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Notice of Appeal.

Filed May 18, 1918.

New Jersey Supreme Court.

KEYSTONE DAIRY COMPANY, a corporation, *Prosecutor-Appellant,* *vs.* ELIZABETH KROOG, widow of Henry Kroog, deceased, *Defendant-Respondent.*	*Notice of Appeal.*

TAKE NOTICE that the prosecutor-appellant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in this cause.

Dated May 11, 1918.

Yours respectfully,

M. CASEWELL HEINE,
Attorney for Prosecutor-Appellant.

To WILLIAM R. GANNON,
Attorney of Defendant-Respondent,
15 Exchange Place
Jersey City, N. J.

Service acknowledged May 14, 1918.

WM. R. GANNON,
EUGENE BLANKENHORN.

Grounds of Appeal.

Filed May 23, 1918.

New Jersey Court of Errors and Appeals

ELIZABETH KROOG, widow of Henry Kroog, deceased, Petitioner-Defendant in Certiorari, *Respondent,* *vs.* KEYSTONE DAIRY COMPANY, a corporation, Defendant-Prosecutor in Certiorari, *Appellant.*	*On Appeal from Supreme Court.* *Grounds of Appeal.*

The above named appellant states the following grounds of appeal:

1. The Supreme Court sustained the finding of the Court of Common Pleas that the accident arose out of and in the course of the employment of petitioner's decedent.

2. Because the Supreme Court sustained the finding of the Court of Common Pleas that the accident arose out of the employment of petitioner's decedent.

3. Because the Supreme Court sustained the finding of the Court of Common Pleas that the death of petitioner's decedent was caused by accident arising out of and in the course of the employment.

Grounds of Appeal.

4. Because the Supreme Court sustained the finding of the Court of Common Pleas of the cause of death, contrary to the medical testimony adduced.

5. Because the Supreme Court sustained the refusal of the Court of Common Pleas to find that an independent cause not arising out of and in the course of the employment was the proximate cause of the death.

6. Because the Supreme Court sustained the Court of Common Pleas in its refusal to strike out the testimony of petitioner's doctor that the death resulted from an accidental fall.

M. CASEWELL HEINE,
Attorney of Appellant.

Writ of Certiorari.

Filed December 22, 1917.

NEW JERSEY. *ss.*

THE STATE OF NEW JERSEY, to the Honorable Mark A. Sullivan, President Judge of the Court of Common Pleas in and for the County of Hudson, and John J. McGovern, Clerk of the said Court of Common Pleas in and for the County of Hudson, and Elizabeth Kroog, widow of Henry Kroog, deceased, GREETING:

[L. S.]

We, being willing for certain reasons to be certified of a certain determination, judgment, order and proceedings made and given by Honorable Mark A. Sullivan, President Judge of the Court of Common Pleas in and for the County of Hudson, in a certain action, plaint and proceeding brought against the Keystone Dairy Company, a corporation, at the suit of Elizabeth Kroog, widow of Henry Kroog, deceased, to recover compensation under "An Act of the Legislature of New Jersey prescribing liability of an employer to make compensation for injuries received by an employee in the course of employment and regulating procedure for the determination of liability for compensation thereunder," approved April 4, 1911, and the supplement of said act, approved May 2, 1911, and the acts amendatory thereof and supplemental thereto, do command you that you send under your seal to the Justices of our Supreme Court of Judicature at Trenton on the 2nd day of January, the said determination, judgment, order and proceedings made and given by you with all things touching and concerning the same as fully and entirely as

they remain in said Court of Common Pleas by whatever names the parties may be called therein, together with this, our writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

WITNESS, Francis J. Swayze, Esquire, the Justice of our Supreme Court, at Trenton aforesaid, this 12th day of December, in the year of our Lord, nineteen hundred and seventeen.

WILLIAM C. GEBHARDT,
Clerk.

M. CASEWELL HEINE,
Prosecutor's Attorney.

Allocatur, December 12, 1917.

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

NEW JERSEY SUPREME COURT.

ELIZABETH KROOG, widow of Henry Kroog, deceased, *Petitioner,* *vs.* KEYSTONE DAIRY COMPANY, a corporation, *Defendant-Prosecutor.*	*On Certiorari.*

Copy of Writ of Certiorari allowed the 12th day of December, 1917, is hereby acknowledged.

WILLIAM R. GANNON,
Attorney of Petitioner.

Return.

The answer of Mark A. Sullivan, Esquire, Judge of the Court of Common Pleas, holden in and for the said County of Hudson, and John J. McGovern, 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 and send 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.

MARK A. SULLIVAN,
Judge.

Attest:

JOHN J. MCGOVERN,
Clerk.

State of Facts.

Filed August 23, 1917.

Hudson County Court of Common Pleas.

To the Honorable Mark A. Sullivan,
Judge of the Hudson County Court of
Common Pleas:

In accordance with the provisions of an Act of the Legislature of the State of New Jersey entitled "An Act Creating a Workmen's Compensation Aid Bureau in the Department of Labor," approved March 15, 1916, said Workmen's Compensation Aid Bureau hereby certifies a state of facts relating to the claim of Elizabeth Kroog, widow of Henry J. Kroog, deceased, hereinafter referred to as petitioner, residing at No. 339 Ogden avenue, in the City of Jersey City, County of Hudson, and State of New Jersey, against the Keystone Dairy Company, a corporation of the State of New Jersey, having its principal office at the southwest corner of Seventh and Madison streets, in the City of Hoboken, County of Hudson, and State of New Jersey, hereinafter referred to as respondent, as follows:

1. That this is a proceeding brought in behalf of said petitioner against said respondent under the provisions 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 procedure for the determination of liability and compensation thereunder," approved April 4, 1911, and the acts amendatory thereof and supplemental thereto.

State of Facts.

2. That the said Henry J. Kroog, deceased, during his lifetime, for a period of eighteen years, was employed by the respondent as a salesman and driver of one of the wagons of the said respondent, and that he continued in such employment up to and including the 8th day of September, 1916, on which day he suffered the accident hereinafter described.

3. That on the 8th day of September, 1916, the decedent sustained personal injuries as the result of an accident; that said accident occurred while decedent was working for respondent while driving a horse and wagon of the said respondent. Decedent was driving said horse and wagon onto a weighing scale at the ice depot belonging to the Mountain Ice Company, located at Ferry street and Ravine road at the Erie Railroad, Jersey City, New Jersey; which horse and wagon was being driven on the said scale for the purpose of weighing same. Decedent had driven the horse and wagon onto the scale when suddenly the horse stopped, and the decedent was accidentally thrown out of the wagon onto the ground at the side thereof, his head striking on an iron rail at the side of the scale; that as a result of said accident, decedent sustained a broken neck and other injuries from which he died within a few minutes.

4. That the said decedent, Henry J. Kroog, at the time of the injury sustained, received for his services wages amounting to $17 per week.

5. That the said accident arose out of and in the course of said decedent's employment.

6. That the respondent had actual knowledge of the occurrence of the said injury.

State of Facts.

7. That the said decedent left him surviving his wife (your petitioner).

8. That the said petitioner is the only actual dependent of the said decedent, and was living with her husband at the time of the accident and at the time of his decease.

9. That the respondent has not paid to your petitioner as dependent the funeral expense of $100 or the weekly compensation due her, or any part thereof, as required by the Workmen's Compensation Act under which this proceeding is brought.

10. That no agreement for lawful and adequate compensation approved by this bureau has been filed with this bureau as required by the provisions of said act creating the bureau.

11. That this bureau has endeavored to bring about a settlement of the pending claim, but without success.

WHEREFORE, This Workmen's Compensation Aid Bureau certifies the facts above set out, and prays that the rights of the petitioner in the premises, and the liability of the said respondent be determined, and that the amount of compensation payable, costs, etc., may be computed by the Court, and that the Court assign counsel to represent the petitioner, and that the said petitioner may have judgment therefor and may have such further relief as may be just.

Respectfully submitted by

WORKMEN'S COMPENSATION AID BUREAU,
Department of Labor,
State of New Jersey.

GEORGE J. JAEGER,
Referee.

Order Fixing Time and Place of Hearing.

Filed August 23, 1917.

HUDSON COUNTY COURT OF COMMON PLEAS.

ELIZABETH KROOG, widow of Henry J. Kroog, deceased, *Petitioner,* *vs.* KEYSTONE DAIRY COMPANY, a corporation of the State of New Jersey, *Respondent.*	*On State of Facts for compensation under "An Act prescribing the liability of an employer to make compensation for injuries, etc.," approved April 4, 1911, and the several supplements thereto and acts amendatory thereof and pursuant to "An Act creating a Workmen's Compensation Aid Bureau, etc.," approved March 15, 1916.*

On State of Facts filed by Workmen's Compensation Aid Bureau.

A State of Facts having been filed in this cause by the Workmen's Compensation Aid Bureau on behalf of petitioner, pursuant to Chapter 54, Laws of 1916, praying for the compensation payable by respondent, it is on this 23rd day of August, 1917,

ORDERED, That William R. Gannon is hereby assigned to represent petitioner and the hearing of said matter be and hereby is set down for Thursday, the 20th day of September, 1917, at the Court House (Common Pleas Court room), in the City of Jersey City, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

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

Answer.

Filed September 28, 1917.

HUDSON COUNTY COURT OF COMMON PLEAS.

