40

RESUME.

The award made by the Supreme Court in its opinion was not erroneous but legal and just. The act allows twenty-five per cent. of the wages earned by the deceased for minor or incapacitated brothers and sisters. In a recent opinion the Court allowed the decedent's mother (the deceased leaving no widow) who was actually dependent upon him, twenty-five per cent. of his wages for the number of weeks fixed by the statute.

Quinlan v. Barber Asphalt Paving Co.,
87 Atl., 127.

In the case at bar there are both the father and mother and certainly the Supreme Court's allowance of twenty-five per cent. for both, can be said to be neither excessive nor erroneous, nor can the allowance of twenty-five per cent. for nine minor sisters and brothers, all but one of whom are under the age of fourteen years.

The respondent shows that the cases cited in the opinion of the learned trial Judge are directly in point, and should be considered by this court before deciding the merits of this appeal.

All the minor brothers and sisters of the deceased Garret Havey were dependent legally and actually upon him within the meaning of the Employers' Liability Law. That the father and mother of said Garret Havey were also dependent upon said Garret Havey within the meaning of said Act. That the evidence of dependency offered at the trial was competent.

That even if the family *in toto* were not entirely, but partially dependent on the said Garret Havey, deceased, (but this the respondent does not admit, as it asserts that were it not for Garret's contribution, the family could not have existed at that time), still under the meaning and construction of the act, which says, "dependency

in fact", they would still be entitled to the compensation awarded by the Court.

That the misrepresentations by Garret Havey as to his name and age were not such as to amount to a fraud or that any undue advantage was taken of the Railroad Company by fraudulent deception which would tend to vitiate the contract of employment *in toto*, or affect recovery under the Employers' Liability Law.

That the determination and judgment of the Supreme Court are not erroneous and contrary to law, but are fair and just and in accordance with the statute. 10

The respondent insists that this appeal be dismissed and that the opinion rendered in the Supreme Court be affirmed.

Respectfully submitted,

GEORGE E. CUTLEY,
Of Counsel with Defendant-Respondent. 20

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tor, &c., of GARRET HAVEY, de-
ceased,

Defendant-Respondent,

vs.

ERIE RAILROAD COMPANY,

Prosecutor-Appellant.

*On Appeal
from
Supreme
Court.*

Brief for Appellant.

1.

Statement of the Case.

This appeal is from a judgment of the Supreme Court reversing a determination and judgment entered in the Hudson County Court of Common Pleas under the New Jersey Workmen's Compensation Act. The appeal is not from the reversal of the judgment entered in the Hudson County Court of Common Pleas, but from that part of the judgment of the Supreme Court which orders the record remanded to the lower Court for further proceedings in accordance with the views expressed in the opinion of the Supreme Court. Appellant claims that the views expressed in the opinion of the Supreme Court are erroneous and that the judgment of that Court directing further proceedings in accordance with those views is also erroneous.

In this case Garret Havey, a young man eighteen years old, entered the employ of Appellant as a

brakeman in the month of January, 1913, giving his name as John Joseph Havey, and stating his age to be twenty-one years, (p. 31). On February 3, 1913, he was run over by a freight car and sustained injuries from which he died the next day (bottom of p. 18 and top of p. 19). His father, William E. Havey, as administrator of the estate of the deceased son, filed a petition for compensation under the New Jersey Workmen's Compensation Act, claiming that the deceased son left five brothers, four sisters and his mother and father, who were mostly dependent upon him (pp. 3-5). An answer was filed to the petition and the matter heard by Hon. George G. Tennant, Judge of the Hudson County Court of Common Pleas, who determined that the misrepresentation by the deceased workman of his name and age did not bar the alleged dependents from compensation under the Act; that the wages of the deceased workman were \$10.80 per week; that the five brothers, four sisters, (eight of whom were under fourteen years of age, and the other, sixteen years of age) father and mother lived together, and that the deceased workman gave his wages to his father who used them in common with his own wages for the support of the family, and that therefore the five brothers, four sisters and father and mother were entitled to compensation, under the Act; and awarded to them sixty per cent. of the wages of the deceased workman for a period of three hundred weeks (pp. 14-17). Judgment was entered on that determination. A writ of *certiorari* was allowed and the determination and judgment reviewed by the Supreme Court (pp. 1-2). The Judge of the Hudson County Court of Common Pleas had obviously applied the schedule contained in the amendment of 1913 to the Act (P. L. 1913, p. 302) which provides for sixty per cent. of the wages where there are six or more dependents. That

amendment was approved on April 1, 1913, and as the accident occurred on February 3, 1913, the case did not come under the Act as amended. The Supreme Court held that the compensation awarded was in excess of that provided by the Act as originally passed and reversed the determination and judgment entered in the lower Court on that ground, but the Supreme Court said that the misrepresentation by the deceased workman of his name and age did not bar his alleged dependents from recovering compensation under the Act, and that twenty-five per cent. of the wages could be allowed to the father and mother and twenty-five per cent. to the minor brothers and sisters, and that the Judge of the lower Court should have given a judgment based on that percentage. The judgment of the Supreme Court remanded the record to the Hudson County Court of Common Pleas for further proceedings in accordance with the views expressed in the opinion of the Supreme Court, which is in effect a direction to the Judge of the lower Court to allow twenty-five per cent. of the wages to the father and mother and an additional twenty-five per cent. to the minor brothers and sisters, making fifty per cent. in all for a period of three hundred weeks. Appellant claims that is erroneous.

2.

Grounds of Appeal.

(a). The Supreme Court erroneously determined that compensation can be allowed to the father and mother of the deceased workman, and in addition to his minor brothers and sisters, contrary to the provisions of the New Jersey Workmen's Compensation Act.

(b). The Supreme Court erroneously determined that the father and mother and minor broth-

ers and sisters of the deceased workman were all legally and actually dependent upon him within the meaning of the New Jersey Workmen's Compensation Act, and that they are all entitled to compensation thereunder.

(c.) The Supreme Court erroneously determined that the father and mother of the deceased workman were dependent upon him within the meaning of the New Jersey Workmen's Compensation Act.

(d.) The Supreme Court erroneously determined that the contract of employment entered into between Appellant and the deceased workman was not made by such fraud and misrepresentation on the part of the workman as would deprive his alleged dependents of compensation under the New Jersey Workmen's Compensation Act.

3.

Brief of the Argument.

(a.)

The Supreme Court erroneously determined that compensation can be allowed to the father and mother of the deceased workman, and in addition to his minor brothers and sisters, contrary to the provisions of the New Jersey Workmen's Compensation Act.

Paragraph 12 of Section II of the Act mentioned, as it existed at the time of the accident in this case and the death of the workman, was as follows: (P. L. 1911, p. 139).

“In case of death compensation shall be computed but not distributed on the following basis:

“(1). Actual dependents.

“If orphan or orphans, a minimum of twenty-five per centum of wages of deceased, with ten per centum additional for each or-

phan in excess of two, with a maximum of sixty per centum.

“If widow alone, twenty-five per centum of wages.

“If widow and one child, forty per centum of wages.

“If widow and two children, forty-five per centum of wages.

“If widow and three children, fifty per centum of wages.

“If widow and four children, fifty-five per centum of wages.

“If widow and five children or more, sixty per centum of wages.

“If widow and father and mother, fifty per centum of wages.

“If grandparents, grandchildren, or minor, or incapacitated brothers or sisters, twenty-five per centum of wages.

“Compensation in case of death shall be computed on the basis of the foregoing schedule, but shall be distributed according to the laws of this State providing for the distribution of the personal property of an interstate decedent, unless decedent has in fact left a will.

“(2). No dependents.

“Expense of last sickness and burial not exceeding two hundred dollars.

“In computing compensation to orphans or other children only those under sixteen years of age shall be included, and only during the period in which they are under that age, at which time payment on account of such child shall cease.

“The compensation in case of death shall be subject to a maximum compensation of ten dollars per week and minimum of five dollars per week, *provided*, that if at the time of the injury the employe receives wages of less than five dollars per week, then the compensation shall be the full amount of such wages per

week. This compensation shall be paid during three hundred weeks.

"Compensation under this schedule shall not apply to alien dependents not residents of the United States."

This paragraph of the Act was amended by an act approved April 1st, 1913 (P. L. 1913, p. 302), but the amending act is not retroactive and does not effect the present case.

The first clause of the paragraph quoted, took care of orphans when there was no widow, for of course, if the widow survived the children would not properly be termed orphans. But the workman might leave a widow and no children and the Legislature next provided for compensation to a widow alone. Next a widow and one child might survive and they were taken care of by the Legislature, and in like manner the widow and three, four and five children were provided for. In some cases it was possible that the workman might leave no children, but a widow and father and mother who were dependent upon him, and compensation was expressly allowed to such a group. There was, however, a possibility that a deceased workman might leave no children, widow, father or mother, but grandparents, grandchildren, or minor or incapacitated brothers or sisters, who were dependent upon him, and the Legislature expressly provided for such dependents in a group.

The section in question follows substantially the statute for distribution of personal estates in fixing the amount of compensation and then expressly provides that the compensation shall be distributed according to the laws of this State providing for the distribution of personal property. In view of those provisions, it is impossible to assume that in a case where the deceased workman left a widow, three children and a dependent grandfather, that the Legislature intended to al-

low fifty per cent. of the wages to the widow and three children and an additional twenty-five per cent. to the dependent grandfather, *but to give the whole seventy-five per cent to the widow and three children and leave the dependent grandfather without anything.* It is far more probable that the intention was to fix the amount of compensation at fifty per cent. of the wages and give that compensation to the widow and three children who would have taken the personal estate of the deceased workman under the statute for distribution. Again in a case where the deceased workman left a widow, five children and a dependent sister, the Legislature could not have intended that 60% of his wages should be allowed to the widow and five children, and an additional 25% to the dependent sister, *but that the entire 85% should be given to the widow and children and nothing to the dependent sister.* The maximum percentage of wages to be allowed was twice fixed by the Act at 60%, viz., in the case of orphans, and in the case of widow and children. It is clear that the intention of the Legislature was to fix that maximum at 60% in any case, yet in both of the illustrations above mentioned, if two of the groups mentioned in the Act were joined, that maximum would be exceeded. The intention of the Legislature to fix the maximum of compensation at 60% is again expressed in the amendment of 1913 to the Act which provides for 60% of the wages when there are six or more dependents. We cite the amendment, not because it applies to the present case, but to show that the Legislature intended to fix the maximum compensation at 60% in any case, and that it was not the intention of the Legislature that compensation should be allowed to two of the groups mentioned in the original Act for the purpose of increasing the amount of compensation.

