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TESTIMONY FOR DEFENDANT.

PLAINTIFF'S EXHIBITS OF FEBRUARY 3, 1928.

DEFENDANT'S EXHIBITS OF FEBRUARY 3RD AND 6TH, 1928.

ADDITIONAL PAPERS ON APPEAL TO THE COURT OF ERRORS AND APPEALS.

Complaint.

(Filed February 14, 1926.)

New Jersey Supreme Court

HUDSON COUNTY.

ALMA MICHELSEN, Administratrix of the Estate of Axel Michelsen, deceased, *Plaintiff*, *v.* ERIE RAILROAD COMPANY, a corporation, *Defendant.*	Action at Law.

The plaintiff residing at No. 5720 Fifth Avenue, Brooklyn, in the State of New York, says:

1. That she is administratrix of the Estate of Axel Michelsen, deceased, and brings into Court letters of administration granted to her upon the said estate by the Surrogate of the County of Hudson.

2. The defendant is a corporation engaged as a common carrier by railroad at divers parts of the State of New Jersey.

3. The intestate of the plaintiff, on the 22nd day of December, 1925, was in the employ of the Frederick Snare Corporation.

4. That in the course of his employment for said Frederick Snare Corporation, it was the duty of the intestate of the plaintiff to aid in the unloading of certain piles from a flat car of the defendant, transported by the defendant from without the State of New Jersey, consigned to the employer of the intestate of the plaintiff.

5. The intestate of the plaintiff, on the 22nd day of December, 1925, while engaged in his said employment in the yards of the defendant company at Jersey City, while unloading said piles from a car of the defendant, was killed through the negligence of the defendant.

6. The negligence of the defendant consisted in this:

That while the intestate of plaintiff was aiding in the unloading of certain piles from a flat car of the defendant, by reason of the failure of the defendant to use reasonable care in the loading, handling, shipping and fastening of the said piles, the said piles were caused to roll and fall from said flat car, against and upon the intestate of the plaintiff, killing him.

7. Intestate of plaintiff was at all times in the exercise of due care for his safety.

8. Intestate of plaintiff left him surviving, his widow, the plaintiff herein and the following next of kin, Hjordes, age 10 years, Agny, age 8 years, Edna, age 6 years and Arnold, age 3 years, who have suffered pecuniary injury by reason of his death.

9. The within action is commenced within

twenty-four calendar months after date of death of plaintiff's intestate.

Plaintiff demands $75,000.

ALEX. SIMPSON,
Attorney for Plaintiff.

Answer.

(Filed February 20, 1926.)

[SAME TITLE]

The defendant, Erie Railroad Company, a corporation of the State of New York, duly authorized to transact business in New Jersey, with its principal office at the foot of Pavonia Avenue, Jersey City, New Jersey, says that:

FIRST DEFENSE.

It has no knowledge or information sufficient to form a belief as to paragraph 1.

2. It admits paragraph 2.

3. It has no knowledge or information sufficient to form a belief as to paragraph 3.

4. It denies paragraph 4.

5. It denies paragraph 5.

6. It denies paragraph 6.

7. It denies paragraph 7.

8. It has no knowledge or information sufficient to form a belief as to paragraph 8.

9. It has no knowledge or information sufficient to form a belief as to paragraph 9.

SECOND DEFENSE.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff's intestate in failing to exercise reasonable care for his own safety.

THIRD DEFENSE.

The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff's intestate in failing to look or listen or otherwise inform himself of the conditions of which the plaintiff complains.

COLLINS & CORBIN,
Attorneys of Defendant.

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

Before—HON HENRY E. ACKERSON, JR., J., and a Jury.

ALMA MICHELSON, Administratrix of the Estate of Axel Michelson, deceased,

Plaintiff,

v.

ERIE RAILROAD COMPANY, a corporation,

Defendant.

Jersey City, N. J., February 1, 1928.

APPEARANCES:

ALEXANDER SIMPSON, Esq., by ARCHIE ELKINS, Esq., For the Plaintiff.

COLLINS & CORBIN, Esqs., by CHARLES W. BROADHURST, Esq., For the Defendant.

GUSTAV SWANSON, sworn.

Direct examination by Mr. Elkins:

Q. Where do you live? A. Brooklyn, New York.

Q. On the 22nd day of December, 1925, by whom were you employed? A. By the Frederick Snare Corporation.

Q. And how long had you been employed by that company? A. I was there about three weeks.

Q. Did you know Axel Michelson? A. I did.

Q. And do you know where he was employed? A. He was employed by the same company.

Q. What was your work and what was Mr. Michelson's work, if you know? A. We were driving piles and when we were not driving we were unloading piles.

Q. You were unloading and putting in piles, is that right? A. Yes.

Q. On that day will you tell us whether you received some instructions regarding the unloading of some logs at some place in the Erie Railroad yard?

Mr. Broadhurst: I object to the "some instructions."

Q. What did you do with reference to getting down to a place where there were some logs? A. There were two cars standing in the yard with eight stakes on them.

Q. You are referring to flat cars? A. Yes.

Q. Where were they? A. At 12th Street, Jersey City, in the Erie Railroad yard.

Q. And where were the logs that you later saw, where were they located? A. They were on top of two flat cars.

Q. At what place? A. In the Erie Railroad yard.

Q. At what place? A. 12th Street.

Q. And what other street? A. 12th Street, I forget the other name.

Mr. Broadhurst: Monmouth?
The Witness: Monmouth.

Q. You went to the Erie Railroad yard at 12th Street and Monmouth Street, Jersey City, is that right? A. Yes, sir.

Q. And did Michelson go with you? A. Yes, sir.

Q. And were there some other men with you? A. Only us two.

Q. And when you got there tell us what you did. Tell us what went on from the time you got there? A. Well, we used to—

Mr. Broadhurst: I object to what he used to do.

A. When we started to unload a car we take out the two middle stakes—

The Court: What did you do on this occasion?

Q. What time did you get there? A. We got there a little after one.

Q. And did you speak to anyone before you unloaded the cars?

Mr. Broadhurst: I object.

Q. Did you see anybody in the railroad yard? A. We asked somebody if it was all right to go ahead—

Mr. Broadhurst: I object and ask that that be stricken out.

Q. Did you speak to anybody of the railroad company about these logs? A. We asked if the car was all right to go ahead.

The Court: Yes or no?

Q. You did. A. Yes, sir.

Q. Do you know who that person was? A. No, I do not.

Q. Did you ask who he was? Was he connected with your company or some other company? A. Well, he had some sort of a mark on him, initials on him.

Q. What were they, railroad initials?

Mr. Broadhurst: I object, calling for a conclusion.

Q. What were they? A. Erie.

Q. Well, you saw this man and you spoke to him? A. We asked him could we go ahead and unload.

Mr. Broadhurst: May we have that answered yes or no?

The Court: Is it admitted that the Erie Railroad Company had drawn these cars into the yard in the course of transportation?

Mr. Broadhurst: No question about that.

Q. Did you ask somebody if the car was ready for unloading?

Mr. Broadhurst: I object, immaterial.

The Court: Sustain the objection.

Q. Now, after you had this conversation with this man did you then start to unload the logs? A. Then we started to unload.

Q. Just tell us what you did and what Mr. Michelson did from the time you started to unload. A. Well, the first thing we done after that, we took the wires off the tops of the two middle stakes. There are four on each side.

Q. That is these wires were there around the logs? A. No, sir, they were on top of the stakes from one to the other, crosswise, just binding them.

Q. You mean the stakes on the side? A. Yes, sir.

Q. And there were wires across connecting each stake? A. Absolutely.

Q. You cut the wires? A. Yes, sir.

Q. And after you cut the wires the stakes remain? A. Yes, sir.

Q. Then what was the next process you were to do after that? A. Then we started to chop them.

Q. Which one did you chop first? A. We chopped the one on the south and it was kind of mushy on the north side. That was the first one to give way.

The Court: Now you started to cut what?

The Witness: Started to cut the stake.

The Court: The stump that held the logs in?

The Witness: Yes, sir.

Q. Is that what you ordinarily do? A. Yes.

Mr. Broadhurst: I object to what is ordinarily done.

The Court: Sustain the objection.

Q. You cut the one on the south end? A. Lengthwise of the car, not crosswise but lengthwise.

Q. Can you draw that on the blackboard? A. Yes, sir.

Q. Come down here and draw it for us.

Mr. Broadhurst: The witness draws on the blackboard a representation of two cars coupled together with two stakes on the side of each car.

The Witness: The first thing we do—

Mr. Broadhurst: Say what you did on this day.

The Witness: This day we went on the top and cut these wires, this wire and this wire that connect the top of the stakes.

Mr. Broadhurst: The witness indicates that they cut the wires of the two stakes which would be nearer the center of the car?

The Witness: Yes, and here too. Then we lift them out or knock them out.

Mr. Broadhurst: What do you mean by that, the stakes?