ELIZABETH KROOG, widow of Henry J. Kroog, deceased, By WORKMEN'S COMPENSATION AID BUREAU, *Petitioner,* *vs.* KEYSTONE DAIRY COMPANY, a corporation of the State of New Jersey, *Respondent.*	*On Petition for Compensation.* *Answer.*

The Answer of the respondent, Keystone Dairy Company, a corporation of the State of New Jersey, to the petition heretofore filed herein says:

FIRST DEFENSE. It alleges that the statute entitled and known as "An Act creating a Workmen's Compensation Aid Bureau in the Department of Labor," being Chapter 54 of the Laws of 1916, is unconstitutional and void, and that this proceeding attempted to be enforced against defendant is null and void.

SECOND DEFENSE. It alleges that this Court has acquired no jurisdiction over the defendant under the act prescribing the liability of an employer to make compensation for injuries, etc., approved April 4, 1911, and the several supplements thereto and acts amendatory thereof, for

the reason that no petition has been filed with the clerk of this Court, as prescribed by said act.

THIRD DEFENSE. It alleges that the order made herein by the President Judge of the Hudson County Court of Common Pleas on the 23rd day of August, 1917, was made improperly and without warrant of law.

FOURTH DEFENSE. It alleges that this proceeding as instituted by petitioner permits the taking of the property of the defendant without due process of law, in violation of the Constitution of the State of New Jersey and the Constitution of the United States.

FIFTH DEFENSE. Without waiving the defenses hereinabove set forth, and without admitting that this Court has obtained jurisdiction over defendant, it alleges, in answer to the paper purporting to be a petition filed herein, as follows:

1. It denies paragraph "1."
2. It admits paragraph "2."
3. It denies paragraph "3."
4. It admits paragraph "4."
5. It denies paragraph "5."
6. It denies paragraph "6."
7. It admits paragraph "7."
8. It has no knowledge concerning the allegations of facts set forth in paragraph "8."
9. It admits paragraph "9."
10. It admits paragraph "10."
11. It has no knowledge regarding paragraph "11."

SIXTH DEFENSE. The injury to the decedent, as alleged in the paper filed herein, purporting

to be a petition, was not the result of an accident arising out of and in the course of employment of petitioner's late husband, but was the result of disease with which the deceased was afflicted at that time.

Wherefore this respondent prays that he may be hence dismissed with this cost in this behalf so wrongfully sustained.

M. CASEWELL HEINE,
Attorney for Respondent.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } *ss.*

William M. Kroog, being duly sworn according to law, on his oath says that he is treasurer of the Keystone Dairy Company, a corporation of the State of New Jersey, the respondent in the foregoing Answer named; that he has read said Answer and that the same is true to the best of his knowledge and belief.

WILLIAM M. KROOG.

Sworn to and subscribed before
me this 21st day of September,
1917.

J. M. FALLON,
Master in Chancery
of New Jersey.

Opening.

HUDSON COUNTY COURT OF COMMON PLEAS.

SULLIVAN, *J.*

ELIZABETH KROOG, *vs.* KEYSTONE DAIRY COMPANY.	*On Petition for Compensation Under Employers' Liability Act.*

TRIAL of the above stated case, November 15, 1917, before Hon. Mark A. Sullivan, Judge.

Appearances:

Mr. William Gannon, for the petitioner.

Mr. M. Casewell Heine, for the respondent.

Mr. Heine. I would like to make a formal motion, as to the jurisdiction; under the act of March 15, 1916, under which this case is certified to the Court of Common Pleas, my contention is that the proceedings now before the Court cannot properly be entertained by the Court for the reason that the act of 1916, known as the act to create a workmen's compensation aid bureau in the Department of Labor, is unconstitutional on the ground that the act embraces more than one object, which is not specified in the title, (2) it impairs the obligation of contract, (3) it takes property without due process of law.

The Court. Motion denied.

Mr. Heine. I ask an exception.

HENRY BARNICKEL, a witness produced on behalf of the petitioner, being sworn, testified as follows:

Direct examination by Mr. Gannon.

Q What is your employment? A Weigh master, ice business.

Q Where are you employed? A Ferry and Newark street, Hoboken.

Q What company? A Mountain Ice Company.

Q Were you employed at that place in that occupation on September 8th, 1916? A Yes.

Q Did you know the deceased, Henry J. Kroog? A Yes.

Q Do you recall anything unusual happening on that day? A I was standing on the scale when the wagon—when Mr. Kroog drove in the same as usual, he drove on the scale, he just put his hands up and said "Whoa," the same as he drove in any other day, turned right around and fell over sideways.

Q Was he in a wagon? A Yes, standing up in the wagon.

Q What kind of a wagon? A One of these high milk wagons, with a low seat. He wasn't sitting on the seat, but standing behind the seat.

Q What happened to him? A He turned right around, fell backwards over the side of the wagon. I run out, run around the head of the horse, he struck on the bridge frame. I called him, we pulled him out, he fell with his head on the iron plate. Before I got around, his heels were against the body of the wagon. By the time I got around the horse his feet had fell under the wagon. If the horse had started it would have went across his stomach. We pulled him from under the wagon—

Q Who? A Gus Chickasiello.

Q You and he? A Yes.

Q Is he here today? A No, sir.

Q When you got around to Mr. Kroog, do you know if he was living or dead? A He never spoke a word, he was still breathing when we pulled him out from underneath the wagon.

Q Can you tell us if it was customary, when the deceased drove into your place for ice, he was usually standing up in his wagon?

Mr. Heine. I object, unless this witness's knowledge can be shown to be greater than his testimony already shows it to be.

Mr. Gannon. I will withdraw the question.

Q About how many times had Mr. Kroog come in there? A Well, that I couldn't say.

Q From your knowledge? A That is something I couldn't say. He came in there quite often.

Q Once a week? A Sometimes once a day. Again, he would have a different man driving the wagon.

Q Did you notice the way in which he drove into this place? A I noticed him driving in.

Mr. Heine. I object, unless this is the specific time of the accident.

The Court. I will allow it.

Mr. Heine. I object, unless the time is fixed.

Q On previous occasions to the date of the accident?

Mr. Heine. I object on the ground it is irrelevant and immaterial.

The Court. I will allow it.

Mr. Heine. I ask an exception.

A He drove in just the same as any other day, drove right on the scale, right to the iron plate, hollered "Whoa," threw up his hands.

The Court. He says he drove in there, put up his hands, hollered "Whoa," just the same as any other day he had driven in there.

The Witness. Yes.

The Court. That is what he said at first —then turned around, fell off the wagon.

The Witness. Then turned around, fell off the wagon.

Q What did you do after you picked him up from the ground? A I called up the Keystone Dairy Company, and called up St. Mary's Hospital—not St. Mary's, Christ Hospital.

Q Did you call for an ambulance? A I did.

Q Did the ambulance come? A Yes.

Q Was a doctor with the ambulance? A Yes.

Q Do you know if he examined Mr. Kroog? A He was working on him; we were very busy at the time, but I know the doctor was working on him, he still was working on him, it started to rain, I asked the man whether they wouldn't sooner take him inside, put him on the floor, I give them some old coats, they laid him on the floor, and the doctor was still on his knees working over him in the office.

Q Did the doctor say what was the matter with him? A The doctor didn't speak to me, but I heard—

Mr. Heine. I object.

The Court. Objection sustained.

William M. Kroog, direct.

Cross examination by Mr. Heine.

Q Which way was Mr. Kroog facing when he fell, towards the house, or back, toward the back of the wagon? A When he fell he was facing south, towards the office. When he drove in—

Q His righthand side or his lefthand side? A He drove in this way (indicating), he turned around this way (indicating).

Q On the righthand side of his wagon? A Turned around, on the wagon, and fell on the side.

Q Fell the other way. Was the horse on the scale? A No, sir; the horse wasn't on the scale, the horse was off the scale.

Q And the wagon on the scale? A The wagon on the scale, just ready to be weighed.

Q (*By Mr. Gannon.*) When he fell he was facing the office? A Yes.

WILLIAM M. KROOG, a witness produced on behalf of the petitioner, being sworn, testified as follows:

Direct examination by Mr. Gannon.

Q You are a brother of Henry J. Kroog? A Yes.

Q Also treasurer of the Keystone Dairy Company? A Yes.

Q How soon after your brother's death did you have knowledge of that fact? A That is something I could not say, as to exactly how soon; as soon as Mr. Barnickel telephoned to my office and told us about it.

Q You went to his house when he was laid out? A Yes.

Q I show you a duplicate copy of the bill—(withdrawn). Did you pay any funeral bill for the funeral bill of your brother? A Yes.

Elizabeth Kroog, direct.

Mr. Heine. We will admit it.

Mr. Gannon. We can only recover to the extent of one hundred dollars.

Mr. Heine. It is admitted that the bill exceeds one hundred dollars.

Cross examination by Mr. Heine.

Q Your brother has been where you have seen him for the last ten or fifteen years, with the Keystone Dairy Company? A Yes.

Q You have seen him from day to day? A Yes; that is, I didn't see him four months before the accident, I was on the border, only got home two days before.

Q He has been here, so you would have come in contact with him every week or so? A Yes.

Q Did you ever know that he suffered from any form of fits, or any seizure, epileptic seizure—

Mr. Gannon. I object. It is outside the scope of the direct examination.

The Court. I will sustain the objection.

Mr. Heine. I will make him my own witness.

The Court. You had better call him in your own turn.

ELIZABETH KROOG, the petitioner, called and sworn in her own behalf, testified as follows:

Direct examination by Mr. Gannon.

Q You are the widow of the deceased? A Yes.

Q You were living with him at the time of his death? A Yes.

Q He was providing for your support? A Yes.

No Cross Examination.

ARTHUR P. HASKING, a witness produced on behalf of the petitioner, being sworn, testified as follows:

Direct examination by Mr. Gannon.