The form and words of the Act as it existed at the time of the accident and death in this case indicate a plain intention of the Legislature to allow compensation to *only one* of the several groups in the order mentioned and for their benefit. If compensation is allowed to one of the groups it cannot again be allowed to another group and the whole compensation given to the one group. In the present case, compensation cannot be allowed to the father and mother and to the minor brothers and sisters in addition.

(b.)

The Supreme Court erroneously determined that the father and mother and minor brothers and sisters of the deceased workman were all legally and actually dependent upon him within the meaning of the New Jersey Workmen's Compensation Act, and that they are all entitled to compensation thereunder.

In this case the father, mother, brothers and sisters of the deceased employe and the latter, all lived at home. The deceased son and brother gave his wages to his father, who used them with his own for the support of the family. The whole family fund was apparently disbursed by the father for the support of his family, and the wages of the father or son cannot actually be traced separately to the support of any one of the alleged dependents. A common family fund is not recognized as a dependent by our act, and if such a fund gives rise to any dependency for a part of the fund the dependency is that of the father who actually gets (not necessarily earns) and disburses the fund.

Although the father may have used his son's wages to support the family, the family were none the less dependent, both legally and actually, upon

the father. If the son gave his wages to his father he helped the father to support the family, and it was the father who got the help so far as dependency of the family was concerned. The fact of dependency of the children upon the father was not changed by the son's action. The son merely helped the father to discharge his burden, and the father sustained a loss when his son's wages were cut off, for he no longer had the benefit of them to support his family.

The brothers and sisters were not legally dependent upon the deceased employee, and they were not dependent upon him in fact merely because their father was helped by him to support them. They may have derived some benefit from their brother's wages through the father's disbursement of the family fund, but that does not make them dependent upon their brother. Benefit and dependence are not synonymous. The definition of the word "dependent" as given in The Standard Dictionary is "one who looks to another for support, help or favor." While the father was living and supporting the children, irrespective of how he did it, the children looked to him for support, help or favor, and not to their brother. In cases of this kind the compensation allowed by the Act takes the place of a common law action under the statute providing for damages in case of death by wrongful act, and although under the death act suit would have to be brought by the personal representative of the deceased, at the time of the accident and death in this case, it would have been for the benefit of the father. *Fitzhenry v. Consolidated Traction Co.*, 63 N. J. L., p. 142.

If the family fund is removed from consideration, and we submit it should be under our act, in this particular case at the time of the death of the employe his father was earning fifteen dollars a week (p. 20, ll. 29-30), which may have been suf-

ficient to support the father and mother, together with some of the children, and those supported by the wages of the father obviously were not dependent in fact upon the brother. On the other hand, the wages of the son may have supported the father and mother, while the wages of the father supported the children, and the father and mother were dependent in fact on their son. It may be difficult to determine whether it was the father and mother or brothers and sisters who were dependent in fact upon the son and brother, but the difficulty is not obviated by saying they were all dependent as a family upon a common fund for neither the family or the fund is recognized by our act. To come within the act the individuals named therein must be dependent in fact not on a common family fund, but on the deceased employee. Dependency under our act is a matter of fact and the individuals named in the act are dependents upon the one they in fact look to for support, who in this case was the father.

Miller v. Public Service Ry. Co., 85 Atl., p. 1030.

If the deceased workman leaves a father and mother and several minor brothers and sisters, the Judge of the Common Pleas Court, if there is sufficient evidence, may determine that the father and mother were dependents and allow compensation to them, but compensation cannot be allowed to the minor brothers and sisters, for the minor brothers and sisters are not dependent in fact upon the deceased brother while the father is living.

The Courts have decided that in case a workman left a father and mother but no widow, the father and mother are entitled to 25 per cent. of the wages. *Blanz v. Erie Railroad Co.*, 84 N. J. L., p. 35; 85 Atl. 1030, *aff'd.* 85 N. J. L., p. 367. In that case there were no minor brothers and sisters.

It was held in the case of *Muzik, Admr. v. Erie Railroad Co.*, 85 N. J. L., p. 127, recently affirmed by the Court of Errors and Appeals, that persons only partially dependent are entitled to compensation under the compensation act, but the point that it was the father of the deceased employee who was partially dependent in fact upon his deceased son and not the brothers and sisters of the latter was not passed upon. In that case the minimum of compensation applied and the number of partial dependents was unimportant.

In the case of *Quinlan v. Barber Asphalt Paving Co.*, 87 Atl., p. 127, the workman left no widow but did leave a mother and brothers and sisters and compensation of 25 per cent. was allowed to the mother.

The case of *Reardon v. Philadelphia & R. Ry. Co.*, 88 Atl., p. 970, was one in which the workman left surviving his father and mother and two brothers and a sister, and in that case 25 per cent. of the wages was allowed.

In the case of *Krauss v. George H. Fritz & Son*, 93 Atl., p. 578, a petition for compensation was filed by the mother as administrator of a deceased workman. The decedent (18 years of age), was a son by a first marriage, and his mother by her second marriage had seven children. The whole family, including the second husband, lived together and was supported by the husband, who earned \$11. a week, and by the deceased workman, who earned \$6 a week and who contributed \$5 thereof weekly to the family fund. It appeared that the other children were too young to earn money. It was held that the mother was an actual dependent upon the deceased workman. In that case, although there were minor half brothers and half sisters, the compensation was allowed to the mother and not to the half brothers and half sisters.

The decisions under the Compensation Act of Great Britain are not helpful on this point, for that act is different from the New Jersey Act. The British Act defines dependents as "such of "the members of the workman's family as were "wholly or in part dependent upon the earnings "of the workman at the time of his death, or would "but for the incapacity due to the accident have "been so dependent, and where the workman, being "the parent or grandparent of an illegitimate child, "leaves a child so dependent upon his earnings, or, "being an illegitimate child, leaves a parent or "grandparent so dependent upon his earnings, "shall include such an illegitimate child, and parent or grandparent respectively. That act also "defines 'member of a family' as 'wife or husband, father, mother, grandfather, grandmother, "step-father, step-mother, son, daughter, grand- "son, granddaughter, step-son, step-daughter, "brother, sister, half-brother, half-sister.'" (*Ruegg's Employers' Liability and Workmen's Compensation*, p. 700).

It will be observed that the British Act recognizes the *family* of the workman as a collective whole, and allows compensation to the dependent members of such family, while our act does not recognize the family as such, and allows compensation only to certain individuals or groups of individuals. Under the British Act each of the members of the workman's family *as members of the family* may be in whole or in part dependent upon his wages as part of a family fund, but under our act as it existed at the time in question, the dependency must be that of individuals upon the employee.

If there was any dependency in the present case, such dependency was that of the father and not of the minor brothers and sisters and no compensation should be allowed to the minor brothers and sisters.

(c.)

The Supreme Court erroneously determined that the father and mother of the deceased workman were dependent upon him within the meaning of the New Jersey Workmen's Compensation Act.

The evidence in this case was that the deceased workman, a young man eighteen years old, had worked off and on for about two years, and that he gave his wages to his father who used them, with his own, for the support of the family. Such evidence is not sufficient to support a determination that the father and mother were actually dependent upon him. The fact that the boy worked unsteadily creates a doubt that he earned more than enough to support himself. How much of his wages were actually used for his support and maintenance, we do not know. It may have been all of them. The mere fact that he gave his wages to his father proves nothing as to those facts.

The theory of the New Jersey Workmen's Compensation Act is compensation to dependents, in case of death, for that which they have lost. Not full compensation for all that has been lost, for the dependents give up part of what has been lost in return for certainty of compensation. In theory the dependency rests not alone upon actual contribution at the time of the accident but also upon a presumption of fact or of law that the contribution would have continued except for the accident. In the case of an adult voluntarily supporting others there is a presumption of fact that the support would have continued except for the accident. In the case of a father there is a presumption of law that he would have continued to support his family except for the accident. The case of an infant is different for there is no presumption that he would have continued to give his wages to his father *after he became of age.*

May, Admx., v. West Jersey, &c., R. R. Co.,
62 N. J. L., 67.

The question that naturally arises is this. Did the Legislature, in the case of the death of an adult, intend to give to the alleged dependents, some part of the support that would have been continued except for the accident; but in the case of the death of an infant to give something more than the support that would have been presumed by law to have continued except for the accident? If so, in the latter case, the Act ceases to be a compensation act and becomes an act for the recovery of arbitrary damages not justified by any presumption. It is doubtful whether the Legislature considered the element of dependency in the cases of infants. Their work is uncertain, their wages are low, and often only about enough to keep themselves, their action after they become of age cannot be foretold. Damages because of loss of the earnings of an infant after he becomes twenty-one years of age would not have been allowed by law. Those facts lead to a reasonable conclusion that the Legislature may have considered that there was no actual or legal dependency in the cases of infants and did not intend to give compensation to those who get the wages of an infant, upon the basis of dependency. If the Court takes that view, the father and mother in the present case were not dependents within the meaning of the Act and no compensation can be allowed to them.