The Witness: The stakes, take them out altogether.

Mr. Broadhurst: The witness indicates that they took out the stake at the end of one car and the stake at the end of the other car.

The Witness: Yes, sir, this comes out and this comes out. These stay here. Say this is the north car—

Mr. Broadhurst: Indicating the end stake on the north car and indicating the end stake on the south car.

The Witness: Then we cut this wire and this wire.

Mr. Broadhurst: Indicating the wire on the stake on the south of the car, then the wire on the north end of the car.

The Witness: Yes, sir. Then he starts to cut this stake.

Mr. Broadhurst: Who is he?

The Witness: Michelson.

Mr. Broadhurst: Indicating that Michelson started to cut the stake on the south end of the car.

Q. Was that necessary, is that what you done ordinarily?

Mr. Broadhurst: I object to what was done ordinarily.

Mr. Elkins: The jury has a right to determine whether he was unloading it in the ordinary way.

Mr. Broadhurst: Whether or not it was the ordinary way would not have any bearing on this case?

Mr. Elkins: Well, it was the customary way to unload cars of that type. I think it is important for the jury to know it.

Mr. Broadhurst: That was not the question.

Q. Well, is that the way— A. That is the way we do it all the time.

Q. And he started to cut that stake on the south side of the car? A. Yes, sir.

Q. And while he was doing that what happened? A. This one carried away and they came down.

Q. What do you mean by carried away?

Mr. Broadhurst: Indicating that the stake on the north end of the car broke.

The Witness: Yes, sir. This is the one he started to cut. He had only chopped about three quarters of an inch with the axe and all of a sudden they came. I ran about four feet ahead of him and I got out of it, but he stumbled on one of the railroad tracks and went head first and the piles came over him.

Q. How far away was he from the car when he was running when he fell down? A. About ten feet.

Q. And you say the stake on the south side had not been fully cut? A. No, sir.

Q. Now just take the stand again. Where did

you get this from? A. I cut it off the day he was killed.

Q. Did this come off the same car? A. From the same car.

Q. Which one is this? A. That is the one on the south side.

Q. That is the one he started to cut? A. That is the one.

Q. Now, when you say—this was on the car when you started to work? A. Yes, sir.

Q. Have you had this in your possession ever since that time? A. Yes, sir.

Mr. Broadhurst: And it is in the same condition now as it was at the time?

Q. Is it in the same condition now as it was then? A. Yes, the same condition.

Q. Has it been touched at all? A. No, sir.

Mr. Elkins: I offer this in evidence.

Mr. Broadhurst: No objection.

(Marked Exhibit P-1.)

Q. How long have you been unloading cars of logs in the railroad yards before this accident? A. Not only in railroad yards, but we unload piles other places also.

Q. But I mean in the railroad yards? A. I have been unloading quite a few years.

Q. How many years? A. Ten or twelve years.

Q. And are you familiar with the custom in railroad yards regarding the unloading of cars?

Mr. Broadhurst: I object.

The Court: Yes. That assumes that there is such a thing.

Q. Do you know of your own knowledge

whether there is any custom in the railroad yard regarding inspection of logs or inspection of cars containing logs?

Mr. Broadhurst: I object. I do not see how this witness can tell us that.

Mr. Elkins: I withdraw the question.

Q. Did you inspect or see this broken stake after the accident?

Mr. Broadhurst: Which one are you referring to? A. The one that broke on the north side.

Q. Did you see it? A. I did, yes.

Q. Will you tell the court and jury what condition it was in with reference to this one. A. It was a mushy stake.

Q. What do you mean by mushy? A. Kind of rotten inside.

The Court: What stake was that?

The Witness: The one that broke first your Honor, the one on the south.

The Court: Did I understand that only one stake broke?

Mr. Elkins: Only one did break, your Honor.

Q. Only one stake broke, is that right? A. The two of them—

The Court: You have produced here a portion of a stake and I understood you to say that that is the one that broke letting the logs down, is that right?

The Witness: Well, the two of them, your Honor—

The Court: Is it or isn't it?

Q. Is that the one that broke? A. That is one of them. The two of them had to go to get all the piles down, that is a sure thing, but the one on the north side broke before this one was cut.

Q. In other words he knew that they were working—

The Court: One minute, this stake you have produced here in court, is that one that broke on that day or is it not?

The Witness: Your Honor, this is the one that broke that day when he was chopping. The two stakes broke, the one on the north side broke first. The one he was chopping was the last one to go and that is the one—

The Court: The last one to go was the one you have here?

The Witness: Yes, your Honor.

The Court: And that is the one he was cutting?

The Witness: Yes, your Honor.

The Court: Why didn't you bring the other one here?

The Witness: I never thought of that.

The Court: The one that caused the trouble.

The Witness: I never thought of that.

Q. You did not get that one, did you? A. I did not.

Q. It was there, wasn't it? A. It was there, yes.

Q. But you did not bring it? A. No, sir.

Q. Now you say you saw this other stake that broke first? A. Yes, sir.

Q. And you say it was rotten?

Mr. Broadhurst: I object to Mr. Elkins putting the words in the witness's mouth.

The Witness: It was rotten.

The Court: Reframe the question.

Q. Will you tell us whether or not in your opinion this stake that broke first was defective or—

Mr. Broadhurst: I object if your Honor please.

Q. This witness's opinion is not important. It is what he observed.

Mr. Elkins: He has a right to give his opinion. He has been doing this for ten or twelve years and he has a right to give his opinion.

Q. You say you made an inspection of that stake that broke first on the north side? A. We did not make an inspection of it because we thought when the stake was there it was all right.

Mr. Broadhurst: I object.

The Court: Did you look at it after this accident?

The Witness: I did, yes, sir.

The Court: Well, describe what you found about it.

The Witness: I found it was rotten on the inside?

The Court: What?

The Witness: That it was rotten or defective on the inside.

Q. It was defective on the inside? A. Yes, sir.

The Court: What about it? What did it look like, can you tell us?

The Witness: Kind of rotty.

The Court: How big was it, give us that first.

The Witness: The same thickness as this one and not quite as big, not quite as heavy on top, but down below it was the same, four inches.

The Court: What was wrong with it when you observed it?

The Witness: It was rotten on the inside, your Honor.

The Court: Well, was there anything on the outside to indicate the condition that was disclosed when it broke and you found it rotten, as you say on the inside? A. Well, we could not see it was rotten from the outside.

The Court: Did you look and observe it before? Did you notice it before?

The Witness: No, sir, we don't do that, we just go ahead when we are told.

The Court: I don't care about that, but on this occasion did you before the accident?

The Witness: No, sir.

The Court: You never saw it when you were up cutting the wire?

The Witness: Up on top?

Q. You never looked at this stake? A. No, sir.

Q. Why didn't you look at the stake?

Mr. Broadhurst: I object. What difference does it make?

Mr. Elkins: I think it is important.

The Court: He says he didn't do it.

Q. Is there any special reason why you did not make an inspection of that stake before the accident?

Mr. Broadhurst: I object. That is the same question.

Mr. Elkins: May I state my reasons for trying to bring this in? It is this. It is our contention, if your Honor please, that these men when they go there under the custom that is in vogue have a right to assume, and they are informed that the car is ready and it is the duty of the Railroad Company to inspect the car and it is not their duty to inspect the car. They have the right to assume that the car is all right and they can go ahead and get the logs off.

The Court: The condition he found there you may disclose, but what actuated him in doing something would not be material on the plaintiff's case.

Q. Now, Mr. Swanson, having observed the condition of this stake, will you tell us—

Mr. Broadhurt: Which one now?

Q. The one that broke first. Will you tell us whether or not in your opinion the stake was bad and defective for the purpose it was put there?

Mr. Broadhurst: I object. I do not see how that would be binding upon us.

(Argued.)

Mr. Elkins: I withdraw the question.

Q. Are you familiar with the inspection made by the railroad company of these logs?

Mr. Broadhurst: I object.

Mr. Elkins: I withdraw the question.

Q. Will you tell us whether or not in your opin-

ion the condition of this stake could have been ascertained by an ordinary inspection of the outside of the stake?

Mr. Broadhurst: I object on two grounds. First it has been answered and secondly I object on the ground that his opinion would not be binding upon us.

The Court: Yes. The test is whether or not there was anything about that stake at that time which the ordinary inspection disclosed.

Q. This stake was on the outside of the car, is that right? A. Yes, sir.

Q. Will you tell us whether or not by standing in front of it you could see its general condition? A. I could not say that.

Q. By general condition I mean you could see the stake itself? A. Yes.

Q. Could you see the lower part, yes or no? A. Yes.

Q. Could you see the part where it broke off by looking at it? A. That we could.

Q. By looking at it? A. Yes, sir.

The Court: You mean the part which subsequently broke off?

The Witness: The one on the north side, your Honor.