Q You are assistant county physician of Hudson County? A I am.

Q As such, did you view the remains of Henry J. Kroog? A Yes.

Q Who was killed September 8th, 1916? A Yes.

Q Did you make any records of what the cause of death was, from your examination? A Why, I examined the body and the circumstances attending the death, issued the certificate of death, as required and customary in the circumstances.

Q Have you the records? A I have a copy of them. The original record is on file with the Board of Health.

Q Isn't it customary, when you examine a body, to make a record for your own use? A I have my office records—notations.

Q Have you those records? A I have a card—office card.

Q Will you produce those records? (Witness produces card.)

Q This is a record made by you immediately after the examination of the decedent? A So much of it as is in my handwriting, the name and address is written, copied from the death certificate, the place of death, how injured, symp-

toms, place of death, cause of death, name of physician, undertaker, is in my handwriting.

Q Referring to the card—can you tell us the cause of death? A Certified by me, was injuries resulting from accidental fall from his wagon.

Mr. Heine. I move to strike out that part of the answer that contains the word "accidental" as a conclusion of the doctor.

The Court. That is his record?

Mr. Heine. Yes. I object to the admission of so much of it as contains the word "accidental" on the ground that it is his conclusion. It can certify to physical facts.

The Court. I will deny your motion.

Mr. Heine. I ask an exception.

Q Refer to that card; what was the injury shown by your examination? A He had a contusion and hematoma of the head, fracture of the second curvical vertebra.

Q A broken neck? A In the upper part, high up.

Cross examination by Mr. Heine.

Q When did you examine him? A It was late in the afternoon, I think on that same afternoon, I believe the eighth, in the afternoon, I think. I am under the impression it was the eighth.

Q So far as the causes of the condition which you found, you had nothing but the statements of other persons from which to get that? A I was not a witness.

Q But you had no information, except from others, as to the cause of the physical condition which you found? A The law requires that I

shall investigate and express an opinion, which shall include the nature of the injury, how recent, whether accidental, suicidal and homicidal.

Q That is in another branch of the law from this. So far as your own knowledge goes now of the subject matter in hand, your information is simply as to the physical condition you found and your remarks as to the cause are hearsay which you got from others? A Certainly. I was not there.

By the Court.

Q Did you perform an autopsy? A No, sir.

Q You examined the body after death? A Yes. By handling the neck, the fracture could be discerned from without. He had also a hematoma, another bruise, as near as I can remember, around the upper part of the head. It was—I made the note here—a contusion which would indicate to my mind, I noticed there was some abrasion of the skin, the word "hematoma" would indicate there was a collection of blood or swelling under the skin; then I made the notation, fracture of the second cervical vertebra, high up, which would cause hematoma. A fracture of that height is usually followed very shortly by death. I viewed the body at Volk's morgue in Hoboken.

Mr. Gannon. Petitioner rests.

WILLIAM M. KROOG, recalled, on behalf of the respondent, testified as follows:

Direct examination by Mr. Heine.

Q You have been associated in business with your brother for the last eight or nine years? A Yes.

Q You have seen him frequently, daily, for the last four months before his death, about weekly? A No, for the last four months I didn't see him. I only got back from the border two days before this accident happened.

Q During the last ten years before his death, did you know of his being subject to any epileptic seizure, or any fits of any kind? A Never.

Q He was in general good health? A As far as I know, yes.

Q Had never had any fainting spells, or any falling from any—causing him to fall during that period? A Never that I know of.

Q Was his position with your company that of shipping clerk? A Receiving and shipping clerk, yes.

Q What were the duties of receiving and shipping clerk? A Receiving goods that came in, and keeping a record of what went in and went out.

Q The usual duties of shipping clerk, which required him to be at that place in the performance of those duties? A Certain hours in the place in Hoboken, certain hours sent out, or went out; for instance, to get ice.

Q Was that a usual or unusual occurrence, to go out to get ice? A Usual occurrence. That was entirely up to him, to get it himself, or take a man with him, or send a man, it was optional, he had to see we had ice.

Q Was it part of his duties to act as a driver? A Not as a driver. We didn't employ him as driver. It was part of his duties to see we had ice.

Q If he went and got it himself, that was his own affair, nothing which concerned the company? A No, it was part of his duties to get it, unless he had somebody to send for it.

Elizabeth Kroog, direct.

Q Did his duties as shipping clerk require him to go and get ice? A Yes.

Q Then it was not merely to receive the ice, he was to see that some one went and got it? A He had to see we had ice, irrespective whether he got it or sent somebody else.

Q How long was it his custom to get ice himself, if you know? A I couldn't say that; possibly every day, maybe one or two days a week. He wouldn't go during the summer time.

Q Did the company ask him to do that—you or your brother? A Yes.

Q Did you ask him specifically to go and get ice? A Yes.

Q Did he ever go when he wasn't directed? A Well, it was part of his duties to see we had ice. If he had the time to get it and didn't have a man to send, he would go and get it himself.

Q But when he was employed as shipping clerk and receiving clerk, was he instructed then to himself go and drive a wagon or horse, whatever it might be, and get the ice? A If it was necessary, yes.

Cross examination by Mr. Gannon.

Q You, as an officer of the company, knew all the time that your brother was in the habit of going for ice himself, driving the wagon also? A Yes.

ELIZABETH KROOG, the petitioner, recalled.

By Mr. Heine.

Q How long were you married? A Nine years.

Q During that time did you ever know of Mr. Kroog being seized with any epileptic fits or seizure of any kind? A No, none.

Q Never had any dizziness or fainting spells? A No, none at all.

Q That caused him to fall? A No.

Q He was in good health? A In good health.

WILLIAM J. ARLITZ, a witness produced on behalf of the respondent, being sworn, testified as follows:

Direct examination by Mr. Heine.

Q You are a practicing physician of this county? A I am.

Q Graduate of what institution? A University of Maryland, twenty-seven and a half years practicing.

Q Have you specialized? A In neurology and surgery.

Q Assume a man about thirty-six years of age, who had never been subject to any seizures, epileptic or otherwise, or fainting spells, who was in general good health for the nine years preceeding his death, and who was accustomed on occasion to drive a wagon to an ice house; that on a certain day he drove this wagon in, standing up in the wagon, and stopped it on the scale, say that his wagon was on the scale, and the horse ahead of the scale, the wagon ready to be weighed, and that while in—as he came to that position, he threw up his hands, said "Whoa," then turned to the side, fell backward, striking his head on the ground, coming in contact with an iron plate; when a person who was in or about came to him, found he was still

breathing, and after being worked over for some time, he died, and the doctor on examination found the second cervical vertebra fractured, and laceration or swelling at the top of the head; could you say with reasonable certainty what was the probable cause of his death?

Mr. Gannon. I object. It is irrelevant. It is absolutely and purely a technical question, qualifying the doctor as an expert witness. There is no foundation for it in the evidence in this case, what disease did cause his death except for the fact of this *prima facie* evidence that a fall from the wagon broke his neck, and that was the cause of his death.

The Court. I will overrule the objection.

A There is no question but that the cause of death was fracture of the cervical vertebra.

Q Can you state what in your opinion would be the probable cause of falling, from his throwing up his hands and falling backwards?

Mr. Gannon. I object.

The Court. Objection sustained.

Q Assuming that a man thirty-six years of age, had been in previous general good health, and that on the occasion he drove the wagon—horse and wagon—into an ice yard, standing up in the wagon, he suddenly would throw his hands up in the air, at the same time he said "Whoa," and the wagon coming to a standstill, he turned sideways and fell out; can you state with reasonable certainty what would be the probable cause of that seizure?

Mr. Gannon. I object.

The Court. Objection sustained. There is not any proof there was any seizure.

Mr. Heine. I will amend the question and strike out "seizure."

The Court. I think you are trying to substitute the doctor's opinion for the opinion of the Court. He might have tripped, the horse might have stopped quickly and he fell over, he might have stumbled over something.

Mr. Heine. There is no such testimony.

The Court. I don't know. You are asking the doctor to speculate.

Mr. Heine. It must be apparent to your Honor, that a person who is apparently in good health, suddenly throws up his hands, there might be a cardiac trouble or any one of half a dozen things which might be probable in view of his raising of his arms, preliminary to falling. It seems to me that is a symptom from which the doctor might—I do not say he will, I don't know what he is going to say—but the Court is entitled to light, whether that is something which in his opinion will enable the Court to form an opinion.

The Court. I understand that the throwing up of his hands was his usual manner of stopping the horse. I will sustain the objection.

Q Assuming a man thirty-six years of age, who had been in previous general good health, not afflicted by any epileptic or other seizure, was driving a wagon into an ice plant, drove it on the scale, he standing up in the wagon, and was to throw up his hands and say "Whoa" in

the usual manner as he had always done, and then should suddenly turn sideways and fall from the wagon, falling so that his head struck the ground and his feet up, or up against the side or wheels of the wagon, the body being between the ground and the side of the wagon, his legs between the wheels; would you be able to say what in your opinion with reasonable certainty might be the cause of that action in falling—that falling caused by?

Mr. Gannon. I object.

Q What was the cause of that falling?

Mr. Gannon. I object, on the same ground.

The Court. I will allow it.

A That the individual had an attack of cardiac syncope or back pressure, or cardiac embolus. That is the way people with those conditions of that kind usually act.

By the Court.

Q You mean they fall? A They are apparently—seem to be—in the very best health, they suddenly put up their hands, through the constriction.

Q You are saying something about putting up their hands. That was not in question. A We will eliminate that.