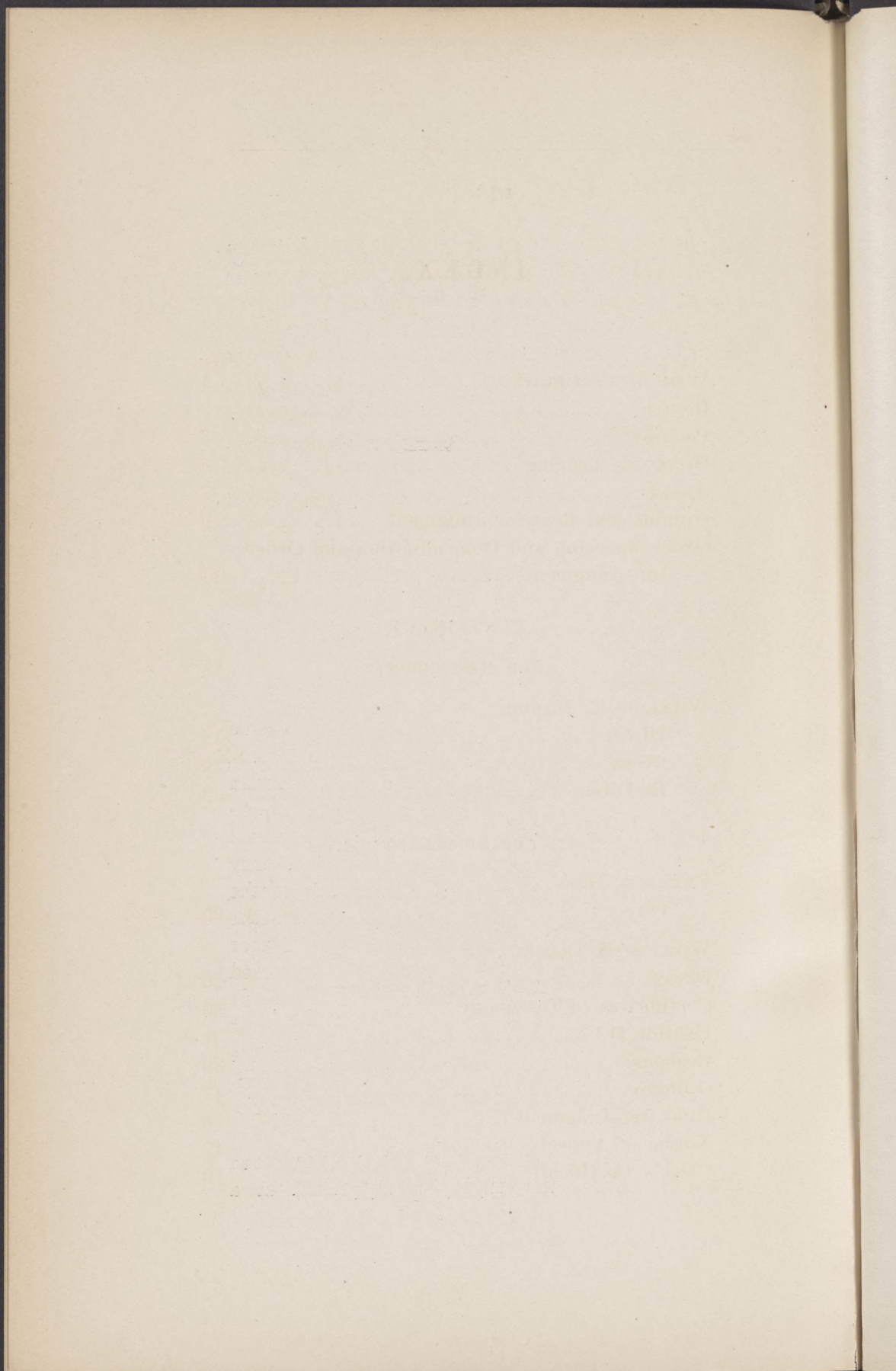
(d.)

The Supreme Court erroneously determined that the contract of employment entered into between Appellant and the deceased workman was not made by such fraud and misrepresentation on the part of the workman as would deprive his alleged dependents of compensation under the New Jersey Workmen's Compensation Act.

The right to compensation under the New Jersey Workmen's Compensation Act depends upon the contract of employment. The name of the workman in this case was Garret Nathan Havey and his age at the time he entered Appellant's employ was eighteen years, (p. 22, ll. 36, 37). He stated his name to be John Joseph Havey and his age to be twenty-one years (p. 21). That was a misrepresentation and a fraud. The only question is whether Appellant acted upon the misrepresentation. Mr. Mantell, Terminal Train Master, certified that he considered the applicant *described* in the application for work as a suitable person to enter Appellant's regular service, and the application was approved by Mr. June, Superintendent of Employment Bureau on that certification (p. 34). That shows that Appellant acted upon the misrepresentation. The contract of employment having been made through misrepresentation and fraud on the part of the workman, there can be no recovery under the Act.

We respectfully submit that the views expressed in the opinion of the Supreme Court, and the judgment of that Court ordering further proceedings in the Hudson County Court of Common Pleas in accordance with those views are erroneous and should be reversed.

GEORGE S. HOBART,
ROBERT J. BAIN,
Of Counsel with Appellant.



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Writ of Certiorari.

(Issued September 15, 1914.)

NEW JERSEY, :::

THE STATE OF NEW JERSEY to Hon.
George G. Tennant, Judge of the
Hudson County Court of Common
(LS) Pleas, and John F. Crosby, Clerk
of said Court, Greeting: 10

We being willing, for certain reasons, to be certified of and concerning a certain determination and judgment made and rendered by Honorable George G. Tennant, Judge of the Hudson County Court of Common Pleas, on the petition of William E. Havey, Administrator, &c., of Garret Havey, deceased, to recover compensation from the Erie Railroad Company under an Act of the Legislature of the State of New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder", approved April 4, 1911, and the petition, order and proceedings upon which such determination and judgment were based, do command you that the said petition, 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 the Justices of our Supreme Court of Judicature, at Trenton, on the fifth day of October, Nineteen hundred and fourteen, that therein may be done what of right and according to law ought to be done, 40

WITNESS, WILLIAM S. GUMMERE, Chief Justice
of our Supreme Court, at Trenton, aforesaid, this
fifteenth day of September, Nineteen hundred and
fourteen.

COLLINS & CORBIN,
Attorneys.
Wm. C. Gebhardt,
Clerk.

ALLOCATUR:

10 I allow this writ. Let it be sealed.
Dated, Sept. 15, 1914.

F. J. SWAYZE,
J. S. C.

Return.

(Filed October 5, 1914.)

20 The answer of George G. Tennant, Esq., Judge
of the Court of Common Pleas, holden in and for
the County of Hudson, and of John F. Crosby,
Clerk of said County, and within named, the record
and proceedings of the plaint, whereof mention is
within made with all things touching the same,
we certify to the Justices of our Supreme Court
of Judicature at Trenton, N. J., at the day and
year within contained in a certain schedule to this
writ annexed, as within we are commanded.

30 GEORGE G. TENNANT,
Judge.
John F. Crosby,
Clerk.
(L. S.)

Petition.

(Filed, November 21, 1913.)

Hudson County Court of Common Pleas.

To the HON. MARK A. SULLIVAN, Judge of the Hudson County Court of Common Pleas.

Your petitioner, William E. Havey, residing at 103 Van Winkle Avenue, Jersey City, New Jersey, respectfully shows:

1. That on the third day of February, nineteen hundred and thirteen, Garret Havey was employed by the Erie Railroad Company at its yards in Jersey City, as brakeman, and was doing night work. That on the said night, while the said Garret Havey was so engaged in his position as brakeman, and while coupling the cars belonging to the said Erie Railroad Company, the said cars suddenly and without warning or notice to the said Garret Havey were forced together by an engine belonging to the said Erie Railroad Company, and operated by its servants and employees, so injuring said Garret Havey, that he became and was unconscious and was taken to St. Francis Hospital, Jersey City, where he died. 10

2. Said Garret Havey was earning in his employment with the said Erie Railroad Company, at the time of the aforesaid accident, a salary of about \$110.00 per month. 20

3. Said Erie Railroad Company had actual knowledge of the aforesaid accident through its Claim Agent, Mr. Knapp, who was immediately informed of the accident by their employees of said Company. 30

4. Said Garret Havey has nine brothers and sisters, whose names are as follows:

Rosalie C., Edward J., James W., Marie; Florence, Claire, George, Mildred, Frances; Rose Havey, the mother, and your petitioner, William 40

Petition.

E. Havey, who is the father. All the brothers and sisters are infants, under the age of twenty-one years; all of whom were mostly dependent on said Garret Havey for support, and having very little other means of support except that derived from the wages of said Garret Havey.

10 5. Your petitioner further shows that by reasons of the facts herein set forth in pursuance of an act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating a procedure for the determination of liability and compensation thereunder." Being Chapter 95 of Laws of 1911, your petitioner is entitled to receive from said Erie Railroad Company, the sum of \$10.00 per week
20 for 300 weeks.

Your petitioner therefore prays, as administrator of the estate of said Garret Havey, that his rights in the premises be determined, and liability of the said Erie Railroad Company to pay to your petitioner the compensation at the rate of \$10.00 per week for 300 weeks.

30 The only other means of support than the efforts of the said Garret Havey, deceased, available to the family of said Garret Havey, are the wages earned by the father, which at present are insufficient to support the said family.

Your petitioner, therefore prays that the amount payable periodically be computed by the Court to one or more lump sum payments, and that your petitioner may have judgment for the said sum or sums, and for such other and further relief as may be just.

And your petitioner will ever pray.

40

WILLIAM E. HAVEY,
Petitioner.
TUMULTY & CUTLEY,
Attorneys.

Petition.

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

WILLIAM E. HAVEY, of full age, being duly sworn upon his oath, deposes and says, that he is the petitioner in the foregoing petition mentioned, and that he has obtained from John P. Egan, the Surrogate of Hudson County, letters of Administration in the Estate of Garret Havey, deceased, and that the contents of the foregoing petition are true to the best of his knowledge, information and belief.

10

WILLIAM E. HAVEY.

Sworn to and subscribed before me }
 this 20th day of November, nineteen }
 hundred and thirteen. }

Jos. M. Branegan,
 Attorney at Law.