The Court: Let's clear this matter up in a judicial way. You did look at that stake after the accident?

The Witness: Yes, sir, afterwards I did.

The Court: But you did not see it before?

The Witness: No, sir.

The Court: Now, directing your attention to the time you looked at the stake that

went out first, after the accident, did you see anything about that stake—putting it back in the condition it was before it broke —that would disclose or did disclose to you what the condition of the inside of the stake was? As you looked at it and before it broke, was there anything that to the naked eye would be observable as to any defect about the stake?

The Witness: If you looked close enough on it, your Honor, you would.

The Court: What do you mean by that?

The Witness: If I was going around the stake—

The Court: What did you see?

The Witness: After it was broke I could see it was rotten on the inside.

The Court: But did it look all right on the outside.

The Witness: Not when you went up to it on the outside after we had it off, then you could have seen it if you looked at it.

The Court: Now, what then did you see from the outside—not the inside—that indicated its condition before it broke, that indicated to you that there was anything wrong about it? You may object if you think it is necessary, Mr. Broadhurst.

Mr. Broadhurst: I think your Honor is trying to get at the meat of it.

The Witness: You can see that stake from the end when you stand on that side of the car—

Mr. Broadhurst: That does not answer it.

The Court: You must realize that we were not there. We do not know. All we

can do is form a picture from what you tell us. Now tell us so that we can see what you saw.

The Witness: Well, I didn't see anything before it was off and when I looked at it, it was rotten on the inside, but you could have seen it if you looked up underneath, you could see it was rotten.

The Court: You mean if you had looked up under where it went in you could see that it was rotten?

Mr. Broadhurst: Show us on this stake where you mean.

The Witness: Yes, sir. I can show you right here. This is the way the stake goes in. Here is where the socket comes, you can see the mark right here. This part runs down into this socket and this stuck up straight. This part only goes about four inches.

The Court: This end projected down below the socket?

The Witness: Yes, sir, from there it did.

The Court: How much of this stake that broke was below the socket?

The Witness: It was about the same as this one here.

The Court: Well, how much was below?

The Witness: Six inches.

The Court: Six inches stuck out below the socket?

The Witness: Yes, sir.

The Court: Where could you see it if you had looked?

The Witness: Right here.

Mr. Broadhurst: Indicating the center part of the bottom of the stake.

The Court: And that is the sharpened end that went into the socket?

The Witness: Yes, sir.

Q. Can you tell us whether or not that rotten condition could have been seen on either the upper part or the lower part. If you looked could you see whether it was cracked or what? A. You could see it from there.

Q. Can you tell us whether you could see that condition by looking at the outside or around the bottom of the socket? A. If you looked underneath you could see the whole thing was rotten.

Q. Could you see that by looking at the outside? A. Underneath.

Q. Listen to me: When you looked under it could you see it was all rotten? A. Underneath, yes, sir.

Q. By looking outside could you see part of the rotten condition?

The Witness: It was kind of reddish at the point it was sharpened.

The Court: Where was that, at the bottom or on the side?

The Witness: On the side. It was tapered down.

The Court: On this Exhibit P-1, put your finger where you say it showed on the side.

The Witness: Right here I could see.

Mr. Broadhurst: Indicating the lower end of the stake.

The Court: But not at the bottom of it?

The Witness: And around this side.

Mr. Broadhurst: Now you are indicating the bottom. The bottom was red too?

The Witness: Rotten.

The Court: The sides were red and the bottom was rotten?

The Witness: Yes, sir.

The Court: How far up did that extend from the base of the stake?

Mr. Broadhurst: The redness?

The Court: Yes, the redness.

Mr. Broadhurst: How far up did the redness extend?

The Court: You say there was six inches of the stake below the socket?

The Witness: Yes, sir.

The Court: Now, how much of that six inches showed this reddish condition?

The Witness: That was rotten all the way up to where it broke.

The Court: You are thinking of the inside. I mean how much of it showed red on the sides where it was tapered down?

The Witness: Only a little here.

Mr. Broadhurst: How much, can you give us any idea?

The Witness: About four inches, but inside it was all rotten.

Q. Now Mr. Swanson, this redness, will you tell us whether or not from an examination and an inspection, whether that would disclose the condition of the stake?

Mr. Broadhurst: I object. Mr. Elkins is asking this witness to give us his opinion.

The Court: Could you say from that, without anything further, the condition of that stake?

The Witness: Not before we cut it or before it broke.

The Court: I am directing your attention to the time when you say you saw a reddish colored condition about three or four inches from the lower end of this stake on the side. At that time was there anything about it that indicated to you the condition which you say you found on the inside, and if so what?

The Witness: I don't know if I can answer that.

Q. You say the red condition, the red part of the stake was on the outside about four inches from the base. Now, having looked at that would that disclose to you what the condition of the inside was? Would the red condition tell you that the inside was rotten? A. It will indicate that it is rotten with oak. When it starts to turn reddish it indicates that it has started to get rotten, must be rotten on the inside. That is the color it starts to turn.

The Court: Now, you have been loading and unloading logs for years as I understand?

The Witness: Yes, sir.

The Court: In your experience during that period had you seen logs before in similar condition?

The Witness: Yes, sir, I have.

The Court: Many times?

The Witness: Lots of times.

The Court: And had you made examinations following that condition to see what it indicated, or not?

The Witness: I have your Honor.

The Court: Now, from the experience

you have had, are you in a position to say whether or not that red condition there was a rotty condition or due to paint or due to some other discoloration?

The Witness: No, your Honor, it is red when it starts to rot.

The Court: From your experience in the laying business could you say whether or not that reddish condition was indicative of any rottenness in that log of itself alone, not getting down and looking in, but just looking at that color.

The Witness: Yes, sir, that I can.

The Court: And that indicated what?

The Witness: That indicates rot on the inside.

The Court: Do you know what character of wood the stake was made of?

The Witness: Yes, sir, I do.

The Court: What was it?

The Witness: Oak.

Q. Now Mr. Swanson after the logs started to tumble down you said they fell on Mr. Michelson? A. Yes.

Q. And what happened after they fell upon him?

Mr. Broadhurst: We do not dispute the fact that he was killed as a result of these logs rolling on him.

Q. How many of the logs fell on him? A. Three of them.

The Court: How many of the logs came down?

The Witness: About fifteen of them

rolled down, but three of them rolled over him.

The Court: How many logs rolled off the car?

The Witness: Fifteen or sixteen of them.

Q. Now, Mr. Swanson, as to the condition of this stake on the north side, will you tell us whether or not that was sufficiently strong and good enough to hold those logs in there?

Mr. Broadhurst: I object as immaterial. How would it be binding upon us whether the stake was strong enough to hold the logs?

The Court: You do not contend that it was not a proper stake if sound, but you claim that it was an unsound stake, which condition could have been ascertained by reasonable inspection?

Mr. Elkins: Yes.

The Court: These stakes or posts that held these logs in, if they were in a sound condition, all of them were proper stakes, were they not, the kind that were normally and commonly used in the business?

The Witness: Yes.

Q. Now, Mr. Swanson, can you tell us from your experience loading and unloading logs whether you have ever inspected the stakes before you started unloading?

The Witness: No, sir.

Mr. Broadhurst: I object as immaterial.

The Court: Sustain the objection.

Mr. Elkins: That is all.

Cross examination by Mr. Broadhurst:

Q. Mr. Swanson, this stake which you have produced and which is marked Exhibit P-1, that is the stake, as I understand it, that was on the south end of the two cars? A. That is correct.

Q. And how far in from the end was this stake set in the stirrup on the side of the car? A. About seven or eight feet from the end of these piles.

Q. I am not talking about the piles now. About how far from the end of the car was this stake set in the stirrup? A. Oh, about ten feet.

Q. And how far was it from this stake or post to the other one which was on the side of the car? A. They are about four feet apart.

Q. So that these logs were held onto the two cars by a stake one on the south end and one on the north end about ten feet in from the end of the car? A. That is about it.

Q. And there was another one about four feet in, is that right? A. That was it.

Q. And there were four stakes on one side of the car and four on the opposite side, the other side of the car? A. Yes, sir.

Q. As I understand it the four stakes which were on the side of the car where the logs rolled off were all of the same general character as this one marked Exhibit P-1, made of the same kind of wood? A. All oak stakes.

Q. And what were the length of these stakes? A. About eight or nine feet.

Q. So that this Exhibit P-1 you have was sawed off by you? A. Yes, sir.

Q. And Exhibit P-1 represents the bottom of that stake? A. Yes, sir.

Q. So that there was six or seven feet more of the stake which stuck straight up? A. Yes, sir.

Q. And were all of the other stakes about the same height? A. Well, a few inches more or less, I could not say.

Q. Now these stakes fit into an iron socket or stirrup on the side of the car? A. Yes, sir.

Q. And this iron stirrup or socket is hollow? A. Yes.

Q. It has not bottom? A. Correct.

Q. Now, taking this stake Exhibit P-1 which is about five and one-half inches in diameter, that was sharpened on the bottom to fit into the stirrup? A. Yes, sir.