Q You have the mere fact that this man drove in there, turned around sideway, put up his hands in the usual manner in which he had always done, turned backwards and fell; can you say with reasonable certainty—that is the question—what was the cause of the fall? A Either cardiac embolus or cardiac syncope or back pressure.

Q That is, supposing there was any internal cause for it, I suppose? A Yes.

Cross examination by Mr. Gannon.

Q What do those phrases mean? A Cardiac embolus means this—a small vegetation was carried from the valves of the heart by the circulation to the brain. That occurs just like that (snaps his fingers), and should produce death.

Q Instantly? A Within a very few seconds, sometimes. By cardiac syncope or back pressure I mean there is a high blood pressure, and because of the high blood pressure the circulation is arrested, and death is produced in that way.

Q How does that affect the brain—that latter condition which you described? A You mean during the lifetime of the individual?

Q Generally, as to the cause of death? A Well, it produces a cessation of the circulation.

Q In other words, it makes the heart stop beating? A Yes.

Q In the first condition you have described, would there be any clot appearing on the back of the head, from a burst blood vessel? A That would be a different condition entirely. If a man had an attack of cardiac syncope or cardiac embolus, unless apoplexy is present in connection with it, there is no reason why he should have a clot of blood there.

Q You are giving us your opinion, that either one of these two causes was the cause of this man's death, from the circumstances related to you? A I know nothing about the circumstances, they have not been related to me. I know nothing about the case.

Q Suppose I was standing as I am standing now, and without throwing up my hands I should

drop to the floor; sitting where you are, could you tell me with reasonable certainty what was the cause of my death—or could you tell anybody else? A Yes, with a reasonable degree of certainty, eliminating fracture of the skull or of the spine. If you fell as you describe, I should say you had cardiac syncope or cardiac embolus, or you might have had a cardiac dilatation with complete loss of compensation.

Q Would any of these phrases you have used correspond with the common acceptation of apoplexy or epilepsy? A No. One of the common uses—common words used for cardiac syncope is heart failure.

Q As a matter of fact, if a man should drop dead on the street, you could only call the cause of his death, unless you saw some extraneous circumstances, heart failure? A No, I would not. The law does not permit me to use such a term, it is too indefinite.

Q The terms you have used would embrace that condition? A Yes. It would mean the same thing, but the law demands, in filling the death certificate, we be more specific.

Q But when you give your opinion what caused this man's death, the phrase which you use would embrace just such a cause of death? A Yes.

Q What is the percentage of cases where a man drops dead without any apparent cause, in which the cause of death is the first condition you have described? A I don't know. It occurs—a great many cases, I couldn't tell you how many. Men are apparently in the very best of health, found dead in bed, found dead sitting on a chair, walk down the street and drop suddenly.

Q Outside of the fact that the man just dropped without any apparent explanation, you don't know what caused his death? A I know nothing about it.

Q You are simply giving it as your opinion, applied generally to these circumstances, that his death was caused by either one of these conditions you have described? A I am not saying that. The statement is made here that this man has a fracture of the cervical vertebra. That is enough to cause his death. I am expressing my opinion as to what caused his fall.

Q If either of these conditions which you have described was the cause of the fall, would it cause instant death? A It might, and the man might die within two or three hours. A man might have an attack of cardiac syncope, and might live for three or four or five hours. Perhaps if remedial measures were used rapidly and heroically, he might recover for the time being—until he got his next attack.

Q Would a post-mortem examination disclose the symptoms from which a definite diagnosis could be made, stating that either one of the causes you have given was the cause of death? A No. In the case of cardiac syncope, unless a microscopic examination had been made of the kidney structure; and unless, in the other condition, a microscopic examination had been made of the valves of the heart, to determine if there had been at any time fluctuation of the valves. An ordinary post-mortem would not disclose that unless the changes were so profound that they could be determined by the eye.

ARTHUR P. HASKING, recalled.

Direct examination by Mr. Gannon.

Mr. Gannon. Do you admit his qualifications?

Mr. Heine. Yes.

Q In your examination of this body, did you discover any symptoms or any signs which would indicate that Mr. Kroog was a sufferer, immediately before his death, from cardiac syncope or cardiac embolus? A I made no internal examination of the body. There was no autopsy performed.

Q You viewed the condition of the body? A I did.

Q From your examination of it, can you say —give us your opinion, if there were any internal causes of death?

Mr. Heine. I object. It is not in proper form, it is hypothetical.

The Court. I will allow it.

A I expressed my opinion that the internal cause of death was fracture of the skull, which would in itself be sufficient to cause death—fracture of the second cervical vertebra.

Q With what degree of certainty would it be said that a man who drops in his footsteps, without any other explanable cause—to what degree of certainty can it be said that he is a sufferer from cardiac syncope or cardiac embolus? A In the absence of a post-mortem examination, you would want to get some of his previous history.

Q Are there any causes which may cause a man's death under those circumstances, than these two conditions? A I understand you to

say what causes would cause death, or will cause unconsciousness?

Q Cause him to fall? A That means unconsciousness.

Q Yes. A Many causes of unconsciousness.

Q Wouldn't an attack of indigestion cause that? A The causes are many; you can go down the list of possible causes, they are very numerous.

Q Mention some of the most simple. A Conditions referrable to the heart, referrable to the central nervous system, would be the two big groups.

Q If a man was suffering from either of these conditions, would there be evidence of it in previous occasions, than that on which the attack occurred? A What were those two conditions?

Q Cardiac embolus and syncope? A An embolus, one would suspect that if there were vegetation on the valves of the heart, it is possible he would have had some other previous history of illness. A cardiac condition not necessarily due to vegetation or valvular conditions may not necessarily have given symptoms of it, because if you had embolus, you would probably have had cardiac symptoms, preceding it, at some other time. It is not probable in the absence, or in a negative history, you would look for it. On the other hand, it is possible to have some one of the cardiac conditions which never existed before, but one would always with a serious condition be likely to have a previous history; although there occur individuals—

Q Isn't it an extraordinary thing for a person to drop from heart disease, without having

some previous symptom? A No. I see that very frequently.

The Court. Mr. Heine, do you want to make any argument in this matter?

Mr. Heine. I will refer your Honor to the case of In re Sanderson, 113 N. E., 355.

ARGUMENT.

The Court. It seems to the Court that there is not any speculation in this case as to what caused the death. Death was caused by a broken neck. I believe I ought to adopt the reasoning of the case cited by Mr. Gannon. The real cause of the death was the broken neck. We shall go back further and further to find out what were the remote causes of the breaking of the neck. It is only when we get further back than that, that we begin to speculate. The respondent brings in a physician who answers the hypothetical question with regard to what might be the cause of the fall. Any other supposition would be just as valid. I think the petitioner has sustained the burden.

Mr. Heine. Will your Honor indicate what you consider the accident?

The Court. When you come to prepare the state of facts, you can indicate that with sufficient certainty for the upper court to review it.

Mr. Gannon. I would like to make formal application for counsel fee.

The Court. Present that at the time you present your findings.

Determination of Facts and Order.

Filed December 4, 1917.

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

1. This is a proceeding brought by Elizabeth Kroog against the Keystone Dairy Company, a corporation of the State of New Jersey, under the provisions 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 an employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the acts amendatory thereof, and supplemental thereto, that a statement of facts relating to the claim of the petitioner, certified by Workmen's Compensation Aid Bureau, under the provisions of an act entitled "An Act creating a Workmen's Compensation Aid Bureau in the Department of Labor," approved March 15, 1916, was filed in lieu of a petition on the 23rd day of August, 1917, and on that date an order was made assigning counsel and setting the cause down for hearing for the 20th day of September, 1917, that the date of said hearing was adjourned regularly from time to time to the 15th day of November, 1917, that process was served upon the respondent on or about the 25th day of August, 1917, and that the answer of the respondent was filed on the 28th day of September, 1917, which hearing was held in the presence of William R. Gannon, attorney of the petitioner, and M. Casewell Heine,

attorney of the respondent, on which day both parties produced witnesses who were examined in the presence of the Court and said counsel.

2. That said decedent was employed by the respondent as a salesman and driver of one of the wagons of the said respondent on or about the 8th day of September, 1916, and his duties included the selling and delivery of milk for said respondent and other numerous duties, among which was the duty of journeying to the yard of the Mountain Ice Company in Jersey City, and procuring ice for use in preserving the milk of the respondent, and that it was his duty on many occasions to make these trips for ice, and that he continued in such employment up to and including the 8th day of September, 1916, on which day he suffered the accident hereinafter described which caused his death.

3. That decedent at the time of his death was receiving for his wage the sum of $17 per week.

4. That on the 8th day of September, 1916, the decedent sustained personal injuries as the result of an accident. That the accident occurred while decedent was driving said horse and wagon onto a weighing scale at the ice depot belonging to the Mountain Ice Company located at Ferry street and Ravine road at the Erie Railroad, Jersey City, New Jersey; which said horse and wagon was being driven on the scale for the purpose of weighing the same. Decedent had driven the horse and wagon onto the scale when suddenly the horse stopped, and the decedent was accidently thrown or fell out of the wagon onto the ground at the side thereof, his head striking on an iron rail at the side of the scale; that as a result of said accident, decedent sustained a

broken neck and other injuries from which he died in a few minutes. That the injury which caused decedent's death was a fracture of the second cervical vertebrae of the spine immediately below the base of the skull and that said accident and death arose out of and in the course of said decedent's employment with respondent.

5. That the respondent herein had proper notice of said accident.

6. That as a result of said accident decedent died leaving him surviving his wife, the petitioner, who was an actual dependent of said decedent and who was living with her husband at the time of the accident and of his decease.

7. That respondent has not paid to the petitioner as a dependent of said decedent the funeral expense of $100 or any weekly compensation due her or any part thereof.