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Order for Hearing.

(Filed November 21, 1913.)

Hudson County Court of Common Pleas.

WILLIAM E. HAVEY, Administrator,
Petitioner,

vs.

THE ERIE RAILROAD COMPANY, a
Corporation, etc.,
Defendant.

Order.

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Upon reading and filing the duly verified petition hereto annexed of the petition herein, William E. Havey, I do hereby order that this cause be heard before me on the 19th day of December, nineteen hundred and thirteen, at two o'clock P. M., at the Court House at Jersey City, that a duly certified copy of this order, and the verified petition in this cause shall be served upon the defendant as required by law.

GEORGE G. TENNANT,
Judge of the Hudson County
Court of Common Pleas.

Filed Clerk's Office,
Nov. 21, 1913,

30 Hudson County, N. J.
John F. Crosby,
Clerk.

40

Answer.

(Filed November 29, 1913.)

Hudson County Court of Common Pleas.

WILLIAM E. HAVEY, Administrator,
etc., of the Estate of Garret
Havey, deceased,

*Petitioner,**vs.*

ERIE RAILROAD COMPANY,

Defendant.

On Petition.

10

The defendant, Erie Railroad Company, a corporation of the State of New York, answering the petition in above matter, says that:

1. It has no knowledge of the allegations contained in the first paragraph of the petition, but says that if the man referred to in said paragraph as Garret Havey, was the man who entered the employ of the defendant under the name of John Joseph Havey, then said man was injured while in the employ of defendant as a yard brakeman at Croxter, N. J., on February 3, 1913, by being run over by a freight car, such accident being caused by his slipping and falling under the wheels of said car, but defendant leaves petitioner to prove that the death of said employee was caused by said injuries.

20

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2. It denies the second paragraph of the petition, and says the man who entered its employ under the name of John Joseph Havey was receiving from it as wages at the time he was injured an average sum of \$8.28 per week.

3. It admits that it had actual knowledge of the accident to its said employee.

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Answer.

4. It has no knowledge of the allegations contained in the 4th paragraph of the petition.

5. It denies the fifth paragraph of the petition.

6. Petitioner is not entitled to the compensation claimed because said deceased employee left no dependants who were actually, legally and entirely dependant upon him.

10 7. It denies that petitioner is entitled to compensation under the Act mentioned, on the ground that if the man who entered the employ of the defendant under the name of John Joseph Havey was in fact Garret Havey, then said contract of employment was entered into by fraud and misrepresentation, in that said employee misrepresented his name and misrepresented his age to be 21 years, when in fact it was 18 years.

20 8. It denies that if petitioner is entitled to any compensation such compensation should be commuted to one lump sum, for the reason alleged in the petition.

Dated, November 26, 1913.

COLLINS & CORBIN,
Attorneys of Defendant.

STATE OF NEW YORK, }
City and County of New York, } ss.:

30 DAVID BOSMAN, of full age, being duly sworn, according to law, on his oath, says that he is Secretary of the Erie Railroad Company, a corporation, the defendant named in the foregoing answer, and that said answer is true to the best of his knowledge and belief.

DAVID BOSMAN.

Sworn and subscribed to at Borough of Manhattan, this 28th day of November, 1913, 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.

(SEAL) A. L. Travis,
A Foreign Commissioner of Deeds
for New Jersey in New York.

Filed Clerk's Office,
November 29, 1913,
Hudson County, N. J.

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John F. Crosby,
Clerk.

Opinion and Rule for Judgment.

(Filed Jan. 5, 1914.)

Entered Jan. 16, 1914.

Hudson County Court of Common Pleas.

TENNANT, J.

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WILLIAM E. HAVEY, Administrator,
of Garret Havey, deceased,

vs.

ERIE RAILROAD COMPANY.

On Petition
for Compensa-
tion under
Employers'
Liability Act.

THE COURT (Tennant, J.): The petitioner is the administrator of Garret Havey, who was employed as a brakeman by the defendant. At the time of his death the decedent was not working on full time. From January 1st, 1913, to January 15th, 1913, his wages were \$10.68. He worked four days during that period, starting on January 10th. From January 16th to 31st, his wages were \$22.46, his work being for five days during that period. In February he worked one day full time, and his compensation therefor was \$3.85. I calculate that his daily wage averaged about \$3.60.

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Opinion and Rule for Judgment.

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His average weekly wage must be calculated having regard to his employment at the time of his death. He was a substitute or extra man, with no continuous employment, and I do not understand that I can calculate the possibilities of continuous employment if he remained in the service. The legislature has fixed the method of computation in this respect. I find that he was working
 10 on half time, and that his wages, based upon that fact, were \$10.80 per week.

While there was a prayer for commutation, there is no sufficient reason shown for commutation, and I will not allow same.

Evidence was presented on behalf of the defendant that at the time the deceased made application for employment he stated his name to be John Joseph Havey, when in fact his name was
 20 Garret Havey, and that he gave his age as being twenty-one years, when in fact it was eighteen. It is urged that as the contract of employment was secured by deliberate misrepresentation, the compensation act does not apply. I do not think that this was such a fraud, if fraud it was, that it should take from the administrator the right to claim compensation under the act.

It is further urged on behalf of the defendant that as those who claim contribution through the administrator are only partial dependents, there
 30 can be no compensation allowed in this case. In support of this contention it is said that when this legislation was first presented to the legislature the draft of the act accompanying the Governor's message contained the following provision :

“Partial dependents. Fifty percentum of the “portion of the wages contributed by the deceased “to the partial dependents”

40 and that when the act was passed the term “par-

Opinion and Rule for Judgment.

tial dependents" was omitted. And the act now refers to "actual dependents" and "no dependents."

The fact that the Legislature omitted from the Enactment the reference to "Partial dependency" is urged against making allowance in this case, because the deceased was one of several who contributed towards the support of those who now make claim to share in the compensation. As already observed the present legislation makes distinction only between "actual dependents" and "no dependents." If the legislature intended to have the compensation apply to sole dependents, I think the intention would have been clearly expressed; and this is more manifest when by the very change between the original draft printed in the Governor's message and the final enactment it is obvious that the particular question must have been considered.

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It seems to me that the omission of the word "sole" is as important, to say the least, as the change from "partial dependency" to "dependency".

A number of English cases point out quite clearly that dependency is not a question of law but a question of fact. So that in the case now under consideration the question may properly be asked. Were the persons, for whom the petitioner made his claim, dependent upon the deceased? The answer to be derived from the testimony in this case is as to some "yes"; to others it might be said, "yes, to some extent". What right has this Court to say that those who were to some extent dependent upon his wages should be cut off from the benefit of the act? Moreover, by the 12th section of the act (amendment of 1913) the term "dependents" is defined to be that it "shall apply to and include any or all of the following who are

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Opinion and Rule for Judgment.

dependent upon the deceased at the time of the accident or death, namely"—and the act includes "brothers, sisters, etc." Now, in thus so defining, if the legislature intended that those named were to be "solely dependent" it seems clear to me that they would have said so in no unmistakable language. True this amendment was passed after the accident to this petitioner. But the reference is made only to indicate the legislative intent.

10

Since the determination in the case of *Davis v. Main Colliery Co.*, by the Appellate Court, the same County Judge before whom that case was first heard has had to deal with a similar situation in *Howells v. Vivian & Sons*, (85 L. T., 529; 18 T. R., 36). The deceased lived at home with his father and mother. He paid his earnings into a common family fund used by his mother in the general family support. The county judge said that as the father could have maintained the family without help from the son, he was not dependent upon his son's earnings and refused compensation. The Court of Appeals held this was wrong. The Master of Rolls said that "the county court judge seemed to have acted under a misconception as to the law laid down by the House of Lords in *Main Colliery Co. v. Davis*, (supra). He had adopted as the test of dependency the question whether the person alleged to be a dependent could support life without the assistance of the deceased, and he thought that dependency was negative if that person could subsist without assistance. The judgment of the House of Lords seemed to preclude them from laying down any definite standard by which to test dependency, but the decision of the county court judge was clearly contrary to what the learned lords stated to be their clear view of the question." In *Rueggs Workmen's Compensation*, the author comments upon the foregoing as

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Opinion and Rule for Judgment.

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follows (p. 395): "This case seems to be an authority for the proposition that when death has resulted in the diminution of a common family fund, used by the head of the family to support its various members, it is not open to an arbiter to find, as a question of fact, that the head of the family was not dependent upon the contribution withdrawn in consequence of the death."

The testimony in this case is sufficiently clear for me to find that there were six or more dependents. 10

Accordingly the amount to be paid in this proceeding will be 60 per cent. of the wages as hereinbefore determined; that is 60 per cent of \$10.80 for a period of 300 weeks.

If there is to be any distribution of this sum among those who are entitled to share, counsel may make application for that purpose. As I understand, however, all of those entitled to receive, excepting the petitioner himself, are infants; and under the act payment may be made to the parents. 20

GEORGE G. TENNANT,
Judge.

And it is further ordered that judgment final be entered in favor of the petitioner and against the defendant for the sum of Nineteen Hundred and Forty-four Dollars payable in 300 weekly payments of \$6.48 each. Besides costs of suit which are taxed at the sum of \$7.60. 30

Rule actually entered January 16, 1914.

On motion of

GEO E. CUTLEY,
(Tumulty & Cutley),
Attorney for Petitioners.

Filed Clerk's Office,
Jan. 5th, 1914.
Hudson County, N. J.

John F. Crosby,
Clerk. 40

**Order Vacating and Determination and
Order for Judgment.**

(Entered June 29, 1914.)

Hudson County Court of Common Pleas.

10	WILLIAM E. HAVEY, Administrator, etc., of Garret Havey, deceased, <i>Petitioner,</i>	}	On Petition.
	<i>vs.</i>		
	ERIE RAILROAD COMPANY, <i>Defendant.</i>		

It appearing that the determination of fact and order for judgment entered in the above matter on January 16th, 1914, was erroneously entered.