Q. And you say that the stake on the north end, the one which you claim broke first, the sharpened end of it stuck down below the stirrup on the side of the car about six inches? A. Yes, sir.

Q. Now, on this day you say you took out the two stakes which were nearer the center of the cars? A. That is right.

Q. Having one on the north and one on the south end of the cars? A. Yes, sir.

The Court: And on the same side?

The Witness: Yes, sir.

The Court: Leaving the two that were not yet taken out on the same side?

The Witness: Yes, sir.

Q. Now, then, who was it took out those two stakes? A. We took them out ourselves.

Q. Who is we, you and Michelson? A. Me and Michelson.

Q. You and Michelson took out the middle stakes on the north side and the middle stake on the south side? A. Correct.

Q. Do you mean the two of you worked together, or not? A. Absolutely.

Q. How did you get them out, did you lift them out? A. Lifted them out.

Q. In other words where did you do it from? Did you do it from the ground or the top of the car? A. One of us was on top of the car and the other down below pushing up.

Q. Who was it on the ground pushing up, you or Michelson? A. I was on the bottom.

Q. Michelson was on the top? A. Yes, sir.

Q. So that Michelson was on top unloading the piles? A. Yes, sir.

Q. And he pulled up on the stakes? A. Yes, sir.

Q. And you were down on the ground and you pushed up on them? A. Yes, sir.

Q. And in doing that you pushed the bottom end out of the stirrup, is that right? A. Yes, sir.

Q. Now when you took those stakes out, what did you do then, throw them down on the ground? A. When we took them out I leaned them up against the car on the ground.

Q. You were on the ground then while this was being done? A. Yes, sir.

Q. Were there any other members of the gang besides you and Mr. Michelson? A. No, only us two.

Q. Just you two men? A. Yes, sir.

Q. Weren't there three or four other men working there? A. No, sir, there was not anybody else.

Q. Did you two men unload piles like that before? A. Not alone.

Q. Well, how many men had unloaded them before when you had unloaded them?

Mr. Elkins: I object, not proper cross examination.

The Court: Sustain the objection.

Q. Had you and Mr. Michelson ever worked unloading cars like that before? A. Lots of times.

Q. And how often had you unloaded cars at that place before, you and Michelson, or Michelson working with you? A. We had unloaded piles there for three or four days before.

Q. How long had you been working there? A. About three weeks.

Q. And during those three weeks how often had you unloaded piles? A. Well, whenever the cars came in.

Q. Had you unloaded any piles that morning? A. No, sir.

Q. Was that the first car of piles you unloaded that afternoon? A. Yes, sir.

Q. There were some other cars with piles on them beside this one? A. Yes, sir.

Q. Now, after those two stakes were taken out Michelson, you say, started to chop this stake which is marked Exhibit P-1? A. Yes, sir.

Q. And which was then on the outside of the car? A. Yes, sir.

Q. And he used an axe to do it? A. Yes, sir.

Q. A long handled axe? A. Not a very long handled axe, no, sir.

Q. Now, where were you when he was chopping? A. Right behind him.

Q. You say that after the accident happened you looked at this stake Exhibit P-1 and you also looked at the other stake which had been on the north end? A. Yes, sir.

Q. And when you looked at Exhibit P-1 it was just the way it is now, except that it was longer? A. Absolutely.

Q. Now, was this the place where Michelson was chopping? A. Yes, sir.

Q. And was that about on a level with the floor of the car? A. Just about the floor.

Q. It was on a level with the floor of the car? A. About an inch or two below.

Q. So that where he was cutting into it would be about on the floor of the car? A. About.

The Court: I would like to be clear on this. You say you lifted up these other stakes you took out. Did you cut them at all?

The Witness: No, sir.

The Court: You just lifted them out of the sockets?

The Witness: Yes, sir.

The Court: And after you did that you went to the side of the car and started to cut away the top of that stake?

The Witness: No, sir, right here he cut it.

The Court: Where were you going to cut it off?

The Witness: When we are going to cut it off we start here.

Q. Why were you going to cut this one off instead of knocking it up and taking it out the way you did the other ones? A. What are you going to hold the piles with?

Q. You mean you could not knock this one up and take it out because there would be nothing there to hold the piles? A. Absolutely.

Q. Were the piles leaning against this stake? A. They certainly were.

Q. And were they leaning against the stake on the north side? A. Certainly.

Q. You have said that this stake had been cut

in about a half an inch. This is considerably more than half an inch, is it not? A. Maybe three quarters of an inch. I will measure it. Yes, seven-eighths of an inch.

Q. And there is a chip here which goes in even deeper than that, isn't that so? Suppose you measure from the outside of the stake into this niche? A. That was ripped apart.

Q. That was ripped by the logs pushing it over? A. Yes, sir.

Q. And how deep would that be, can you give us an idea? A. If you straighten it out—

Q. I have not strength enough to straighten that out, I don't think. Now Exhibit P-1 did break, didn't it? A. It did.

Q. The fibres at the bend have every appearance of having been torn? A. Yes, sir.

Q. You say you were right in back of Michelson when he was chopping Exhibit P-1? A. Yes, sir.

Q. How far behind him were you? A. About four feet.

Q. Just standing there? A. Just standing there watching him chopping.

Q. How do you know that the stake on the north side is the one that gave way first if you were standing behind him watching? A. They both came.

Q. In other words, the first thing you knew of anything unusual happening was that the logs began to come off the car? A. Absolutely.

Q. About how long do you think these flat cars are? A. Forty or forty-two feet long. The piles are over sixty feet.

Q. So that the cars together were perhaps eighty feet long? A. Yes, sir.

Q. So that you were about fifty or sixty feet

away from the stake on the north end of the car which you say broke? A. Yes, sir.

Q. Now, when you examined the stake on the north end of the car after the accident as I understand you, you say that you observed that there was a mushy condition on the inside? A. Yes, sir.

Q. And when you say mushy condition, just what do you mean by that? A. It was rotten.

Q. And when you refer to this reddish color, which end did you look at, the top end? A. No, sir, the bottom end.

Q. Did you look at the top end at all? A. No, I did not.

Q. So that you do not know how the top end looked? A. No, but I knew it was rotten in there.

Q. Referring now to the bottom end? A. Yes, sir.

Q. But you did not look at the top end? A. No, sir.

Q. This reddish color you indicate you saw you say was on the bottom end of the stake about three or four inches up? A. Yes, sir.

Q. And that was on one corner of it? A. This is the way it goes up.

Q. You say it went up from the bottom in a V shape to a point, is that right? A. Yes, sir.

Q. And the top of the point was about three or four inches from the bottom of the stake? A. Yes, sir.

Q. On which one of the four sides was that reddish color? A. Well, all over.

Q. You mean it was on all four sides? A. Yes, sir, in the same way.

Q. So in the center of each side there was a small red discoloration? A. Yes, sir.

Q. Now you say, in addition to that, when you

looked at the very bottom of the stake, that you saw something in there. What was that? A. That was rotten right around here.

Q. That was at the very end of the stake? A. Yes, sir.

Q. And the rest of the bottom of the stake which had been cut to fit the stirrup, as I understand it, the rest of that was white, there was no redness? A. The inside was rotten.

Q. But the only part you could see on the outside where these marks were, were these V-shaped patches? A. Yes, sir.

Q. Now, why didn't you bring the stake that was on the north side? A. I forgot to get that.

Mr. Elkins: I object on the ground that it is not proper cross examination.

The Court: He may answer that.

Q. Why didn't you bring us the stake that was on the north side? A. I never thought of that. I brought the one he was chopping on.

Q. As a matter of fact you thought, didn't you, at that time, that the stake which gave way first was the stake that he was chopping and that is the reason— A. Oh, no, that was not the reason.

Q. Well, what was the reason you did not bring it? A. That was the handiest one for me to get.

Q. Why did you cut this stake down to bring it here?

Mr. Elkins: I object. What difference does it make?

Mr. Broadhurst: This is cross examination.

The Witness: Well, I thought maybe it was needed some time.

Q. For what? A. I don't know. Somebody told me to take it with me.

Q. Was the reason that you thought there might be a law suit and you wanted to show the Court and jury the stake that broke, is that the reason you took it? A. Well, only I thought it was good to have it.

Q. I am not asking you whether you thought it was good or not, I am trying to find out what motive you had when you cut the stake down and kept it? A. Well, I was told to keep it as long as I had it.

Q. Weren't you told to keep the other one? A. No.

Q. Well, who told you to keep this one, that is what I am trying to find out? A. Well, the fellows over there kind of talked about it and I said to myself I will take it home.

Q. If it was important to keep this stake, why didn't you take the other stake, which you say was rotten and which broke first? A. Well, I took the first one I got hold of at the time.