8. That the petition filed in the above matter, was filed in accordance with an act entitled "An act creating a Workmen's Compensation Aid Bureau in the Department of Labor," approved March 15, 1916, and that no provision for lawful and adequate compensation approved by said bureau has been filed as required by the provisions of said act creating the bureau, and that the efforts of said bureau to bring about a settlement were without success.

9. I find therefore that the petitioner is entitled to compensation for a period of three hundred weeks at the rate of $5.95 per week and burial expenses to the amount of $100.

10. The counsel of the petitioner is entitled to compensation in addition to his costs in the sum of two hundred ($200) dollars, said sum to

be paid by respondent, in addition to the compensation above provided for.

11. Costs will be allowed the petitioner, to be paid by respondent in addition to the compensation and counsel fees above provided for.

12. It is therefore on this 3rd day of December, 1917,

ORDERED, that judgment final be entered in favor of the petitioner, Elizabeth Kroog, and against the respondent, Keystone Dairy Company, Inc., a corporation, in the sum of $5.95 per week for a period of three hundred weeks beginning with the 8th day of September, 1916, together with the sum of one hundred dollars burial expenses and $200 allowed counsel for petitioner and taxed costs, to be paid in one lump sum upon the entry of judgment final. Costs taxed at $36.97.

MARK A. SULLIVAN,
J.

Filed December 4, 1917, Clerk's office.

JOHN J. MCGOVERN,
Clerk.

Reasons.

Filed December 22, 1917.

New Jersey Supreme Court.

ELIZABETH KROOG, widow of Henry Kroog, deceased, *Petitioner,* *vs.* KEYSTONE DAIRY COMPANY, a corporation, *Defendant-Prosecutor.*	*On Certiorari.* *Reasons.*

And the said prosecutor, Keystone Dairy Company, a corporation, comes and prays that the judgment against it in the Court of Common Pleas of the County of Hudson, may be set aside, reversed and for nothing holden, for the following reasons:

1. Because the Court held that the accident arose out of and in the course of the employment of petitioner's decedent.

2. Because the Court held that the accident arose out of the employment of petitioner's decedent.

3. Because the Court found that the death was caused by accident arising out of and in the course of the employment.

4. Because the finding of the cause of death was contrary to the medical testimony adduced.

Reasons.

5. Because the Court refused to find that an independent cause not arising out of and in the course of the employment was the proximate cause of the death.

6. Because the Court refused to strike out the testimony of the doctor from his record that the death resulted from an accidental fall.

M. CASEWELL HEINE,
Attorney for Defendant-Prosecutor.

Service acknowledged December 20, 1917.

WILLIAM R. GANNON,
Attorney for Petitioner.

Opinion.

Filed May 3, 1918.

NEW JERSEY SUPREME COURT.

FEBRUARY TERM, 1918.

ELIZABETH KROOG, &c.,
Defendant,

vs.

KEYSTONE DAIRY COMPANY,
Prosecutor.

On Certiorari.

Submitted February Term, 1918.

Before Justices Bergen and Black.

For Prosecutor, M. Casewell Heine, Esq.

For Defendant, William R. Gannon, Esq.

Per Curiam.

This is a Workmen's Compensation case heard in the Hudson County Court of Common Pleas, resulting in a determination in favor of Elizabeth Kroog, widow of Henry Kroog. Henry Kroog was a salesman and driver of one of the defendant's wagons, on the 8th of September, 1916, he was killed while driving a horse and wagon on to a weighing scale, at the ice depot belonging to the Mountain Ice Company at Ferry Street and Ravine Road at the Erie R. R. in Jersey City; as he was driving on to the scale, he was standing up in the wagon, he was heard to say "whoa" suddenly, the horse stopped and decedent was accidently thrown or fell out of the wagon on to the ground, his head striking an iron rail at the side of the scale causing

death. The defense was that his death was the result of natural causes, such as heart failure. This is the only point in the case. The judgment of the Common Pleas Court is supported by the evidence and this under the statute, on questions of fact is conclusive and binding. The judgment of the Court of Common Pleas is affirmed with costs.

Rule Affirming Judgment.

Entered May 9, 1918.

NEW JERSEY SUPREME COURT.

ELIZABETH KROOG, widow of Henry Kroog, dec'd, *Petitioner and Defendant,* *vs.* KEYSTONE DAIRY COMPANY, a corp'n, *Respondent and Prosecutor.*	*On Certiorari Rule.*

The court having inspected the transcript and proceedings of the Court of Common Pleas of the County of Hudson returned with the certiorari in this cause, the reasons for reversing the judgment below, and heard the argument of counsel therein, and having duly considered the same, do order that the judgment of the Court of Common Pleas of the County of Hudson be in all things affirmed with costs, and the said record remitted to the court below to be proceeded with according to law and the practice of said court.

Entered May 9, 1918.

On motion of

WILLIAM R. GANNON,
Attorney of Petitioner and Defendant.

D. EUGENE BLANKENHORN,
Of Counsel.

A true copy.

ENOCH L. JOHNSON,
Clerk.

New Jersey Court of Errors and Appeals

ELIZABETH KROOG, widow of HENRY KROOG, deceased, *Respondent,* *vs.* KEYSTONE DAIRY COMPANY, a corporation, *Appellant.*	On Appeal from Supreme Court.

BRIEF OF PETITIONER-DEFENDANT

I.

Death was caused by an accident arising "out of" the employment of decedent.

The court found as a fact that "decedent had driven the horse and wagon onto the scale when suddenly the horse stopped, the decedent was accidentally thrown or fell out of the wagon onto the ground at the side thereof, his head striking on an iron rail at the side of the scale; that as a result of said accident, decedent sustained a broken neck and other injuries from which he died in a few minutes. That the injury which caused decedent's death was a fracture of the second vertebra of

the spine immediately below the base of the skull and that said accident and death arose out of and in the course of said decedent's employment with respondent'' (Case, p. 33, ll. 34-40, p. 34, ll. 1-10). There is ample testimony in the case to sustain such a finding. The following expressions are found in the testimony:

HENRY BARNICKEL: ''I was standing on the scale when the wagon—when Mr. Kroog drove in the same as usual; he drove on the scale; he just put his hands up and said, 'Whoa', the same as he drove in any other day, turned right around and fell over sideways'' (Case, p. 12, ll. 19-24). ''He turned right around, fell backwards over the side of the wagon'' (Case, p. 12, ll. 30-33). ''He never spoke a word; he was still breathing when we pulled him out from underneath the wagon'' (Case, p. 13, ll. 8-10).

The deceased was still alive when the doctor arrived from the hospital in the ambulance and the doctor ''worked over him'' for some time after he reached the scene of the accident (Henry Barnickel, p. 14, ll. 20-40).

In order to adopt the respondent-prosecutor's view of the case, the court should have to follow counsel into the realms of speculation. Dr. Arlitz, alone, testified that in his opinion, cardiac syncope or cardiac embolus caused the fall (Case, p. 25, ll. 20-24). A microscopic examination would have disclosed whether the fall resulted from either cause (Dr. Arlitz, p. 28, ll. 28-40; Dr. Hasking, p. 29, l. 36). This proof respondent did not offer, although it had ample opportunity to have such post-mortem examination made, and consequently there was nothing before the court from which the conclusion could reasonably be reached that the fall was due to the cause suggested by Dr. Arlitz.

Dr. Hasking testified that there were many things which might have caused deceased to fall (Case, p. 30, l. 10), and the court adopted his view of the matter.

Both physicians agreed that a fracture of the cervical vertebra caused the death (Dr. Arlitz, p. 28, ll. 11-13; Dr. Hasking, p. 29, ll. 27-29).

But should it be conceded that cardiac syncope or cardiac embolus caused the fall, such an attack might not necessarily cause the death, "until he got his next attack" (Dr. Arlitz, p. 28, ll. 18-23). Hence, had deceased not received the injury from which concededly death resulted, and had he recovered sufficiently to have lived "until he had another attack," respondent might have escaped liability.

Reimers vs. Proctor Pub. Co., 89 At., 931.

But by reason of his position upon the milk wagon, due to his employment, decedent in his fall received the injury which resulted in his death.

The case of *Reimers vs. Proctor Publishing Co.,* 89 At., 931, cited by the prosecutor-respondent is not in point, since in that case the employee violated the express rule of his employer with reference to the use of the automobile in which he received an injury, and there was no testimony from which it could be inferred that the injury so received resulted in his death, because the physician who attended the employee testified that he could not state whether the injury caused the death.

Appellant's counsel has directed the court's attention to the case of Sanderson (113 N. E. p. 355) in which the Supreme Court of Massachusetts held that there was an entire absence of evidence to show that the hemorrhage was caused by the fall from the wagon. In that case, however, there was no evidence that the hemorrhage from which death resulted occurred subsequently to the fall from the

wagon, and the court found that it was obliged to speculate in order to determine at what time the hemorrhage occurred. The courts of this state on a similar state of facts have held that the finding of an employee dead with a wound, which admittedly was received in the course of his employment, establishes a prima facie case entitling the petitioner to recovery under the compensation law. The facts in *Muzik v. Erie R. R. Co.* 85 N. J. L., 129 and *De Fazio's Estate v. Goldschmidt Detinning Co.,* 88 Atl. (N. J.) 705 are almost identical with that of the Sanderson case, and the holding is directly contrary.

The leading American decisions have followed the English case of *Wicks v. Dowell,* 2 K. B., 225, 2 Awn. Cas. 732.