20 It is, on this 29th day of June, Nineteen Hundred and fourteen, ORDERED that said determination and order for judgment be and they hereby are vacated and set aside, and that the following determination of facts and order for judgment be entered in place and stead thereof:

30 I. A petition having been presented by William E. Havey, Administrator, &c., of Garret Havey, deceased, to Hon. George G. Tennant, one of the judges of the Hudson County Court of Common Pleas, on November 15th, 1913, praying for a determination of the amount of compensation due the petitioner from defendant pursuant to the provisions of an act of the Legislature of the State New Jersey, entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation there-

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Order Vacating and Determination and Order for

under," approved April 4, 1911, and the supplements thereto and amendments thereof; and such petition having been filed with the clerk of the Hudson County Court of Common Pleas on said day, and said judge upon the presentation and filing of said petition having by order fixed December 19, 1913, at two o'clock P. M., at the time and place for the hearing thereof, and a copy of said petition and order having been duly served on defendant on November 22, 1913, and the defendant having filed an answer to said petition on November 29, 1913, and both parties by their respective attorneys and counsel appearing on December 19, 1913, and the matter having been heard by said judge, the facts are determined as follows:

2. On February 3, 1913, Garret Havey, for whose death compensation is sought, was employed by the defendant as a substitute or extra brakeman at Croxton, Hudson County, New Jersey, at wages amounting to \$3.60 per day, but having no continuous employment, he entered employ of defendant under the name of John Joseph Havey and at that time gave his age as twenty-one years, when in fact is was eighteen years, but said misrepresentation was no such fraud as deprives his dependents of compensation.

3. From January 1, 1913, to January 15, 1913, said Garret Havey was actually employed by defendant for four days and received \$10.68 as wages, and from January 16, 1913, to January 31, 1913, he was actually employed by defendant for five days and received \$22.64 as wages; therefore his average wages were \$10.68 per week.

4. On February 3, 1913, said Garret Havey, while employed by defendant as a yard brakeman at Croxton, aforesaid, slipped and fell under the wheels of a freight car and sustained injuries from

Order Vacating and Determination and Order for

which he died; and that said accident arose out of and in the course of his employment by defendant.

5. Defendant had actual knowledge of said accident.

10 6. Said Garret Havey died as a result of said accident on the day thereof and left him surviving his father, William E. Havey, the petitioner, his mother, five brothers, and four sisters, eight of the brothers and sisters being under fourteen years of age; the other sister being sixteen years old; the entire family lived together, and said Garret Havey gave his wages to his father who used them for his support and in common with the wages of the father for the support of the family; therefore the father and mother, five brothers and four sisters, are entitled to compensation.

20 7. No claim was made by petitioner for medical and hospital services and medicines.

8. Compensation amounting to sixty per cent. of \$10.80, the average weekly wages paid to said Garret Havey by the defendant at the time he was injured as aforesaid for a period of three hundred weeks, is awarded to petitioner and the other dependents above mentioned; no sufficient reason appears for commuting such compensation and same will not be commuted.

30 9. Petitioner is allowed costs in this matter to be taxed.

40 It is therefore on this 29th day of June, Nineteen hundred and fourteen, ORDERED that judgment final be entered in favor of petitioner, William E. Havey, Administrator of the estate of Garret Havey, deceased, and against defendant, Erie Railroad Company for the sum of six dollars and forty-eight cents per week for a period of three hundred weeks, with costs to petitioner to be taxed.

GEORGE G. TENNANT,
Judge.

Order Vacating and Determination and Order for

Entered July 6, 1914,

On motion of

GEORGE E. CUTLEY,
Attorney of Petitioner.

We hereby consent to the form but not the substance of the within order.

COLLINS & CORBIN,
Attorneys of Defendant. 10

Filed Clerk's Office,
July 6th A. D., 1914.
Hudson County, N. J.
John F. Crosby,
Clerk.

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Testimony.

Hudson County Court of Common Pleas.

TENNANT, J.

10	WILLIAM E. HAVEY, Administrator, of the Estate of Garret Havey, Deceased, <i>vs.</i> ERIE RAILROAD COMPANY,	}	On Petition for Compensa- tion under Employers' Liability Act.
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TRIAL of the above entitled cause, December 19,
 1913, before HON. GEORGE G. TENNANT, Judge.

APPEARANCES :

Mr. GEORGE CUTLEY for the petitioner.
 20- Mr. BAIN (MESSRS. COLLINS & CORBIN) for the
 defendant.

WILLIAM E. HAVEY, the petitioner, being sworn,
 testified as follows:

DIRECT EXAMINATION BY MR. CUTLEY :

Q. You are the father of Garret Havey? A.
 Yes.
 30 Q. When did he die? A. February 3, 1913.
 Q. By whom was he employed at the time of
 his death? A. The Erie Railroad Company.
 Q. In what capacity? A. As brakeman.
 Q. Do you know the circumstances of his death?
 A. Yes.
 Q. What do you know? A. He slipped from
 the top of a car.
 Q. Did you see him the night he was injured?
 40 A. Yes.

William E. Havey—Direct.

Q. How soon before he died? A. About an hour.

Q. What time did he die? A. About quarter to three.

Q. In the evening? A. In the morning.

Q. What time did this accident happen? A. Quarter to eleven.

Q. Where did he die? A. St. Francis Hospital.

Q. Do you know how long he was working on the railroad? A. He worked about ten days. 10

Q. Do you know what his wages amounted to? A. His wages amounted to thirty-seven dollars and twenty cents.

Q. As administrator have you collected those wages? A. Yes.

Q. Do you know anything of the circumstances of his working as "John Joseph Havey"? A. I didn't know that until I seen the— 20

Q. After his death? A. Yes.

Q. How old was he? A. Eighteen.

Q. Are you married? A. Yes.

Q. Where do you live? A. 103 Van Winkle Avenue, Jersey City Heights.

Q. How many in the family? A. Nine.

Q. Nine boys and girls? A. There is five boys and four girls.

Q. What are their names? A. Rosalie, Marie, Claire, Florence, George, Edward, James— 30

Q. Nine altogether? A. Nine altogether.

Q. How many of those working? A. One.

Q. Which one? A. The oldest girl.

Q. Rosalie? A. Yes.

Q. How long had your son, Garret Havey, been working prior to his death? A. Well, he didn't work steadily—off and on from the time he left school.

Q. How long ago? A. Sixteen years old.

Q. What place did he work? A. The Erie Railroad. 40

William E. Havey—Cross.

Q. What wages did he receive, ordinarily? A. He worked for the Erie Railroad previous to that.

Q. In what capacity? A. As messenger boy.

Q. What salary did he get?

MR. BAIN: I object.

A. I couldn't say what salary he was getting at that time.

10 Q. What did he do with his wages? A. Brought it home and gave it to me.

Q. What part of it? A. All of it.

Q. What was done with it—used in the maintenance of the family? A. Yes.

Q. What salary do you receive?

MR. CUTLEY: On the question of dependency.

(Question withdrawn.)

20 Q. Garret Havey did contribute to the support of the family? A. Yes.

Q. You used them in the maintenance of yourself, and your children and your wife? A. Yes.

CROSS EXAMINATION OF MR. BAIN:

Q. How old was Garret when he died? A. Eighteen years old.

30 Q. What wages did you earn at the time Garret died? A. Fifteen dollars a week.

Q. What wages did your daughter, Rosalie, earn? A. She wasn't working at that time.

Q. Did any of the family work at the time he died? A. Nobody at all, only myself.

Q. How much did Garret actually give you each week of his wages? A. He gave me all his wages.

40 Q. How do you know he gave you all? Do you know what he received? A. Not from the Erie Railroad, but when he was braking before, I know what he received.

William E. Havey—Cross.

Q. Two weeks before he died, how much of his wages did Garret give to you? A. He gave it all to his mother.

Q. How much was it? A. Something around ten dollars, I think.

Q. Did that represent one week's or two week's wages? A. About four days.

Q. Ten dollars, four day's wages? A. I think so. 10

Q. You are not sure? A. I think it is four days.

Q. He worked as brakeman for the Erie Railroad Company during the month of January, and three days in February, didn't he? A. Yes.

Q. Do you know what his wages amounted to for those thirty-four days? A. Thirty-four days?

Q. Yes. A. He didn't work thirty-four days.

Q. For those four weeks and three days? A. His wages amounted to \$37.27 for the ten days he worked. 20

Q. Did you get the wages that were due to Garret for the month of January, 1913?

MR. CUTLEY: He has testified he didn't work during the entire month of January.

Q. Did you get the wages that were due to Garret for the month of January? A. No, not the entire month; it was on the 18th, I think, he started to work. 30

Q. When? A. The 18th of January.

Q. Are you sure about that? A. I am pretty sure; yes.

Q. How much did he earn for the three days in February? A. The three days in February; well, the same as any other brakeman.

Q. How much? Do you know? A. The same as he did—that is according to the work, the time he worked. 40

William E. Havey—Cross.

Q. Do you know how much he did earn? A. Not exactly; no.

Q. You are not in a position to state how much he earned during those three days in February? Do you know of your own knowledge how much he earned during the month of January, or any part of the month of January, he worked for the company? A. No; I have his time down on a slip at home. I haven't it with me.

10

Q. You don't know how much he earned on an average during the month of January? A. No, not during the month of January.

Q. You don't know as an actual fact, and cannot state at this time, what his wages were at the time he died? A. At the time he died he was being paid as brakeman.

Q. Can you state of your own knowledge what his wages were at that time? A. How much he got an hour.

20

Q. How much he got per week at that time? A. Amounted to about twenty-four or twenty-five dollars, I guess, six days.

Q. Do you know that of your own knowledge?

THE COURT: Is there any doubt about it?

Q. Do you actually know of your own knowledge? A. Do you remember what that check was for, Mr. Cutley?

30

Q. Do you know of your own knowledge how much he got at the time he died? A. No, I cannot answer that, although I got the time, home. I have in the book where he had it wrote, himself.

