

otherwise would have been lost. The fact was a general one. No particular oil was mentioned and the fact was not confined to oils. The public was directed to make a 'simple preliminary test to determine which oily substance yields the proportion of froth or scum desired.' The patent having been held good as to the oils although experiment was necessary to find out what oil would work best with a given ore, the disclosure was an anticipation although experiment might be necessary to choose among the substances having the required affinity the one that would produce the best result.

The petitioner adverts to the success that has attended the later patent and to the fact that the world waited until it appeared. But interlopers naturally would be slow to venture into the field occupied by a powerful company armed with patent No. 835120 and supported by a subtle ingenuity that we cannot doubt would have been exercised with even more effect to show that a process like that in No. 962678 was an infringement than it now is to prove that the later patent was a revelation that transformed the art.

Decree affirmed.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.*
BRYANT, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 113. Argued January 16, 17, 1930.—Decided February 24, 1930.

1. An action for wrongful death will not lie under the Federal Employers' Liability Act where the injury from which death resulted was inflicted two days after the employment of the decedent by the railway company had been terminated. P. 405.
2. The writ of certiorari should not issue to review a case in a state court as one governed by the Federal Employers' Liability Act, if judgment against the carrier was rested upon the state law, pursuant to a finding that the injured person's employment by

the carrier had ceased before the injury occurred, and if there was some evidence to support that finding. *Id.*
152 Va. 263, affirmed.

CERTIORARI, 279 U. S. 834, to review a judgment of the Supreme Court of Appeals of Virginia, affirming a recovery against the Railway Company in an action for death by wrongful act.

Mr. J. M. Perry for petitioner.

Mr. Charles Curry, with whom *Messrs. R. B. Stephenson* and *Curry Carter* were on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an action seeking to charge the petitioner for the death of the respondent's intestate, who was shot and killed by the foreman of a gang in which the deceased if not discharged would have worked. At the trial the petitioner demurred to the evidence, on the ground, among others, that at the time of the killing the parties were engaged in interstate commerce. The demurrer was overruled and the respondent (plaintiff) got judgment, which was affirmed by an equally divided Court. If the parties were governed by the Federal Employers' Liability Act the respondent might have difficulties from the decisions of this Court. *Davis v. Green*, 260 U. S. 349. *Atlantic Coast Line R. R. Co. v. Southwell*, 275 U. S. 64. But the deceased was killed on Monday, and there was some evidence that he had been discharged on the Saturday before. If so the Act of Congress did not govern and the parties were left to the State law, with which we have no concern. The writ of certiorari would not have been granted but for the impression that there was no doubt that the deceased was employed by the petitioner in interstate commerce up to the moment immediately preceding his death.

Judgment affirmed.