In *Carroll v. What Cheer Stables Co.* (R. I.) 96 Atl. 208, at page 211, the court cited with approval the rule laid down in *Wicks v. Dowell & Co.,* in which the employee, being seized with an epileptic fit, fell through a hatchway and received injuries resulting in his death as follows:

> "The case of *Wicks v. Dowell & Co.*, supra, was followed in the case of *Driscoll v. Cushman's Express Co.,* Mass. W. C. C. (July 1, 1912—June 30, 1913) pp. 125, 130, where the driver of an express wagon, employed by the defendant, while driving his wagon, suffered a fainting fit, or an "epileptiform attack," falling from his wagon and fracturing his skull, dying from the effect of the fracture. It was held by the Industrial Accident Board, in review, and in confirmation of the decision of the committee of arbitration, that the employe was exposed to a substantial and increased risk owing to his occupation, that the injury arose out of and in the course of his employment, and that the dependent mother was entitled to compensation.

"*Wicks v. Dowell,* supra was cited by the court with apparent approval in *Fennah v. Midland, etc., Ry.,* 45 Ir L. T., 192, 4 B. W. C. C., 440, 442, a case decided in the Court of Appeal, Ireland, 1911, and has been frequently cited in argument both in the English Court of Appeal and in the House of Lords. No case has been cited to us in which that case has been criticized, modified, doubted, or overruled. A number of cases have been cited to us involving the same general principle that were the previous diseased condition or temporary illness of the employee is a contributing or antecedent cause of the accident nevertheless the employe may recover. See: *S. S. Swansea Vale v. Rice,* 4 B. W. C. C., 298, a case of temporary illness, contributing to the accident of falling overboard from a vessel. *Fennal v. Midland, etc., Ry.,* 4 B. W. C. C., 440, where an engine driver, at work on his engine while stopped at a station, tightening up a nut fell to the permanent way and died from the effects of the fall, and where it appeared that he had previously had fainting fits it was held that recovery could be had, that it was an accident arising out of his employment. *Ismay v. Williamson,* 1 B. W. C. C.,232 (House of Lords), where the accident was a heat stroke from a furnace which happened to a hand employed in the engine room, and who was shown to have been in poor physical condition, not fit to stand the heat. *Clover, Clayton, & Co. v. Hughes,* 3 B. W. C. C., 275 (House of Lords), a case of death of a workman who had a very serious aneurism of the aorta, which ruptured while he was engaged in his ordinary occupation; disease of long standing. *Mc Inness v. Dunsmuir & Jackson,* 1 B. W. C. C., 226 (Court of Sessions, Scotland), where a workman having hardening of the arteries, by over exertion brought on cerebral hemorrhage, which was more likely to occur in his case on account of the hardening of the arteries. *Maskery v. Lancashire Shipping Co.,* 1914 Stone's W. C.

& Ins. Cas., 290 (Court of Appeal, England), a case of death from heat stroke suffered by a laborer in the engine room of a steamer in the Red Sea, deceased being physically unfit for the work which involved exposure to extreme heat, citing *Ismay v. Williamson,* supra, See, also, *Morgan v. Zenaida,* 2 B. W. C. C. 19, and *Aitken v. Finlayson, etc.,* 1914 Stone's W. C. & Ins. Cas. 398."

We are of the opinion that the decree appealed from in this case is fully supported by the evidence; and under the principles of law so clearly set forth in the above-cited cases, with which we find no reason to dissent, we find that what happened to the petitioner was an "accident" under the terms of the act, and that the accident 'arose out of * * * the employment.' "

"The appellant cites a few cases which do not seem to this court to have any weight in this connection, since the court in each case found that injury or death of the employe did not 'arise out of the employment.' but arose from natural causes to which any one not so employed would have been equally subject. Sheldon v. Needham, 1914 Stone's W. C. & Ins. Cas. 274; *Roger v. Paisley School Board,* 1912 Gordon's W. C. Cas. 157; *Robson v. Blakely,* 1912 Gordon's W. C. Cas. 86; *Butler v. Burton-on-Trent Union,* Id. 222; *Thackway v. Connelly & Sons,* 3 *B. W. C. C.* 37; *and Nash v. "Rangatira"* (owners), 1914 Stone's W. C. & Ins. Cas. 490. In the latter case the accident and death were found to have arisen out of intoxication and not out of the employment. We have carefully examined all of these latter cases and find nothing therein to disturb our conclusions."

Appellant's counsel cites *Butler vs. Burton-on-Trent* as being in conflict with the decision in *Wickes vs. Dowell.* But upon a careful reading of the case no conflict appears. The facts found were:

"C. F. Butler was employed by the appel-

> lants (the municipal corporation of Burton-on-Trent) as a workhouse master at Burton-on-Trent. On August 21, 1911, he was sitting on a balustrade at the head of some steps leading up to the part of the workhouse premises where his house was, and was smoking and talking to the labor-master, giving him instructions for the next day, when he was seized with a fit of coughing. He got up, turned half way round and fell from the top to the bottom of the stone steps. One of his ribs was broken, and a few days later he died of pneumonia. * * * There was medical evidence to the effect that the husband had a healed tubercular nodule at the apex of the right lung, the presence of which was liable to produce violent paroxysms of coughing, that it was well known that the coughing caused giddiness, and that the pneumonia from which he died was caused by the perforation of the cavity of the chest by the fractured rib.''

The duties of a workhouse master were not defined in the case, but in England the term ''workhouse master'' signifies the officer in charge of a workhouse. He is furnished with a residence or quarters within the workhouse.

The Court remarked that the deceased might as well have been seized with a fit of coughing whilst sitting at his desk or in any place other than the workhouse or his residence, and seemed to take the view that the deceased was at the place were the accident occurred of his own volition and that by reason of the fact that he resided upon the premises and not because the nature of his duties required him to be in the position of danger from which resulted the injury.

There is a clear distinction between such a case and the case of *Wicks v. Dowell,* where the deceased met his death by the very nature of his occupation which required him to be in the partic-

ular place of danger where the accident occurred, although an epileptic fit caused the fall into the hatchway. There is nothing to show nor any reason to expect that the fatality to the workhouse master would have occurred had the deceased been occupied in some position other than the place of danger aforementioned. To have held that his dependent was entitled to compensation under the circumstances would have been to have held that death occurring to a workhouse master from any accidental cause would entitle his dependents to compensation, a theory which never has been adopted.

Butler v. Burton, therefore, holds in effect that since the deceased's employment did not take him into the position in which he was sitting at the head of the steps from which he subsequently fell, while the accident occurred in the course of his employment, it did not arise out of his employment.

In the case under consideration such a conclusion cannot be reached since the decedent was in the dangerous place upon the milk wagon by reason of his employment as a driver of that wagon, the accident arising out of the employment.

The trial court having found as a fact that death resulted from a broken neck caused by a fall from the wagon, this court will not set it aside. The finding by Judge Sullivan was based upon disputed questions of fact, and he having made a decision, this court will not review it.

Jackson v. Erie R. Co., 86 N. J. L., 550;

Long v. Bergen Co., 86 N. J. L., 117;

Dunewald v. Steers, 99 Atl., 345.

II.

The Petitioner-defendant has sustained the burden of proof.

Petitioner presented proof that deceased fell from a wagon of the respondent-prosecutor while in the employ of and in the prosecution of the business of the respondent-prosecutor, sustaining an injury from which he died. In the absence of any other proof, petitioner thereby made out a prima facie case, which respondent was obligated to overcome by preponderance of evidence.

Muzik v. Erie R. Co., 85 N. J., 129;
De Fazio's Est. v. Goldschmidt Detinning Co., 88 Atl., (N. J.) 705.

In both of the cases cited, there was no proof whatever of how the deceased persons were killed. They were found lying dead.

It is respectfully submitted that the judgment of the Hudson County Common Pleas Court should be affirmed.

Respectfully submitted.
WILLIAM R. GANNON,
Attorney of Petitioner-Defendant.

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New Jersey Court of Errors and Appeals

ELIZABETH KROOG, widow of Henry Kroog, deceased,
Petitioner—Defendant in Certiorari,
Respondent,

vs.

KEYSTONE DAIRY COMPANY, a corporation,
Respondent—Prosecutor in Certiorari,
Appellant.

Action at Law.

On Appeal from Supreme Court.

Brief of Appellant.

Statement.

This action was brought in the Hudson County Court of Common Pleas in a Workmen's Compensation case and the trial of the issue resulted in a finding, determination and judgment in favor of the petitioner and against the respondent.

On certiorari to the Supreme Court the judgment of the Court of Common Pleas of Hudson County was affirmed and the respondent and prosecutor in certiorari now appeals to this Court.

Grounds of Appeal.

The above named appellant states the following grounds of appeal:

1. The Supreme Court sustained the finding of the Court of Common Pleas that the accident arose out of and in the course of the employment of petitioner's decedent.

2. Because the Supreme Court sustained the finding of the Court of Common Pleas that the accident arose out of the employment of the petitioner's decedent.

3. Because the Supreme Court sustained the finding of the Court of Common Pleas that the death of petitioner's decedent was caused by accident arising out of and in the course of the employment.

4. Because the Supreme Court sustained the finding of the Court of Common Pleas of the cause of death, contrary to the medical testimony adduced.

5. Because the Supreme Court sustained the refusal of the Court of Common Pleas to find that an independent cause not arising out of and in the course of the employment was the proximate cause of the death.

6. Because the Supreme Court sustained the Court of Common Pleas in its refusal to strike out the testimony of petitioner's doctor that the death resulted from an accidental fall.

M. CASEWELL HEINE,
Attorney of Appellant.

Brief of the Argument.