Q. What was his full name? A. Garret Nathan Havey.

Q. Is your wife living? A. Yes.

Q. She looks after the house? A. Yes.

40

Q. All your children go to school? A. All that is old enough; yes. There is three, isn't.

William E. Havey—Re-Direct.

Q. How many are under fourteen? A. Eight.

Q. All under fourteen? A. Yes.

Q. Only one over fourteen? A. Yes.

Q. That one never did any work, the one that is over fourteen? A. She is working now.

Q. Was she working before Garret died? A. No.

FURTHER DIRECT EXAMINATION BY MR. CUTLEY: 10

Q. Your only information about the wages came from the amount you received from the railroad company for ten days' pay, amounting to thirty-seven dollars? A. Thirty-seven dollars and some cents.

MR. BAIN: I object. He has testified he doesn't know.

Q. You signed for that, didn't you, as administrator? A. Yes. 20

Q. Do you know how many days in all he worked for the company when he went back? A. Ten days in all.

Q. Ten days? A. Yes.

Q. That check was for that ten days? A. He had worked three days previous to that. That was what it amounted to, for the ten days he worked, amounted to \$37.20.

Q. Do you know that that \$37.27 represented only ten days' wages? A. Ten days' wages. 30

Q. Are you sure? Do you know? A. I can't figure it up. I might have made a mistake, but I don't think I did.

Q. (By Mr. Bain.) You really didn't know anything about it, did you? A. Yes, I did, certainly.

Q. (By Mr. Bain.) You got your idea only from that check you got from the company for some wages—you don't know how many days' 40

William E. Havey—Re-Direct.

wages that check was for, do you? A. Well, I don't remember.

Q. What did you sign for? You received a check and signed for something. What was it for? A. Twenty-six dollars.

Q. What does that represent? A. His wages.

Q. How do you know that? Did you get it from the railroad company, collect it from the railroad company? A. I don't know.

Q. Did you sign for it? A. Yes.

Q. Did you see whether there was a note on the slip when you signed for it, as to what length of time that was for? A. I got that slip there yet. You sent that slip to me.

Q. Did you go to the railroad company and collect it? A. Yes, I went there afterwards.

Q. Was there any endorsement on the check as to what length of time that check was payment for? A. No.

Q. Then how did you fix in your mind that it was for ten days' pay? A. I didn't say the check was for ten days' pay.

Q. You said thirty-seven dollars was for— (Interrupted.) A. I said the time he worked amounted to \$37.20.

Q. How long was that time? A. Ten days.

30 THE COURT: It is admitted that the deceased at the time of the injury was employed by the defendant, and that the injury was the result of an accident which arose out of and in the course of his employment, as alleged in the petition.

MR. BAIN: Yes.

Frank A. Hass—Direct.

FRANK A. HASS, a witness produced on behalf of the defendant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. BAIN:

Q. What is your position? A. Chief clerk in the Employment Bureau of the Erie Railroad.

Q. Have you charge of the applications for employment? A. Yes. 10

Q. Have you with you the application made by John Joseph Havey for employment with the company? A. Yes.

Q. Will you produce it? A. (Witness produces a paper.)

Q. Was that application sworn to before you? A. Yes.

Q. To what facts did Mr. Havey swear when he signed that application? 20

THE COURT: It speaks for itself.

MR. BAIN: It is not an acknowledged instrument, that proves itself.

THE COURT: Is this the paper he signed?

MR. BAIN: Yes, but he didn't see him sign it; he took his oath to it.

Q. Did you take the affidavit of Mr. Havey to that application? A. I did.

Q. Did he swear to the facts stated in that affidavit? A. Yes. 30

MR. BAIN: I offer it in evidence.

(It is marked Exhibit D-1 in evidence.)

Q. Is that the application under which he entered the employ of the company? A. Yes.

NO CROSS EXAMINATION.

William F. Dorsey—Direct.

WILLIAM F. DORSEY, a witness produced on behalf of the defendant, being sworn, testified as follows:

DIRECT EXAMINATION BY MR. BAIN:

Q. What is your occupation? A. Time-keeper of the Erie Railroad.

10 Q. Have you charge of the time book of the yard brakeman at Croxton? A. I have.

Q. Will you produce the time book which indicates the time of Mr. Havey, a yard brakeman at Croxton? A. (Produces a book.)

Q. Will you turn to it and tell us the amount of wages Mr. Havey received from January 1st to January 15th, while in the employ of the company—1913? A. \$10.68, from the 1st to the 15th inclusive.

20 Q. How much did he receive from the 16th to the 31st? A. Two items in there, one of \$18.14 and one of \$4.32.

Q. Making a total of \$22.46? A. \$22.46.

Q. Making a total for the month of \$33.14? A. Yes.

BY THE COURT:

Q. Why was it so much less in the first fifteen days? A. He only worked four days.

30 Q. January 1st to 15th,—really only four days, four working days? A. That was all; he was an extra man, he had no steady position. He reported every day; when there was work for him he worked.

Q. How many days did he work from the 16th to the 31st? A. Five days.

Q. How many days did he work in February, 1913? A. One day. He was allowed overtime the night he was injured.

40 Q. That was the only day he worked in February? A. That was the only day.

William F. Dorsey—Direct.

Q. How much did he get for that one day?
 A. \$3.85. He was allowed forty-five minutes of extra overtime; ten hours and forty-five minutes;—the day is ten hours—the same as the rest of the crew. The whole crew got overtime.

BY MR. BAIN:

Q. Did he get any fixed weekly wages? A. No, sir; the first two days he worked in the Clerk's office, at the rate of forty dollars a month, as yard clerk; two days at the rate of forty dollars a month. 10

Q. That was not as freight brakeman? A. No. The rest of the time he was night freight brakeman.

Q. Tell us the total number of days he worked in January and February and the total amount of time he worked? A. His total amount for February was \$3.85.

Q. What was the total amount for January? 20

THE COURT: In January he worked nine days and got \$33.14.

THE WITNESS: The figures I gave you.

Q. Apparently he worked ten days altogether; for those days he got \$3.69 a day average. A. A brakeman's salary is \$3.60 a day; anything over that is overtime.

Q. His regular pay was \$3.60 a day? A. That overtime of forty-five minutes was allowed him on the last day. 30

Q. But he never worked six full days a week in any week, during the time he was employed as such brakeman? A. This is overtime (indicating).

Q. He never earned \$21.60 a week during any week he worked? A. No.

Q. What was the highest amount he received, the largest amount he received during any one 40

William F. Dorsey—Direct.

week while he was employed as such brakeman?

A. Do you mean a week of seven days?

Q. Yes, from Monday to the following Saturday, or any consecutive seven days?

MR. BAIN: I will withdraw that. \$3.60 a day is the nearest we can get to it.

BY THE COURT:

10 Q. Did he work in December? A. No. The 10th of January he was employed.

Q. But for the four weeks before his death, what he actually earned was \$36.99? A. Thirty-seven dollars and something.

Q. Thirty-seven dollars? A. Or is it \$36.99? Yes, that is right.

Q. For the entire month before he died, he earned \$36.99? A. Yes. But I think, if divided
20 into weeks, it would make nine dollars.

Q. He didn't start to work until the 10th of January? A. The 10th of January. Out of twenty-four days he worked ten days.

Q. What was the labor? A. Extra brakeman.

Q. How long would an extra brakeman have to work before he would get a place as a regular brakeman? A. Depends a good deal on himself, and whether there is a vacancy. When there is a vacancy it is advertised. Some men get in right
30 away; others—

Q. As extra brakeman he was working half time? A. Yes.

BY MR. CUTLEY:

Q. He had to report every night? A. Yes.

Q. Did he report every night? A. That I can't tell you. I never seen him myself. I get the reports every day.

Q. What is the ordinary brakeman's pay? A.
40 Three dollars and sixty cents a night, working ten hours a night.

William F. Dorsey—Direct.

Q. You say he was clerking the first night? That is not brakeman's work, is it? A. That is all the time given him.

Q. (By the Court.) Was he regularly employed as brakeman on the night he was killed? A. He was working that night, yes, filling some one's place.

CASE CLOSED.

10

MR. BAIN: I ask for a dismissal of the petition on the ground, first, that the contract of employment was obtained under misrepresentation. He said his age was twenty-one when it was eighteen. He said his name was John Joseph Havey, when it was Garret Havey. Under those facts there was no contract of employment.

Second, there has not been any dependency proved, upon the deceased. The testimony is that his father had many other sons and daughters whom he was supporting. I think he was getting something from Garret. I do not recall any evidence that it was necessary for the proper support of the family.

20

Third, if there is any dependency, it is only partial dependency, and there can be no allowance for partial dependency.

30

40

Certificates to Testimony.

10 I, FREDERICK N. ESHER, a stenographer regularly acting for George P. Kelley, the official stenographer of the County of Hudson, duly appointed to report stenographically the evidence given before the courts of said County and the Judges of said courts, in all cases, hearings and proceedings, do hereby certify that the foregoing is a transcript of the evidence given on December 19, 1913, before Honorable George G. Tenant, Judge of the Hudson County Court of Common Pleas, upon the hearing of the petition filed by William E. Havey, administrator, etc., of Garret Havey, deceased, against the Erie Railroad Company.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this second day of October, Nineteen hundred and fourteen.

20

FREDERICK N. ESHER.

(Seal.)

30 I, JOHN F. CROSBY, Clerk of the County of Hudson and also Clerk of the Hudson County Court of Common Pleas, do hereby certify that the foregoing is a transcript of the evidence given upon the hearing of the petition of William E. Havey, administrator of Garret Havey, deceased, against the Erie Railroad Company, on December 19, 1913, as certified by Frederick N. Esher, the stenographer appointed to report such evidence stenographically.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this second day of October, Nineteen hundred and fourteen.

JOHN F. CROSBY.

(Seal.)

40

Exhibit D-1.

If known, show here Employment
Bureau File No.