Q. Isn't it a fact that the reason you did not take the stake, the other stake, was because it was the breaking of this stake, Exhibit P-1, which let the load down and smashed the other stake off? A. No, sir. That was the one he was chopping on.

Q. Can you give us any other reason why you did not bring the other stake? A. No, sir, only what I told you.

The Court: This Exhibit P-1, how long was that stake before you cut it?

The Witness: About seven or eight feet.

Q. Now, when you were on the ground lifting up the center stakes, with Michelson on top, you

say you were within four feet of this other stake? A. About that.

Q. And while you were lifting it up or pushing it up, wasn't this other stake on the north end clearly within your view? A. Yes, it was in my view.

Q. Now, did you at that time observe these red marks? A. I did not, if I did, I would have taken the other stake.

Q. If you had, you would have cut the north stake, is that what you mean? A. No, I would not have cut it.

Q. If you had observed it, then what? A. I might have left the other stake in.

Q. In other words, you would have taken the second one out from the north end? A. The rotten one.

Q. In other words, in order to see this you would have to get quite close to it, that is what you mean? A. That is right.

Q. Get right up and look at it, is that it? A. Yes, sir.

Q. And I suppose you would have to have some knowledge of wood? In other words, you know as a carpenter, I suppose, that redness on a piece of oak indicates that there is some rottenness inside? A. Yes, sir.

Q. But you would have to know something about wood to know that, wouldn't you? A. Yes, sir.

Q. Above the socket on the outside you could not see from the outside that it was rotten? A. No, sir.

Mr. Broadhurst: That is all.

Redirect examination by Mr. Elkins:

Q. But these discolorations would indicate the rotten condition you found there? A. Yes, sir.

The Court: I think you have answered this but I want to be sure about it. Did you look at this rotted stake as you call it before the time that it broke?

The Witness: I did not before, no, sir.

Q. Now, Mr. Swanson, if this stake which broke, this north stake, if that was in good condition would it have held the logs in?

Mr. Broadhurst: I object.

A. It would have held it—

Mr. Broadhurst: I move that the answer be stricken out.

The Court: Strike it out. That is not the test.

Q. What would have happened if this stake on the north end was in good condition? What would have happened to the logs after you cut this stake?

Mr. Broadhurst: I object.

Q. Well, will you tell the Court and jury, assuming that Mr. Michelson had cut the south stake and the north stake was in good condition what would have happened to the logs in the car? Would they have stayed there? A. They would have stayed until we gave them a couple of notches up on the south end, then we have a line on the stake and we would get away from it and break it off.

The Court: That is the way you do it?

The Witness: Yes, sir.

Q. Now, Mr. Swanson, if a person made an inspection of the stake which broke, a person knowing lumber, will you tell us whether or not this condition which you explained could have been seen by the eye?

Mr. Broadhurst: I object. I think the witness has explained the condition and told us on his direct examination and cross examination what could be seen.

The Court: Your eyesight is good?

The Witness: Pretty good.

The Court: And you saw this condition?

The Witness: I did, your Honor.

The Court: I mean after the break?

The Witness: Yes, sir.

The Court: Did you have to get down and examine it closely or did you see it standing off on the side?

The Witness: I had to get near it to see that it was rotten.

The Court: I am talking about this discoloration. How far away were you when you saw them?

The Witness: Why right up to it when I seen it, when I examined the stake after I pulled it out of the socket. But that was two or three days after when we pulled it out.

Q. Now, you say you had unloaded logs previous to the accident, is that right? A. We had.

Q. Will you tell the Court and jury whether these logs had been unloaded in the Erie yard?

Mr. Broadhurst: I object. What difference does it make? I will withdraw the objection.

The Court: I assume you want to show

that this was the Erie yard where they were? He admits that.

Mr. Elkins: I also want to show that the Erie Railroad Company had been delivering logs there before and were familiar with the delivery of logs and if they had made this inspection they would have ascertained the condition which he testified to. However, I won't press it.

Q. All the time you had been unloading logs it was in this yard at 14th Street and Monmouth? A. That was the only place we had been, yes, sir.

Q. And you had done that for at least three weeks? A. Yes, sir, off and on, driving and unloading.

Mr. Elkins: That is all.

Recross examination by Mr. Broadhurst:

Q. At this place you were working, they were building the viaduct for the Vehicular Tunnel? A. Yes, sir.

Q. And these cars were placed so that you could unload them and use these piles on the viaduct? A. Yes, sir.

Q. How far away from where you were working were these cars unloaded? A. Well, this one here was about forty or fifty feet away from the work.

Mr. Broadhurst: That is all.

CARL ANDERSON, sworn.

Direct examination by Mr. Elkins:

Q. On the 22nd day of December, 1925, were you employed by the Frederick Snare Corporation? A. Yes, sir.

Q. And did you know Axel Michelson in his lifetime? A. Yes, sir.

Q. Was he employed with you at that place? A. Yes, sir.

Q. Will you tell the Court and jury whether you were down at the scene of the accident after it occurred, after it happened? A. Yes, sir.

Q. Did you go there the same day? A. Yes, sir, just when it happened.

Q. Someone notified you about it, is that it? A. I heard them.

Q. You were in the vicinity? A. I was foreman on the job.

Q. Now after the accident did you do anything to ascertain the cause of the accident? A. Yes, sir.

Q. Now tell the Court and jury what you did? A. Well, as soon as I heard the piles roll over the man I ran over and the first thing I did was to get the piles off the man.

Q. Now, was the man living when you got there? A. No, he was dead.

Q. Was there blood over him?

Mr. Broadhurst: I object as immaterial. We admit that his death was due to the accident.

Q. Will you tell us what you did. A. I ran over and removed the piles and then I looked at the stakes and I seen the stakes was rotten.

The Court: Which one was that?

The Witness: The two of them.

Mr. Broadhurst: This one Exhibit P-1?

The Witness: That one and the back one.

Q. Did you see the stake that was supposed to have broken and caused the piles to fall off and break the stake? A. Yes, sir.

Q. Did you see that one? A. Yes, sir.

Q. Will you tell us what condition that was in?

Mr. Broadhurst: Which one?

Q. The one on the north side, the north stake which you were informed had broken first. Will you tell us what condition you noticed it to be in when you saw it? A. Well, it was really rotten, the stake.

Q. The stake was rotten? A. Yes, sir.

Q. Was there anything on the outside of the stake that would indicate or did indicate to you the condition of the stake?

Mr. Broadhurst: Which one?

Q. The one on the north side, the one that broke first.

Mr. Broadhurst: I object as a conclusion.

Q. The one on the north side which you say was really rotten, was there anything on the side of the stake, the base of it to indicate its condition on the inside? A. Yes, sir, she was deadish like, must I call it, dry rot.

Q. What was its color? A. Kind of a jelly.

Q. You say it was a sort of a jelly color? A. Yes, sir.

Q. And you say that was on the outside of the stake? A. Yes, sir.

Q. Will you tell us what that condition, that jelly colored condition, indicated or would indicate to one who saw that stake?

Mr. Broadhurst: I object.

Q. What did it indicate to you? A. Rotten.

Q. Will you tell us whether you could see that condition by looking at it with the naked eye, I mean the condition of the stake? A. Yes, sir.

Q. Now tell us, Mr. Anderson, whether you ever inspect cars before you unload them?

Mr. Broadhurst: I object, immaterial and irrelevant.

The Court: What are you trying to show, experience?

Q. How long have you been engaged in unloading cars of logs? A. Around thirty years.

Q. And are you familiar with lumber? A. Yes, sir.

Q. And are you familiar with the type of stakes that were in this car on that day? A. Yes, sir.

Q. And you know from your experience—

Mr. Broadhurst: I object as leading.

Q. Now tell us from your experience whether you ever inspected cars before you unload them?

Mr. Broadhurst: I object, immaterial.

The Court: How would that be material?

Mr. Elkins: Only that the jury might desire to know—

The Court: We do not care about what this man may have done.

Q. Will you tell us whether or not in all your experience in unloading logs from cars, whether you or the men working under you inspected the stakes before unloading?

Mr. Broadhurst: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustain the objection.
Mr. Elkins: Exception.

Q. These particular cars here, where were they sent to, what yard? A. In Twelfth Street.

Q. Is that the Erie Company's yard? A. Yes, sir.

Mr. Broadhurst: There is dispute about the fact that these cars were in our yard.

Q. Do you know whether your company, the Frederick Snare Corporation, inspected these cars before they started to unload them?

Mr. Broadhurst: I object, incompetent, irrelevant and immaterial.
The Court: Sustain the objection.

Q. Do you know whether the Erie Railroad Company does it?

Mr. Broadhurst: I object.
The Court: Sustain the objection.
Mr. Elkins: That is all.

Cross examination by Mr. Broadhurst:

Q. I think you said on your direct examination that the stake on the north side was rotten, just like this one was, is that right? A. Yes, sir.