The appellant contends that there is no evidence upon which the Trial Court could base a finding that the death of Henry Kroog (petitioner's decedent) was the result of an accident arising out of his employment.

Appellant's further contention is that not only did the Trial Court find without evidence to support the finding, but that he found directly contrary to the evidence adduced.

Appellant's contention that the evidence shows that the death of Henry Kroog resulted from natural causes and not from any accident is included within the reasoning that underlies the first contention above.

Point I.

There is no evidence to sustain the finding and judgment of the Court of Common Pleas affirmed by the Supreme Court.

The Supreme Court in its opinion affirming the judgment of the Common Pleas says "the judgment of the Common Pleas Court is supported by the evidence" and adopts the language of the determination of the Court of Common Pleas that "decedent had driven the horse and wagon onto the scale when suddenly the horse stopped and the decedent was accidentally thrown or fell out of the wagon" (case, p. 33, ll. 34 to 40).

It is conceded that if the evidence showed that the horse "*suddenly*" stopped there might be an inference from this, upon which the finding of the lower Court could rest.

The evidence, however, does not show that the horse "*suddenly*" stopped. An examination in detail demonstrates that the element of "suddenness" in the stopping has been injected into the case by the Court out of its imagination and without any evidence.

ANALYSIS OF THE EVIDENCE ON THE QUESTION WHETHER THERE WAS A "*SUDDEN*" STOP BY THE HORSE.

The testimony on this point is given by witness Barnickel on pages 12 to 15 of the case. He states:

1. Kroog "drove on the scale" (case, p. 12, l. 22)
   the only fair inference is that this act of driving on the scale was completed. There is nothing in this statement to connote a "sudden" stop.

2. "Drove in the same as usual, the same as he drove in any other day" (case, p. 12, ll. 21 and 24).
   There is no testimony that the usual method of Kroog's driving upon the scale on other days was to drive in quickly and come to a "sudden" stop and no element of "suddenness" is connoted by this testimony.

3. "Just put his hands up and said "whoa" (case, p. 12, l. 23).
   There is no evidence here that the horse obeyed the command of "whoa" by "suddenly" stopping or that there was anything

unusual in the nature of "suddenness" occurring after Kroog had said "whoa." The only inference possible is that when Kroog said "whoa" the horse was in motion and that at once thereafter he stopped. If there had been anything "sudden" in the character of this stop, this witness should have testified to it. There being no such testimony, there is no basis in the evidence for the Court to find that it was a "sudden" stop.

4. "Turned right around" (case, p. 12, l. 25).

Kroog, having driven in upon the scale, having put up his hands, and said "whoa," the inference from the fact that he then "turned right around" is that at the time of the turning the command to "whoa" had been obeyed and that the horse and wagon was at a standstill. It is not fairly inferable that he would have so turned around until after the command to the horse had been obeyed. There is nothing here in the evidence to indicate anything in the nature of a "sudden" stop, which preceded or accompanied his turning around.

5. "And fell over sideways."

This evidence is conclusive that there could have been no "sudden" stopping or starting movement by the horse. If the horse had "suddenly" stopped while the wagon (with Kroog standing up in it behind the seat) was proceeding forward, a "sudden" stop would have thrown Kroog forward.

If, on the other hand, the horse had suddenly started up again, after stopping, it would have thrown Kroog backwards. The testimony, however, that he "fell over sideways" is conclusive that the fall was in no way contributed to by the movement of the horse, and negatives any contention of "sudden" movement on the part of the horse, either stopping or starting.

This witness reiterates on page 12, line 31, "he turned right around, fell backwards over the SIDE of the wagon."

This confirms what has been said above about the stop having been completed prior to the turning around and also in regard to the fall from the side.

On page 14, the witness further reiterates "he drove in just the same as any other day. He drove right on the scale, right *to* the iron plate, hollered whoa, threw up his hands" (page 14, ll. 1 to 10). When the Court interposed "that is what he said at first," the witness continues "*then* turned around, fell off the wagon" (case, p. 14, ll. 15 to 18).

The word "then" is extremely significant. It indicates that in the witness' mind there was some interval of time between the hollering "whoa" and throwing up his hands and the turning around and falling. The only inference that is fair is that when he hollered "whoa" and threw up his hands, the horse stopped and that after the stop then Kroog turned around and fell. Certainly there is nothing here to connote any unusual character in the stopping, such as "suddenness." This witness would surely have been able to have testified to it if that had been the case and his failure to do so, in the face of his other testimony, conclusively eliminates any element of "suddenness" in this stop.

This witness again says on page 15, line 10, he turned around—"turned around on the wagon and fell on the side."

The stopping was a completed act before Kroog turned around and after he turned around he fell. There is no element of "suddenness" in the movement of wagon or of Kroog, it is an ordinary, normal sequence of events. The witness saw it all and must have seen any unusual or "sudden" movement. There was none. He is unable to explain the cause of the fall.

Referring to the time when Kroog fell (page 15, ll. 15-20) witness continues, the horse was off the scale—the wagon on the scale, just ready to be weighed.

This shows that the wagon was at a stand still when Kroog turned around and fell, else it could not have been "ready to be weighed."

The whole of petitioner's case, therefore, which rests upon proof of a "sudden" stop, falls for lack of any evidence whatsover to sustain it.

Inasmuch as the fall from the wagon was not caused by a "sudden" stop we are, therefore, brought to the question as to what did cause the fall.

The evidence as to this in the case is uncontradicted.

Respondent's physician, Dr. William J. Arlitz, gives his opinion that it can be said with reasonable certainly that the cause of decedent's fall was an attack of cardiac syncope or cardiac embolism (case, p. 25, ll. 10 to 20).

In answer to the Court's question the doctor continued that persons apparently in the best of health suddenly put up their hands, through the constriction (case, p. 25, l. 28) and he explains this (on page 26): "A cardiac embolism means a small vegetation was carried from the valves of the heart by the circulation to the brain. That occurs just like that (snaps his fingers) and should produce death."

"By cardiac syncope or back pressure I mean there is a high blood pressure, and because of the high blood pressure the circulation is arrested and death is produced in that way. It makes the heart stop beating." (Case, p. 26, ll. 14-24).

The doctor continues, in answer to question on cross examination where counsel says: "Suppose, as I am standing now, and without throwing up my hands, I should drop to the floor; sitting where you are could you tell me with reasonable certainty what was the cause of my death—or could you tell anybody else?" A "Yes, with a reasonable degree of certainty, eliminating fracture of the skull or of the spine. If you fell as you describe, I should say you had cardiac syncope or cardiac embolism, or you might have had a cardiac dilatation with complete loss of compensation." (Case, p. 28, ll. 1-15.)

The doctor states that this happens in a great many cases. (Case, p. 27, ll. 35-40.)

The doctor goes on to give his emphatic opinion that this heart condition was the cause of decedent's fall. (Case, p. 28, l. 15.)

Petitioner's own physician, recalled, testifies to his own counsel: Q "Isn't it an extraordinary thing for a person to drop from heart disease, without having some previous symptom?" A "No, I see that very frequently." (Case, p. 30, l. 39; p. 31, l. 1.)

Point II.

The death of decedent was not caused by an accident arising "out of" his employment.

Burden of Proof.

> "The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by 'an accident arising out of and in the course of his employment' rests upon the claimant." Bryant *v.* Fissell, 84 N. J. L. 72 (86 Atl. 458).

The words "out of" involve, according to the opinion in *Bryant* v. *Fissell, supra,* "the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment."

The Court in the same case defines the word "accident" as "an unlooked for mishap or untoward event which is not expected or designed."

In *Lyondale Bleach Works* v. *Riker,* the Court deals exhaustively with the question of whether a disease may be considered an accident and holds against the view which makes the word "accident" include those events which were not only the result of violence and casualty, but also those resulting conditions which were attributable to and caused by events that take place without one's foresight or expectation.

And the Court says:

> "This, however, is to make the employer's liability turn on resulting conditions rather than on the fact of injury by accident. There may indeed be compensation awarded for resulting conditions where you can put your finger on the accident from which they result; but the ground of action fixed by the statute is the injury by accident, not the result of an indefinite something which may not be an accident."

Further, in *Reimers* v. *Proctor Publishing Co.,* 89 Atl. 931, the Court holds:

> "Where the doctors refuse to state that death was caused by the accident there is no basis for inference to that effect by the Court."

It is submitted that in the case at bar the petitioner has failed to sustain the burden in accordance with the principles above stated.

In brief, this case may be stated as follows (taking the evidence most favorable to petitioner): Decedent's death was caused by a broken neck which he received when he fell from his wagon, and the fall was caused by a diseased heart condition.

The first question, therefore, which we come to is: What is the accident? And it was this question which the Court below declined to answer at counsel's request (case, p. 31; l. 30).

Concededly the broken neck resulted from the fall. Is the fall the unexpected or untoward event—the accident? There is no evidence that decedent tripped, or stumbled, or that the wagon started—absolutely nothing except that he raised his arms, turned and fell.

But people do not fall, limp and helpless in this manner, without some cause, and the uncontradicted evidence in the case shows that the cause of the fall was a diseased heart condition.

Obviously, under *Lyondale Bleach Wks.* v. *Riker, supra,* this diseased heart condition can not be an accident arising out of the employment.

There can be no question on the evidence that the proximate cause, "the cause without which the accident would not have occurred," "the cause which, acting through a natural sequence of events, causes the injury," "the dominant cause" of decedent's death and of the fall which resulted in his death was the diseased condition of the heart.