ERIE RAILROAD COMPANY.

CHICAGO & ERIE R. R.

NEW JERSEY & NEW YORK R. R.

NEW YORK, SUSQUEHANNA & WESTERN R. R.

10

APPLICATION FOR EMPLOYMENT.

(To be made in duplicate.)

To be filed by applicant in his own handwriting,
and all statements to be made under oath.

1. Applicant's

First Name (Spelled out)	Middle Name (If none, so state)	Last Name
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20

John Havey	Joseph	Havey
-----------------------	--------	-------

2. Employment applied for Brakeman; month,
day, year.

3. Age on last birthday, 21 years. Date of
birth, August 12, 1891.

4. Nationality, American.

5. Where born, Jersey City, N. J.

6. Name of wife, if living; if unmarried, so
state. Not married.

30

7. Name and address of parents, if living; if
dead, so state. William Havey, 103 Van
Winkle Ave. Rose Havey, 103 Van Winkle
Ave.

8. If unmarried, and parents are dead, give
name and address of nearest relative.

Relationship _____

Name _____

Address _____

40

Exhibit D-1.

9. Give names and addresses of relatives wholly dependent upon you or to whose support you are contributing.
Relationship. Mother and Family.
Names—————
Addresses—————
10. Whom do you wish notified in case of serious illness or injury?
Name, Mother.
Address, 103 Van Winkle Ave.
11. Do you use alcoholic drinks? No.
12. Have you ever been employed on any part of the Erie or the New York, Susquehanna and Western R. R.? No.
If so, state for each time—————
Where—————
Under whom employed—————
In what capacity—————
Date of leaving service—————
13. Have you ever been discharged from any situation? No.
If so, state when————— Where—————
14. Have you ever suffered any physical injury? No.
If so, state
When—————
Where—————
Nature of injury—————
15. Have you any physical defect or ailment which might render you unfit for railroad service? No.
16. Have you ever made application for employment and been subjected to a physical examination? No.
If so, write out the following information:
Date of examination————— Where—————
Name and address of physician—————
Were you accepted or rejected—————
—————

Exhibit D-1.

It is expressly understood that the period of the service of the applicant may be terminated at any time by this Company and pay allowed only for the actual time worked, regardless of whether applicant be employed by the month, week, day or hour.

The applicant will only be considered as in the temporary service of this Company until his application shall have been approved by the Superintendent of the Employment Bureau.

Applicants under 21 years of age must furnish minor's release (Form 265) with each application.

17. In order that the Erie Railroad Company may be fully informed as to my personal character and my qualifications for the position for which I have made application, I refer to each of my former employers, and request and authorize each of the said Companies for whom I have formerly worked, to give to the above-named Company all information they may be in possession of, whether shown by my personal record or otherwise, as to my personal character, and also my qualifications for the position I have herein applied for, and the reason why I was discharged or quit service, upon any inquiry that may be made of them, or either of them, by said Erie Railroad Company.

(Usual signature of applicant),

JOHN JOSEPH HAVEY,
Address, 103 Van Winkle Ave.

Witness:

H. G. Weitkamp.

Exhibit D-1.

DESCRIPTION OF APPLICANT.

(To be filled out by the employing officer.)

Height 5 feet 8 inches; weight 146 pounds;
color of hair, brown; color of eyes, blue.

Give description of distinguishing marks or
peculiarities.

10

Name of predecessor _____ Rate _____

Disposition made of him _____

I consider the above described applicant a suitable person to enter the Company's regular service. I desire to employ him as Yard Brakeman at Croxton Station.

20

Month Day Year
N. Y. Division. Effective Jan. 10, 1913.

Rate of pay schedule.

Name and title,
J. J. MANTELL,
Terminal Train Master,
Supt. of Terminals

30

(NOTE: Papers to be forwarded when applicant is actually at work and date effective can be correctly stated.)

Approved: J. G. June.

Approved:

Approved:

Superintendent of Employment Bureau.

(Book of Rules No. 23878.)

40

Exhibit D-1.

(Paragraphs 1 and 2 do not apply to shop employees.)

1. I hereby acknowledge receipt of a copy of the rules and regulations for the government of the Operating Department of said Railroad Company, and all amendments thereto, and also a copy of the current time table, and agree to familiarize myself with and observe all the same, and to keep advised of such amendments to said rules as may hereafter be made.

10

2. And I hereby acknowledge that I have been informed of the character of the employment I am about undertaking, and the duties connected therewith; that I have been notified that there are numerous Bridges, Buildings, Tunnels, Viaducts, Stock-Yard Chutes, Mail Cranes, Platforms and Coal Chutes and other obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree in consideration of my employment to familiarize myself with the same and use due care for my safety without further notice from the Railroad Company, and I accept notice from said Railroad Company that few, if any, of the aforesaid buildings or obstructions will clear a man riding on top or side of a car, and that I am to use constant care for my safety in working about same. I also understand and agree that when it is necessary for me to go into the yards of other companies, I must exercise the same care about looking out for obstructions which may be close to track.

20

30

3. I also agree to examine and know for myself that the ways, works or machinery connected with or used in my employment are at all times in safe and proper condition and agree to give immediate notice in writing to some person superior

40

Exhibit D-1.

to myself in the service of the Company of any defect in the condition of the ways, works or machinery connected with or used in my employment, and if I continue to use such ways, works or machinery with a defect or defects therein, I agree to assume the risk of an accident as a risk incident to my employment, and hereby waive the provisions of any and all statutes or laws with respect thereto.

(Signed) JOHN JOSEPH HAVEY.

Read in my presence before signing.

Witness: H. G. Weitkamp,

Address of witness.

Park Ridge, N. J.

STATE OF NEW YORK, }
County of New York, } ss.:

20 JOHN JOS. HAVEY, being duly sworn, says he is the applicant named above and the person who subscribed the foregoing application; that he knows the contents of the said application, and that, as filled out and subscribed by him, it is true of his own knowledge. He further says that he makes and verifies the foregoing statement for the purpose of obtaining employment on the above-mentioned Railroad.

30

Applicant's signature,

JOHN JOSEPH HAVEY.

Subscribed and sworn to before }
me this 8th day of Jan., 1913. }

Frank A. Heiss.

Notary Public.

(Seal.)

40

Exhibit D-1.

HOW AND WHERE PREVIOUSLY OCCUPIED.

Give continuous record for the last five (5) years in regular order. To verify periods when unemployed, in own business or working for relatives, give names, occupations and present post office addresses of two responsible persons; when at school its location and number, and the names and addresses of teachers; to verify arrival in this country, names of navigation company, vessel and port of landing and the date.

10

The employing officer, to save subsequent correspondence, should see that the information is given intelligibly, and in as complete form as possible, verify at bottom such records as he can that are not covered by previous papers, enclose any Erie service certificates held by applicant, copies of army and navy papers, passports, inspection cards and letters of recommendation, and an authority blank, form 2183, signed and witnessed, for each foreign railroad to which applicant refers, AND EXPLAIN ANY OMISSION OF THESE DETAILS.

20

30

40

From to

USE ONLY ONE LINE FOR EACH REFERENCE.

Month	Day	Year	Month	Day	Year	Occupation and check No. if any	What company or individual Name: P. O. ad- dress unless a railroad), street and No., R. F. D. No, place, state.	At what point employed. place and state.	Under whom Name Title	Department maintenance of way mechanical, transporta- tion.
1.	June	10	1907	Jan.	8	1913	Grocery Clerk			

P. J. Doherty, 698 Newark Ave.,
Grocer, Jersey City.

TWO REFERENCES TO VERIFY PERIODS WHEN UN-
EMPLOYED, IN OWN BUSINESS OR WORKING FOR
RELATIVES.

Name. P. O. Address (street, house No.,
Rural Delivery No., place,
state.)

Patrick Grimes, 211 St. Paul's Av., J. C.
Frank Machelhome, 109 Van Winkle Av., J. C.
See instructions at top of page.

EMPLOYING OFFICER'S VERIFICATION OF FORMER
EMPLOYMENT IN SAME DEPARTMENT, IF NOT
COVERED BY PREVIOUS PAPERS.

Applicant was actually employed in this de-
partment as claimed on lines Nos. _____,
cause of leaving each time as follows:

Superintendent.
Master Mechanic.

Reasons.

(Filed, October 10th, 1914.)

New Jersey Supreme Court.

WILLIAM E. HAVEY, Administrator
&c. of Garret Havey, deceased,

*Petitioner-Defendant,**vs.*

ERIE RAILROAD COMPANY,

Defendant-Prosecutor.

On Certio-
rari.
Reasons.

10

The Erie Railroad Company, prosecutor above named, by Collins & Corbin, its attorneys, herewith files the following reasons for reversal of the determination and judgment in above case.

1. The father and mother, and minor brothers and sisters of Garret Havey, the deceased employe, were erroneously allowed compensation although they were not all legally and actually dependent upon him within the meaning of the Act of the Legislature of the State of New Jersey under which such compensation purports to have been awarded.

20

2. Compensation was erroneously allowed to the father and mother of said Garret Havey and in addition to his minor brothers and sisters contrary to the provisions of said Act.

30

3. Compensation was erroneously allowed to, or on behalf of, the minor brothers and sisters of said Garret Havey, who were not dependent upon him within the meaning of the Act above mentioned.

4. Compensation was erroneously allowed to the father and mother of said Garret Havey, who were not dependent upon him within the meaning of said Act.

40

Reasons.

5. There was no competent evidence of any dependency upon said Garret Havey within the meaning of said Act.

6. The dependency of the father and mother and minor brothers and sisters of said Garret Havey upon him, if any, was only partial and compensation to partial dependents is not provided by the Act mentioned.

10 7. The compensation awarded is in excess of that provided by said Act.

8. The contract of employment entered into between prosecutor and said Garret Havey was made by fraud and misrepresentation on the part of said Garret Havey and, therefore, the alleged dependents of said Garret Havey are not entitled to compensation under the Act mentioned.