Q. And it looked just like this one, did it, except that it was not bent of course? A. Well, it was not the same thing, it was not bent, it was broken off.

Q. I mean the stake on the north end of the car you say was rotten just like this one is? A. Yes, sir.

Q. All right, now will you show us where this one is rotten? A. Well, I don't see any rot on that, but I mean—

Q. Was the stake on the north end of the car just like this one? A. No, sir, it was different.

Q. You thought it was the same as this one before I showed it to you, didn't you? A. I seen that before over in the yard.

Q. I am asking you—before I showed you this one you thought that the stake on the north end of the car was just like this one? A. No, it was—

Q. You said a minute ago that the stake on the north end of the car was just like this one? A. Yes, rotten.

Q. What did you mean by the statement that it was rotten just like this one? Has this one some rottenness? A. Well, I didn't mean that one was rotten, but the other one was rotten.

Q. So that you mean now that the one on the north end of the car was rotten? A. Yes, sir.

Q. Now, how soon after the accident was it that you got down to the car? A. Oh, right away, it could not have been a minute.

Q. And what did you do first, help get the man out? A. Help get the man out.

Q. How long after the accident was it that you looked at the stakes? A. As soon as we got the man away.

Q. How long would that be, an hour, a half hour? A. About a half hour.

Q. Now, then, when you looked at the stake on the north end of the car did I understand you to say that you observed it was rotten at the bottom end of the stake? A. Yes, sir.

Q. And did you see or did you not see these red marks which were on the side of the stake down near the bottom? Did you see them? A. No, I didn't notice that.

Q. The only thing you noticed was that by look-

ing at the under side of the stake at the very bottom? A. Yes.

Q. That it was rotten in there? A. Well, up here where it was broken off.

Q. On the inside about where it was broken off, there it was rotten? A. Yes, sir.

Q. But that was on the inside up where it was broken off? A. On the inside.

Q. Did that break off clean? Or did it break off like this one? A. It bent about the same as that.

Q. What I am trying to find out is, was the piece in the stirrup broken off or was it bent something like this? A. It was bent over.

Q. But it was still on there? A. Yes.

Q. But it was bent over? A. Yes, sir.

Q. In other words, the fibres of the wood were actually holding at some point? A. The rest of the piles were jammed up against it. It might have been clean off there for all that.

Q. Well, was it clean off when you looked at the stake after the accident, after the man was taken away, was the top part of the stake broken clear off the bottom part or was it bent? A. It was laying at the bottom of the piles.

Q. Was it broken off? A. It was broken, yes.

Q. Clean off? A. Yes.

Q. You told me a minute ago that it was bent like this one? A. Yes, bent off and broken, hanging down with the piles jammed up against it.

Q. Were there any of the fibres of the wood still holding it to the piece in the stirrup? A. Some of the slivers were, I guess.

Q. What are you doing, guessing? A. Well, it was bent in to the car with about ten piles on top of it.

Q. How could you see the bottom if that was the condition? A. Because we always place the stakes that we take out so that the piles will roll over them and the piles were stacked up against them so that you could go underneath there any time.

Q. So that you went underneath the piles and looked at the bottom? A. Yes.

Q. Why did you do that? A. I did it to see what happened.

Q. You say then you do not know except by looking at the bottom when you went underneath the piles, you do not know whether this stake actually broke clean off or not? A. Yes, it did break off.

Q. How long was this stake? A. About eight feet.

Q. How big was the stake you looked at, when you looked at the bottom, how big was it? A. What was left of it?

Q. Yes. A. It was broken about the same as this one here.

Q. About as this one is? A. It was, just hanging with some slivers down here.

Q. And was that broken off? A. Well, it was broken.

Q. Now you say that the only time you looked at the rottenness was when these piles were up against the stake and you were underneath the piles and looked at the bottom? A. No, sir, I didn't say that.

Q. When did you look at the bottom? A. I looked at the bottom after it was broken off.

Q. Had the piles been moved away or not? A. No, sir.

Q. The piles were still there? A. Yes, sir.

Q. Did you have to go underneath to look at the bottom? A. Yes, sir, at the end.

Q. You had to go underneath the piles? A. Yes, sir.

Q. Now, do you mean to tell us that when you went underneath the piles to look at the bottom, that you could see the red marks on the side? A. I didn't say that. I seen them here. I said it was rotten up here. I didn't see any marks down there.

Q. How did it look? A. It had a kind of a jelly look.

Q. Where was that? A. Right up along here.

Q. You are indicating the top of the stake. How far was that above the car floor? A. About two feet, as far as I could see.

Q. How could you see two feet above the car floor underneath the piles? A. You could see that stake there between the piles. The piles were not lying so close together.

Q. That is the only time you saw it? A. Yes, sir.

The Court: This jelly color you mentioned indicating a rotten condition; you saw that just above the stirrup?

The Witness: Yes, sir.

The Court: And was that on the outside?

The Witness: On the outside, yes, sir.

Q. And which side of the stake was that on, the side which would be to the outside? A. That was mostly all the way around.

Q. Did you see that? A. Yes, sir.

Q. Tell us where you saw it? A. Right in between the poles.

Q. Where did you see it on the stake? A. On

the stake, from down where she was broken off along about two feet.

Q. Well, was that two feet—that must have been on the ground then? A. It was lying from the car and right down to the ground, yes, behind and between the piles.

Q. And that was after it broke? A. Yes, sir.

Q. You do not know how it appeared before it broke at all? A. No, sir.

(Recess until two P. M.)

AFTER RECESS.

Redirect examination by Mr. Elkins:

Q. You told us this morning that there were marks on this stake of a jelly color. Will you please tell us whether or not those marks or this discoloration was any place around the stirrup or—

Mr. Broadhurst: I think that is very leading.

Q. What I want to know is whether these discolorations were around the stirrup?

Mr. Broadhurst: That is what I am objecting to.

Q. Will you just tell us where you saw this so-called discoloration? A. It was around the stirrup and up about two feet.

The Court: Was that above or below the stirrup?

The Witness: Above.

Q. Now will you tell us whether or not the

breaking of the stake was due to the rotten condition of the stake or some other condition?

Mr. Broadhurst: I object. That is purely a matter of speculation.

Q. Are you familiar with the type of lumber these stakes are made of? A. Yes, sir.

Q. Can you tell us what kind of wood this was in this stake? A. Oak.

Q. And are you familiar with the breaking of stakes of this kind? A. Yes, sir.

Q. Now will you tell us—

The Court: What experience have you had with reference to the strength of timbers and their condition both as whole and rotten?

The Witness: With oak, if you find a jelly color on it, it has started to get dry rot.

The Court: Are you prepared to give us an opinion as an expert as to the strength of logs in various conditions of decay?

The Witness: No, sir, that is not my trade.

Q. Mr. Anderson, the condition of the stake which you observed after the occurrence, will you tell us whether or not in your opinion the matter of color and the rot was the same before the occurrence? In other words, would there have been a change in the condition of the stake from the accident?

Mr. Broadhurst: I object to that.

A. No, sir.

Mr. Broadhurst: I ask that the answer be

struck out. I object to that as purely guesswork.

The Court: I think you are entitled to find out from him whether from his knowledge these discolorations were of a character that would come on suddenly or whether they had been there for a long duration.

Mr. Broadhurst: No objection to that.

Q. Will you tell us whether or not the discoloration and the rottenness of the stake was of long standing, or did it happen suddenly? A. Of long standing, yes, sir.

Q. Now can you tell us Mr. Anderson whether any inspection had been made of this particular car involved in the accident?

Mr. Broadhurst: I object. The witness was not there when it was unloaded.

Q. If you know.

Mr. Broadhurst: I object. That would be based upon hearsay. He was not present when the accident happened.

Mr. Elkins: Well, he was the foreman there.

Q. As the foreman in charge of this job do you know whether any inspection was made?

Mr. Broadhurst: I object.

Mr. Elkins: That is competent examination. That is part of the *res gestae*. We say our men were not supposed to inspect the car and we have a right to show why we didn't inspect it.

Mr. Broadhurst: If this witness observed anybody from the railroad company inspecting, I have no objection to his testifying to it.

Q. Now, Mr. Anderson, so far as you know, of your own knowledge as foreman there, do you know whether any inspection was made by the railroad company of that particular car?

The Court: Yes or no.

Q. Do you know of your own knowledge? A. No.

Q. Who would know whether an inspection was made of that car? A. The people in the railroad yard would know.

Q. Why wouldn't you know as foreman of that job?

Mr. Broadhurst: Objected to as immaterial why he would not know.

Mr. Elkins: That is all.