The only theory on which the petitioner should possibly be able to establish liability would be that the employer had notice of the diseased heart condition of the employee and would therefore be presumed when putting him to the work of driving a wagon to know that he was subjecting him in that position to special risk incident to the employment, by reason of which there should have been before the employer's mind the likelihood that the diseased condition of the heart would manifest itself at a time when the employee was up from the ground on the wagon, and that the heart condition would be likely to cause a fall from the wagon with consequently more serious results than if the employee were kept at work upon the ground and on the level.

It is evident that the more elevated the position of the workman the more likely he is to be injured in case he falls, but that does not affect the principle. The same principle should govern whether the person suffering the accident stands in one place or another, so far as the determination of the proximate cause of the accident is concerned. The degree to which he may be injured in one place as compared with the possible extent of his injuries in another does not in any way assist in the determination as to what was the proximate cause of the accident, or whether the accident arose "out of" the employment. All that arises out of the employment is that the consequences of the fall are more serious, but the fall itself does not arise out of it. It is wrong to dis-associate the petitioner's seizure or dizziness from heart trouble and to say that though the one was not an accident the other was.

Further, the evidence in the case absolutely negatives this theory, for it affirmatively appears that the employer had no such knowledge of the diseased heart condition of the employee, and consequently this case can not be brought within the reasoning of the English hatchway case (*Wicks* v. *McDowell,* 2 K. B. 225—and this case has not been followed by the later English cases such as *Butler* v. *Burton, infra.*)

By analogy the reasoning in *Schmoll* v. *Weisbrod Brewing Co.,* 97 Atl. 723, supports respondent's contention. In that case the Court found that there was no evidence that the neighborhood in which the

brewery collector performed his duties was more frequently the scene of lawless acts than any other neighborhood in Atlantic City; that therefore the employer could not be charged with knowledge that he was placing his employee in a position where unusual risks would be incident to the employment.

In the case at bar the employer had no knowledge on the evidence that in placing decedent in the position of a driver of a wagon he would be exposed to any unusual risks by reason of the likelihood of being attacked by a seizure which would cause him to fall and his position on the wagon thereby render his fall likely to be more serious than if he had remained on the ground. As was said in the Schmoll case:

> "Where an employer had no knowledge of a practice existing among his employees which added a risk to the employment which otherwise did not exist and would not have arisen except under special circumstances, it would be plainly unreasonable to hold that the employer was bound to anticipate an accident happening from such unknown risk."

In the present case it is submitted to be equally unreasonable to hold the employer in this case bound to anticipate a seizure by heart disease when the employee might be in a position where a fall would be serious, such as being upon a wagon instead of on the ground, inasmuch as the employer had no knowledge that the employee was suffering from any such disease.

The employer, in his capacity of "reasonable person," had no intimation at the inception of the employment that the employee was liable to seizure from heart trouble, which might create an unusual risk of injury if he were put at the work of driving a wagon.

The ordinary risks of driving a wagon, such as the sudden starting of the horse, the possibility of collision with other vehicles, etc., were within the purview of both employer and employee; but that the employee might be seized by an attack of heart disease while standing still upon a standing wagon and be thereby precipitated to the ground, receiving injuries, was certainly not a risk within the contemplation of the employer in the evidence before the Court and under the rules of law. The risk from this heart condition was in no way peculiar to the employment of driving a wagon. The same fatal injury might have been received had the employee been attacked by the disease while standing on the floor of the shop, had he fallen so that his head struck any hard object, or even the floor. The diseased condition might have manifested itself while the employee was on the street, or at the head of a flight of stairs in his home, and it was the risk common to all sufferers from this disease that its effect might be completed upon the employee at any time, regardless of where he might be. It is the disease and its manifestation which is the dominant cause, which, setting in motion the chain of events, resulted in the employee's death and the disease would have been under any circumstances the dominant cause which would have set in motion any chain of events, resulting in injury to the employee. It is this upon which we must place our finger as the proximate cause, and as such it can not be the basis of liability for injury by accident.

In *Butler v. Burton,* 5 B. W. C. C. 355, and 1912 Gordon's W. C. Cases, 222, the English Court of Appeals held that a yard master while sitting at the head of a flight of steps was taken with a fit of coughing, due to tubercular conditions, and became dizzy and fell down the steps, was not entitled to compensation, that the accident was not such as arose out of the employment in the sense that it was due to the nature of the employment or to anything to which the employment required him to expose himself.

The Court says:

> "The provision that the accident must be an accident arising out of the employment has the meaning that the accident must arise out of some risk reasonably incidental to the employment, in the sense that the man who meets with the accident must have been exposed in the course of his employment to some risk additional to those of other members of the public." * * * "In this instance I think the accident was brought on by the tubercular nodule which caused the fit of coughing. The coughing in its turn produced giddiness, and owing to the giddiness the man fell."

In *Salmi* v. *Columbia, etc. R. R. Co.,* 146 Pac. Rep. 819, L. R. A. (N. S. 1915 D, 834), the Court traces the sequence as follows:

> "Likewise in this instance the explosion of the blast naturally produced the mental state of fright, the fright the faint, the faint the fall, the fall the fracture of the abdominal wall, upon which the plaintiff rests her cause of action."

The Supreme Judicial Court of Massachusetts in *Sanderson's case,* 113 N. E., p. 355, deals with the case of a man who was seen driving a wagon and later was found in the road, and cites the McNichol case, 215 Mass. 497 (L. R. A. N. S. 1916 A., 306). The Court says that an injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. The Court holds that this excludes "an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment."

In the Sanderson case the Court held that there was "an entire absence of evidence to show that the hemorrhage was caused by the fall from the wagon. It could have been found that the blow upon the head was sufficiently severe to have caused the hemorrhage, but there is no evidence to show that such injury did produce the hemorrhage. In other words, a finding that the hemorrhage preceded the fall and caused employee to fall from the wagon, is as consistent with the evidence as is a finding that the hemorrhage was caused by the fall."

In the case at bar the evidence is direct that the fall was caused by the diseased heart condition. In the Sanderson case the Court says: "Many conjectures could be made as to the cause of the fall of the deceased," and adds: "It is plain that if the hemorrhage was due to natural causes, and was not produced by the fall, it could not

be found to be an injury arising out of he employment." This is exactly the state of the evidence in the case at bar, where the testimony is uncontradicted that the heart disease caused the fall.

In the case of *Nash* v. *"Rangatira,"* 1914, Stone's W. C. and Ins. Cases 490, a seaman, returning to his ship which was moored to a pier, was apparently intoxicated. He walked on the gangplank to board the ship, lost his balance, fell off and was killed. The Court below held that the primary cause of the accident was the intoxicated condition, but that the accident would not have happened had he not been at the time mounting the gangplank, an incident in the performance of his duty in returning to the ship, hence he was under a special risk.

The Court of King's Bench, however, held this reasoning to be unsound, and that it was not sufficient that a drunken man should meet with an accident in the ambit of his employment.

So far as the employment is concerned, drunkenness and Bright's disease, or heart disease as causes of a fall are on the same footing. The sailor's fall was caused by his drunkenness without relation to his employment, and the same will be true of an attack of heart disease.

Point III.

The burden of showing the cause of death is not sustained by the petitioner.

The Assistant County Physician certified the cause of death to be fracture of the second cervical vertebra, but his examination was made after death and does not negative the possibility that the heart condition itself caused death. It is obvious that the man might have died from the heart condition and still have sustained the injury to the neck in falling. His testimony is simply of the physical condition he found (case, p. 19, l. 10). There was no autopsy. The doctor says that a fracture at that particular vertabra is usually followed very shortly by death (case, p. 19, l. 30).

Dr. Arlitz, in testifying to the usual symptoms and course of the disease known as cardiac syncope or cardiac embolism, says (at case, p. 27, ll. 1-10), in response to a question of petitioner's counsel describing the decedent's symptoms, that death might result from these causes and adds that death occurs in this way by a sudden dropping down of a man in a great many cases (case, p. 27, ll. 30-40). He further states that the cardiac condition which he diagnosed as probable might cause instant death or death within two or three hours (case, p. 28, ll. 15-20). The county physician, recalled, says that he frequently has seen people drop dead from heart disease without having any previous symptom (case, p. 30, l. 39; p. 31, l. 1).

It is submitted, therefore, that the evidence stands in exactly the same situation as it did in the case of *Reimers* v. *Proctor Publishing Co.*, 89 Atl. 931, where the Court says: "We think the furthest this testimony goes is to show a possibility that the death was due to the accident. Where the doctors refuse to state that death was caused by the accident there is no basis for inference to that effect by the Court."

In that case a man had received an injury to the head and was later attacked with vomiting and died, and it was possible that his condition was due to a recurrence of the trouble in the head, which had been injured by an accident, or to an acute attack of indigestion. The Court held, as above, that this was not sufficient, that the petitioner had not sustained the burden.

In the case at bar there is the possibility that decedent died from heart failure, irrespective of the fracture to the vertebra. There is also the possibility that the heart failure merely caused the fall (this is uncontradicted) and that death was actually caused by the broken vertebra. The actual cause of death is left to conjecture, as in the Sanderson case, *supra,* where it was a question whether the hemorrhage of the brain was due to natural causes, or whether it was produced by the fall.

It is submitted that in the absence of testimony by the doctors that there was a greater probability of death being caused by the broken vertebra than by the heart disease the petitioner has not made out a case. The possibility is equal as to either cause, and this balance of the evidence is insufficient.

Point IV.

It is submitted that the judgment of the Supreme Court affirming the judgment of the Court of Common Pleas should be reversed and that judgment should be directed to be entered for respondent, dismissing the petition.

Respectfully submitted,

M. CASEWELL HEINE,
Of Counsel and Attorney for Defendant-Prosecutor.