

Court, that Frese, the engineer, was guilty of negligence as a matter of law in not having prevented the collision, the real and substantial cause of the collision was the negligence of the fireman, Savage, and, under the provisions of § 3 of the Employers' Liability Act, a recovery cannot be denied to the plaintiff, but only diminished in the proportion that the negligence of Frese bore to the combined negligence of Frese and Savage. *Union Pacific R. R. Co. v. Hadley*, 246 U. S. 330.

Mr. M. G. Roberts, with whom *Mr. Bruce Scott*, *Mr. H. J. Nelson* and *Mr. E. M. Spencer* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action in Missouri under the Federal Employers' Liability Act for the death of the plaintiff's (petitioner's) intestate, caused by a collision in Illinois between engines of the defendant and the Wabash Railroad Company at a grade crossing. The deceased, Frese, was the engineer in charge of the defendant's engine. A statute of Illinois [Hurd's Rev. Stats., 1916, c. 114, § 75] required that "All trains running on any railroad in this State, when approaching a crossing with another railroad upon the same level, or when approaching a swing or draw bridge, in use as such, shall be brought to a full stop before reaching the same, and within eight hundred (800) feet therefrom, and the engineer or other person in charge of the engine attached to the train shall positively ascertain that the way is clear and that the train can safely resume its course before proceeding to pass the bridge or crossing." *Southern Ry. Co. v. King*, 217 U. S. 524. Frese brought his train to a stop somewhat over two hundred feet from the crossing, and the Wabash train stopped at about three hundred feet from it. But the view of the

Wabash track from the Burlington was obstructed intermittently until the Wabash track was reached. The two trains did not discover each other, but started on again and collided, killing Frese. The Supreme Court of Missouri held that, as the engine was under the control of the engineer who was killed, the statute of Illinois imposed upon him the imperative duty positively to ascertain that the way was clear before entering upon the crossing; that if he had done so he would not have been killed, and that the plaintiff could not recover. Judgment was ordered for the defendant. 290 Mo. 501.

The plaintiff contends that there was evidence of contributory negligence on the part of the fireman, Savage, and therefore that, even if Frese was negligent, that would not be a bar to this action under the Employers' Liability Act. But the only evidence as to the fireman came from a man who was standing on the ground as the engine passed him. He says that it looked to him that the fireman then was looking through the front window at that time and that he continued in that position up to say fifty or sixty feet from the crossing of the tracks. The fireman was on the left on the side of the other approaching train, the engineer on the right where he could not see so well. But of course the witness could not testify which way the fireman turned his eyes after he saw only his back, and it is a mere speculation to argue that Savage did not do all that he could. Moreover, the statute makes it the personal duty of the engineer positively to ascertain that the train can safely resume its course. Whatever may have been the practice, he could not escape this duty, and it would be a perversion of the Employers' Liability Act, (April 22, 1908, c. 149, § 3; 35 Stat. 65, 66,) to hold that he could recover for an injury primarily due to his failure to act as required, on the ground that possibly the injury might have been prevented if his subordinate had done more. See *Great Northern Ry. Co. v. Wiles*, 240

U. S. 444, 448. If the engineer could not have recovered for an injury his administratrix can not recover for his death. *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 70. There is no doubt that the statute of Illinois applied to this case.

Judgment affirmed.

BREDE *v.* POWERS, UNITED STATES MARSHAL
FOR THE EASTERN DISTRICT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NEW YORK.

No. 45. Argued October 4, 1923.—Decided October 22, 1923.

1. The sections of the Revised Statutes governing the places in which sentences of imprisonment for crime may be executed are *in pari materia* and should be construed together. P. 11.
2. The power of the District Court to sentence to imprisonment in another State, in a penal institution designated by the Attorney General under Rev. Stats., § 5546, is not confined to cases in which the imprisonment is for more than a year or at hard labor (§§ 5541, 5542,) but exists also where the sentence is for imprisonment merely, for a year or less. *Id.*
3. Under § 21 of Title II of the National Prohibition Act, which declares any building, boat, vehicle, place, etc., where intoxicating liquor is manufactured, sold, kept, or bartered in violation of that title, to be a common nuisance, and provides that any person maintaining such nuisance shall be guilty of a misdemeanor and punishable by fine of not more than \$1,000, or imprisonment for not more than one year, or both, the imprisonment imposed cannot be at hard labor or in a penitentiary; and, the offense, not being infamous, may be prosecuted by information. P. 12.
4. A law of New Jersey (1917, c. 271,) authorizing the board of chosen freeholders of any county to "cause to be employed" within the county any or all prisoners in any county jail, construed as not contemplating the requirement of labor as a punishment. P. 13.

279 Fed. 147, affirmed.