Cross examination by Mr. Broadhurst:

Q. You say that this stake had a mark on it that you have described from the stirrup up about how far? A. Two feet.

Q. And what color was that mark? A. It was jelly.

Q. Jelly is no color, we have all kinds of jelly. A. Brown—like your necktie.

Q. That would be a light brown I take it. A. Well, something like that.

Q. And you say that was a light brown in color from the stirrup to about two feet above the stirrup? A. Yes, sir.

Q. What else was there about it except the color brown that you saw? Did you touch it? A. I had hold of it.

Q. And all the way up from the stirrup, for about two feet, you touched it with your hand? A. Yes.

Q. And when you touched it how did it feel? A. Well, it felt like dry rot.

Q. It felt like what? A. Like dead wood.

Q. Did it have bark on it like this one has? A. No, sir, not like that.

Q. Did it have any bark up to two feet? A. No, sir.

Q. No bark at all? A. Some like this, underneath. You see, there are two kinds of bark.

Q. It had the inner bark on it, is that the idea? A. Yes, sir.

Q. Well, the inner bark is a light brown, isn't it? A. Well, there is a difference in it.

Q. Is the inner bark light brown? You are familiar with wood? A. Yes, sir.

Q. Is the inner part light brown? A. Just depends upon if it is dried up.

Q. Look at this piece of bark there; it is dark brown where it is shaved along in there. A. It does look like your necktie, yes.

Q. But this was lighter brown than that? A. Yes, sir.

Q. Now, was all the bark off for two feet? A. Here and there. There were spots like—

Q. Now you say it was jelly-like. Was it like this end, indicating Exhibit P-1? A. No.

Q. Now you say that was up for about two feet? A. Yes, sir.

Q. And that is the only place you saw when you looked at it, up to two feet? A. Yes, sir, and it was rotten in the center where it was broken off.

Q. You mean at the stirrup? A. Yes, sir.

Q. Was it light brown at the stirrup? A. It was all dry rot.

Q. Was it light brown in color? A. Light brown, jelly.

Q. Now as I understand, you inspected this while the logs were still leaning against it and after you had gone under the logs to look at it? A. Yes, sir.

Q. That was the only time you inspected it? A. Yes, sir.

Q. Will you tell us how you could possibly see that this was a light brown all around if the logs were lying against it.

Mr. Elkins: I object on the ground that he has already testified what he did see.

The Court: He has a right to test him.

Q. Will you tell us now how you could see that this was a light brown all around if the logs were lying against it? A. Yes, I can tell you that.

Q. Well, tell us. A. With a freight car down on the railroad tracks we take ties to roll the piles off. There is a space from the next track of about six or eight feet. Now when the piles roll down they roll down on them skids. Now, the stakes are down in this fashion and the piles keep on rolling until they are down and they never lie tight together, they are open.

Q. So that the piles were not lying against the stakes at all? A. Oh, yes, they were.

Q. Were the piles actually lying against the stake? A. Yes, sir.

Q. How could you see the sides of the stake against which the piles were lying? A. You could see it because the piles were a little open.

Q. If the piles were lying against the stake how could you see the condition of the stake underneath it? A. Well, the piles are not flat. The piles are round, the same as this one.

Q. And the piles were lying against the stake? A. Yes.

Q. Did those piles cover the stake? A. No, sir.

Q. They did not touch it at all? A. They did touch it, but you can see in between two piles. If you have a fourteen by fourteen pile here and another one there, you can see the space in between.

Q. Assuming that these piles were lying there, touching, how could you see this stake? A. I could see that right from the top.

Q. You said you looked underneath? A. From the underneath too and from the top.

Q. Didn't you tell me a moment ago you only looked at these stakes from underneath? Did you look at these anywhere except from underneath? A. On top too.

Q. Didn't you tell me a little while ago that you only looked at these from underneath? Didn't you say that a minute ago, that you only looked at these stakes from underneath? A. No, sir, I don't remember that I said it.

The Court: I do not understand this: Why did you have to get down underneath? Why didn't you just stand off and look at them if you could see them any how?

The Witness: From underneath you can see the point of the stake where it goes through the socket, but when the piles are lying up against them from the side of the car, up against the stakes, you can see the stakes from the outside.

The Court: This discoloration and this jelly condition around the stirrup and above the stirrup, could you give us the distance that it appeared to be from the top of the stirrup up to where it ended?

The Witness: That is pretty hard to say.

I said about two feet but if I had peeled the bark off whatever was left around there I might be able to tell.

The Court: But what could you tell from just being able to look at it?

The Witness: About two feet.

The Court: And was that noticeable—I do not mean getting close to it but could you see it if you stood off to the side?

The Witness: Yes, sir, about, I should say five or six feet away from it.

The Court: Standing on the side of the car?

The Witness: Yes, sir.

The Court: On the ground?

The Witness: Yes, sir.

Recross examination by Mr. Broadhurst:

Q. Would you have to have some knowledge of wood to know that that was decayed underneath? A. What?

Q. In other words you knew it was decayed by looking at it. That is because you have a knowledge of wood, isn't that a fact? A. Yes, sir, I know wood.

Q. In other words, a person who had no knowledge of wood and did not have the experience you have would not know it the same as you did? A. Oh, no.

Mr. Broadhurst: That is all.

Redirect examination by Mr. Elkins:

Q. A person even though they did not have any knowledge could see the condition of the stake? They could see that condition as you did, could they not? A. They could see it, sure.

Mr. Elkins: That is all.

ALMA MICHELSON, sworn.

Direct examination by Mr. Elkins:

Q. You are the widow of Axel Michelson? A. Yes, sir.

Q. And you have been appointed by the Surrogate of this County to bring this suit?

Mr. Broadhurst: I object to that and I ask for the production of letters.

The Court: Sustain the objection.

Q. I show you—

Mr. Broadhurst: I have no objection to the formality of your offer. My objection goes to the fact that the letters are general letters of administration and not letters of administration *ad prosequendum.*

Q. At the time of your husband's death how old was he? A. Forty years and eleven months.

Q. And prior to his death will you tell us what his physical condition was, his state of health? A. He was in perfect health.

Q. Had he been always working up to the time of his death? A. Yes, sir.

Q. Now, at the time of his death, who did he leave besides yourself? A. Four children.

Q. And how old were you at the time of his death? A. Thirty-two.

Q. What was the first child, the eldest child? A. Hjordes, ten years old.

Q. She was ten years old at the time of his death? A. Yes, sir.

Q. What was the next child? A. Agnese, eight.

Q. And the next child? A. Edna, six.

Q. And the next? A. Arnold, two.

Q. And those four children are your children? A. Yes.

Q. Now, how much money was your husband earning at the time of his death? A. Fifty-seven dollars and fifty cents a week.

Q. And what was he by trade? A. A dock builder.

Q. How much of this money did he give to you for yourself and the children? A. He gave me fifty dollars.

Q. Each week? A. Yes, sir.

Q. And with that I suppose you ran the home? A. I did.

Q. Paid for the rent? A. Yes, sir.

Q. How much rent were you paying at that time? A. I paid forty-two dollars a month.

Q. Out of that fifty dollars a week I suppose he would get his board? A. Yes.

Q. Sleeping and lodging and so forth? A. Yes, sir.

Q. And how about his clothes; did he buy his clothes? A. I did.

Q. And about how many suits a year did he get? A. About one I guess.

Q. And about how much did he pay for that suit? A. Twenty-five dollars.

Q. A little more I suppose at times? A. Maybe.

Mr. Elkins: Cross examine.

Cross examination by Mr. Broadhurst:

Q. About how much would his working clothes, ordinary working clothes average in a year, Mrs. Michelson? Can you give us an approximation? A. I could not tell you that.

Q. When you say he spent twenty-five dollars

for a suit, that was for a working suit, I assume? A. Yes.

Q. Can you give us some idea roughly how much you would spend a year for all his clothes? A. That is pretty hard.

Q. Just an approximation. We do not expect you to be able to tell us the exact dollar. Would you say one hundred dollars or two hundred dollars? A. I do not know what to say.

Q. You cannot tell us? A. No.

Q. I assume he had his breakfast and dinner at home and would take his lunch with him when he left? A. Yes.

Q. Did you give him spending money every day out of what he gave you? A. He kept seven dollars for himself and he had his carfare and his spending money from that.

Q. You mean he would take his carfare and his spending money out of that? A. Yes.

Q. So that you would not have to give him anything for carfare and spending money? A. That happened once in a while.

Q. Can you give us any idea how much that might be over a period of a month or a year? A. No, sir.

Q. Did anyone else live with the family except yourself, Mr. Michelson and the children? A. No, sir.

Mr. Broadhurst: That is all.

Redirect examination by Mr. Elkins:

Q. At the time of his death is it a fact that you and your children were solely dependent on him? A. Yes, sir.

Q. And what was your age at that time? A. Thirty-two.

Mr. Elkins: I offer in evidence the death certificate issued by the Bureau of Vital Statistics.

Mr. Broadhurst: No objections to it. I am willing to admit at this time that his death was caused by this accident.

(Admitted and marked in evidence Exhibit P-2 of this date.)