20 9. Said determination and judgment are for the reasons above stated and in other respects erroneous and contrary to law.

Dated, October 5, 1914.

COLLINS & CORBIN,
Attorneys of Prosecutor.

Opinion.

(Filed June 28, 1915.)

NEW JERSEY SUPREME COURT.

November Term, 1914.

WILLIAM E. HAVEY, Admr. etc., of
GARRET HAVEY, deceased,

*Petitioner-Defendant.**vs.*

ERIE RAILROAD COMPANY,

Prosecutor.

10

Argued November term, 1914. Decided June
, 1915.

On certiorari.

20

Before Justices Swayze, Parker and Kalisch.
For the prosecutor, Collins & Corbin; George
S. Hobart & Robert J. Bain of counsel.

For defendant, George E. Cutley.

The opinion of the court was delivered by
Kalisch, J.

Garret Havey, the petitioner's decedent was a
brakeman in the employ of the prosecutor. It
is not denied by the prosecutor that the plaintiff's
decedent met his death by an accident arising out
of and in the course of his employment.

30

The trial judge found the following facts:

1. That at the time the plaintiff's decedent
went into the employ of the prosecutor, he repre-
sented himself to the prosecutor to be John Joseph
Havey, aged twenty-one years, when in fact he
was Garret Havey, aged eighteen years.

40

Opinion.

2. That at the time of the decedent's death he was living at his father's home, and that he left him surviving a father and mother and four brothers and four sisters, under the age of fourteen years.

10 3. That the average weekly earnings of the deceased were ten dollars and sixty cents, which were turned over by him to his father who applied the same to the support of the household, and that the father and mother and brothers and sisters were actual dependents.

The trial judge held that the misrepresentation by Garret Havey as to his name and age did not relieve the prosecutor from making compensation under the statute and awarded, as compensation, sixty per cent. of the weekly earnings, and accordingly gave judgment against the prosecutor
20 for six dollars and forty-eight cents per week for three hundred weeks.

One of the reasons assigned for reversal of that judgment, by counsel for prosecutor, is that the contract of employment entered into between the prosecutor and the plaintiff's intestate was made by misrepresentation and fraud, in that the plaintiff's decedent misrepresented his name and age to the prosecutor at the time he applied for employment and obtained it.
30

We think that the misrepresentation as to name and age, in the absence of any proof, that the prosecutor was induced to enter into the contract upon such misrepresentation did not constitute such a fraud that it will operate to relieve the prosecutor from the statutory obligation to make compensation in a case arising under the statute.

Moreover, it does not appear that there was any causal connection between the misrepresentation
40 and the contract.

Opinion.

The chief argument addressed to us by counsel of prosecutor is, in substance, that the father and mother and the minor brothers and sisters were not dependents within the meaning of the term of "actual dependents" of paragraph 12 of section 2, of the act of 1911, and that even though they be such, the allowance of sixty per cent. of the weekly earnings is in excess of the amount authorized by the act; that under the act no more than twenty-five per cent. of the weekly earnings of the deceased could be properly adjudged.

10

Whether or not the father and mother and minor brothers and sisters, living together in the same household, and subsisting in part on the earnings contributed by the deceased to his father, the head of the household, and applied by the father to the support of himself and his family, were actual dependents upon the deceased, was a question of fact for the trial judge to determine.

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There was testimony in the case that tended to establish that the plaintiff's intestate gave his wages to his father and that such wages were devoted to the support of the family.

That fact was sufficient to afford a legal basis for the finding of the trial judge that they were actual dependents.

It has been held by this court that it is not essential to the right of a dependent who seeks to recover compensation under the act, that such dependent should be actually or entirely dependent upon the earnings of the deceased, for the necessities of life, but it is sufficient if it appears that he is a dependent in fact.

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Miller v. Public Service Ry. Co., 84 N. J. L. 174;

Muzik v. Erie R. Co., 85 Id., 131; 86 Id., 695.

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Those cases are controlling here.

The serious difficulty that presents itself in the case under consideration is in the amount of compensation awarded by the trial judge.

10 The accident occurred before the act of 1913 amending the act of 1911, was in existence. It appears that the trial judge first made an award under the former act but subsequently set that order aside and made an order under the act of 1911, leaving the award, however, as originally fixed, at sixty per cent.

We think that the compensation awarded by the trial judge is in excess of the amount permitted to be fixed by paragraph twelve of section two of the act of 1911.

20 That paragraph provides for only two instances in which the award of the maximum-sixty per cent. is authorized. The first instance is that where there are orphans an additional ten per cent. is allowed for each orphan in excess of two not exceeding sixty per cent. The other is where there is a widow with five children or more.

30 Under paragraph twelve or section two which provides: "If the widow and father and mother fifty per centum of the wages" it was held by this court that twenty-five per cent. of the weekly earnings may be awarded, where there is no widow, to the father or mother as the case may be. *Blanz v. Erie R. Co.* 84 N. J. L., affirmed by the Court of Errors and Appeals in 85 Id. 367.

The result arrived in that case was predicated upon the fact that an earlier clause of paragraph twelve provided that where there was a widow alone she is entitled to twenty-five per cent.

40 There is another clause of paragraph twelve which reads: "If grand parents, grand children,

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or minor incapacitated brothers and sisters, twenty-five per centum of the wages."

We perceive no obstacle in the way, under this clause, of the trial judge to have made an additional allowance of twenty-five per cent, since it appears that there are brothers and sisters, who are minors under the age of sixteen years and actual dependents upon the earnings of the plaintiff's decedent.

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It is evident from the reading of this paragraph that it was the legislative intent to provide for minor brothers and sisters, who were actual dependents within the meaning of the act.

Adopting this theory of computation the petitioner was entitled to recover no more than fifty per cent of the weekly earnings of the plaintiff's decedent, and the trial judge should have given a judgment based on that percentage.

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But the insistence of the counsel for the prosecutor in that regard is that there was no proof before the trial judge of the age of the brothers and sisters and that therefore there was no proper basis afforded to fix a compensation based on the paragraph relating to that class.

There was testimony before the trial judge that each of the minor brothers and sisters was under the age of fourteen years. It is a fair inference that several of them are of a very tender age. As the compensation allowed covers a period of three years, it is equally a fair inference that there still will be several of them at the expiration of that period of time, who will not have reached the age of sixteen years, the age fixed by statute, when payment on account of children shall cease.

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We do not overlook the fact that there is another clause of paragraph twelve which provides, that compensation in case of death shall be subject to a minimum of five dollars per week, ex-

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cept where the employee at the time of the injury receives less than five dollars per week.

Viewing the judgment given by the trial judge in any of the aspects of paragraph twelve of section two of the statute, it is apparent that the judgment is in excess of express statutory authority.

10 The judgment should be reversed, and the record remanded to the Court of Common Pleas to be proceeded with in accordance with the views expressed in the opinion.

Rule for Judgment.

(Entered July 8, 1915.)

NEW JERSEY SUPREME COURT.

20 WILLIAM E. HAVEY, Administrator,
etc., of Garret Havey, deceased,

Petitioner-Defendant,

v.

ERIE RAILROAD COMPANY,

Defendant-Prosecutor.

On Certio-
rari.

30 The Court having inspected the proceedings and judgment returned with the certiorari in this cause, the reasons assigned for reversal, and heard the argument of counsel thereon and considered the same, do order that said judgment be reversed, and the record remanded to the Hudson County Court of Common Pleas to be proceeded with in accordance with the views expressed in the opinion of this Court.

Entered July 8th, 1915.

On motion of

40 COLLINS & CORBIN,
Attorneys of Prosecutor.

Notice of Appeal.

(Served August 5, 1915.)

(Filed August 6, 1915.)

NEW JERSEY SUPREME COURT.

WILLIAM E. HAVEY, administra-
tor &c., of GARRET HAVEY, De-
ceased,

*Petitioner-Defendant,**vs.*

ERIE RAILROAD COMPANY,

Defendant-Prosecutor.

On
Certiorari.

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To

George E. Cutley, Esquire,

Attorney of William E. Havey, Administra-
tor &c., of Garret Havey, deceased, de-
fendant.

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TAKE NOTICE that Erie Railroad Company, prosecutor, appeals to the New Jersey Court of Errors and Appeals from so much of the judgment entered in this cause as adjudges that the record in said cause be remanded to the Hudson County Court of Common Pleas to be proceeded with in accordance with the views expressed in the opinion of the Supreme Court upon the following grounds:

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1. The Supreme Court erroneously determined that the father and mother and minor brothers and sisters of Garret Havey, the deceased employe, were all legally and actually dependent upon him within the meaning of an act of the Legislature of the State of New Jersey entitled,

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Notice of Appeal.

"An Act prescribing the liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and that therefore they are all entitled to compensation under said act.

10 2. The Supreme Court erroneously determined that compensation can be allowed to the father and mother of said Garret Havey and in addition to his minor brothers and sisters, contrary to the provisions of said Act.

3. The Supreme Court erroneously determined that the minor brothers and sisters of said Garret Havey were dependent upon him within the meaning of said Act.

20 4. The Supreme Court erroneously determined that the father and mother of said Garret Havey were dependent upon him within the meaning of said Act.

5. The Supreme Court erroneously determined that there was evidence of dependency upon said Garret Havey.

30 6. The Supreme Court erroneously determined that the contract of employment entered into between prosecutor and said Garret Havey was not made by such fraud and misrepresentation on the part of said Garret Havey as would deprive his alleged dependents of compensation under said act.

7. That part of the judgment of the Supreme Court from which this appeal is taken is in other respects erroneous.

COLLINS & CORBIN,
Attorneys of Appellant.

Clerk's Certificate.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Notice of Appeal filed and also of a rule entered in the minutes of the Court in the above stated cause.

IN TESTIMONY WHEREOF, I have set my hand and the seal of said Court, at Trenton, this sixth day of August, A. D. Nineteen hundred and fifteen. 10

WM. C. GEBHARDT,
Clerk.

(Seal.)

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