Mr. Elkins: The plaintiff rests with the exception of introducing letters of administration.

Mr. Broadhurst: I move for a nonsuit on behalf of the defendant on the ground that there is no evidence of any negligence on the part of the defendant as alleged in the complaint, which was the proximate cause of the accident.

Of course at this time the plaintiff has not offered letters of administration.

Mr. Elkins: May I put on Mr. Callahan on that subject?

The Court: You may.

JOHN F. CALLAHAN, sworn.

Direct examination by Mr. Elkins:

Q. Mr. Callahan in 1925 and 1926 will you tell us whether or not you were the Deputy Surrogate of Hudson County? A. I was.

Q. And in that capacity will you tell us whether or not it was your duty to pass upon the granting of letters of adminstration *ad prosequendum* and letters of general administration to applicants? A. It was.

Q. Will you tell us whether or not before the

papers were granted an application was presented to you? A. It was.

Q. Will you tell us whether or not you inspected that application? A. I did.

Q. Now I show you an application and ask you to look at it. A. yes.

Q. Will you tell us what that application indicates and what was granted?

Mr. Broadhurst: I object to what was granted on it. I have no objection to Mr. Callahan stating what the application is for. I think the record is the best evidence as to what was granted on it.

A. This application was granted to—

Mr. Broadhurst: I object to that.

The Court: Just what the application is for, not what was done with it.

The Witness: For the purpose of bringing suit. There is no estate as shown here, no figures.

Q. Will you tell us what kind of administration papers you granted on that application?

Mr. Broadhurst: Objected to on the ground that the record is the best evidence and we have it here in court.

The Court: You have the records in your office, do you not?

The Witness: Of course, Judge, I am not in that office any more.

The Court: At that time there was a record, for example, whether or not general administration was granted or administration *ad prosequendum* was granted and you kept the records?

The Witness: Yes, sir.

Mr. Broadhurst: Would it be in the same book, Mr. Callahan, administration *ad prosequendum* and administration generally?

The Witness: Yes, in the record.

Mr. Broadhurst: In the book record?

The Witness: Yes, sir.

Q. Now, is there a different form of application that you pass upon for administration ad *prosequendum* and general? A. Yes, sir.

Q. And what is the difference? How can you tell by that application what form of administration was granted?

Mr. Broadhurst: I object to what was granted.

Q. What does the application call for? A. This calls for the purpose of bringing a suit for damages for injuries which caused the death of the intestate. I might say, Judge, if it is permissible—

The Court: You had better not.

Q. Well, tell us what you did grant on that.

Mr. Broadhurst: I object.

Q. What does it call for?

Mr. Broadhurst: He has told you that.

The Court: He may add to that that it calls for letters of administration *ad prosequendum.*

Q. Well, if that is what it calls for will you tell us whether or not letters of administration *ad prosequendum* were granted on that application?

Mr. Broadhurst: I object, the record is the best evidence.

The Court: Sustain the objection.

Q. Are there forms for administration *ad prosequendum* and forms that call for a general administration?

Mr. Broadhurst: I think he has already answered that. He said they were different.

The Witness: There are two different blanks.

Q. And do you always grant the separate blanks? A. If we had the blanks.

Q. Well, if you did not have the blanks for the general and someone wanted administration *ad prosequendum,* would they make out a general blank?

Mr. Broadhurst: I object. That would not make any difference.

The Court: Yes. Furthermore, it does not make any difference what was applied for. It is what was granted.

Q. Can you tell us of your own knowledge whether administration *ad prosequendum* was granted to this woman or general?

Mr. Broadhurst: I object. The best evidence is the record.

The Court: Yes. The record would have to speak for itself.

Q. Do you pass upon the granting of administration *ad prosequendum* and the general? A. I did.

Q. Did you pass upon this one?

Mr. Broadhurst: I object on the ground that the record is the best evidence.

The Court: Sustain the objection. You have to produce the record.

Mr. Elkins: If he is the officer in charge it seems to me that he can tell what he did in his official capacity.

Mr. Broadhurst: You have the record right here.

The Court: But the record is the final result of what he did. It is not what he intended to do; it is not what he is supposed to do and it is not what you asked him to do. The vital point is: What did he do? What did he grant? And the record tells us.

Q. What does that record show, Mr. Callahan?

Mr. Broadhurst: I object. I think the record is the best evidence.

Mr. Elkins: That is what I am referring to if you will listen to me.

The Court: The record speaks for itself. Sustain the objection.

Q. Will you tell us from this record whether or not the form in the record shows—

Mr. Broadhurst: Same objection.

The Court: Sustain the objection.

Q. Will you tell us whether or not from the form of the record which is admitted to be the record of the Surrogate's Office which is this certificate of granting of papers—or whether these are the papers themselves?

Mr. Broadhurst: The record is the best evidence. I have no objection to the record going in.

The Court: It has not been offered.

Mr. Elkins: Will your Honor grant me an adjournment of this case until tomorrow morning?

Mr. Broadhurst: If your Honor is going to grant an adjournment at this time, I have a witness here from Philadelphia who is very anxious to return and I would like permission to take his deposition before Mr. McKeever as Supreme Court Examiner.

Mr. Elkins: I have no objection.

The Court: Then that may be done. We will recess until ten A. M.

Recess.

February 2, 1928.
Ten A. M.

Mr. Elkins: May I reopen the case to recall Mrs. Michelson?

The Court: Yes.

ALMA MICHELSON, recalled.

Direct examination by Mr. Elkins:

Q. Mrs. Michelson, shortly after your husband's death were you appointed by the Surrogate of New York and also the Surrogate of Hudson County to bring suit for your husband's death?

Mr. Broadhurst: I object to that. The record is the best evidence.

The Court: Sustain the objection. The record always has to control.

Mr. Elkins: Exception.

Q. Were you appointed—

Mr. Elkins: I have not got the record here now, but I will have in a few minutes.

Q. Were you appointed this morning by the

Surrogate of this County for the purpose of bringing this suit under letters of administration *ad prosequendum?* Did you make application—

Mr. Broadhurst: I object on the ground that the record is the best evidence.

Mr. Elkins: Subject to my right to bring the papers here.

The Court: Even so, it would not be evidential.

Mr. Elkins: I withdraw her for the time being until the records are produced reserving my right to put in testimony or offer in evidence the letters of administration *ad prosequendum* issued even as of today, or to have an order made by the Surrogate *nunc pro tunc* as to her appointment administratrix *ad prosequendum* of the plaintiff's intestate to bring this suit. With that reservation of the production of the evidence, I then move for an amendment to the complaint so as to substitute the administration *ad prosequendum* of the intestate in this action. I make that motion for an amendment.

The Court: I cannot rule on that. It is not before me and until the matters are before me I am powerless to act.

Mr. Elkins: As I stated, with the reservation as to the production of the records themselves.

The Court: I do not know what the records might disclose.

Mr. Elkins: Then will your Honor indulge me for a few moments. They ought to be here in a few minutes.

Mr. Broadhurst: While we are waiting I would like to ask Mr. Swanson a question which I omitted on my cross examination.

Mr. Elkins: I have no objection.

GUSTAV SWANSON, recalled.

Further cross examination by Mr. Broadhurst:

Q. Mr. Swanson, I show you a paper and ask you if that is your signature? A. Yes, sir.

Q. Do you recall having signed that as a statement of how the accident occurred, to Mr. Ross, who sits there? A. I do not know the name.

Mr. Broadhurst: Stand up, Mr. Ross.

A. I do not recall seeing him.

Q. Did you say in this statement which you say contains your signature—

Mr. Elkins: Of course I object to the reading of any part of it.

Mr. Broadhurst: I have to ask him the direct question. It is for the purpose of contradiction.

Q. Did you in this statement which you say contains your signature say, "He," meaning Michelson, "had gone through the stake about one inch when it gave way. The other stick was rotten and when the one he was chopping gave way the rotten one went also." Did you say that to him? A. No. I didn't say any such thing.

Mr. Elkins: No questions.

(Witness excused.)

Mr. Elkins: In view of the situation as it now stands and in view further of the fact

that there has been some error made in the granting of these letters, I believe that an adjournment until tomorrow morning would enable me to straighten out the difficulty and the manifest error and I would respectfully ask your Honor to grant me a further adjournment until tomorrow morning at ten o'clock.

(Argued.)

The Court: We will adjourn until tomorrow morning at ten o'clock with the understanding that counsel must proceed at that time without further delay.

February 3, 1928, 10 a. m.

Met pursuant to adjournment.

Counsel as before.

Mr. Elkins: I offer in evidence Letters of Administration *ad prosequendum* granted to Alma Michelson upon the death of her husband, Alex Michelson as of date the 29th day of January, 1926.

Mr. Broadhurst: Objected to on the ground it is merely the Certificate and the Surrogates records are the best evidence. To assist Mr. Elkins, I subpoenaed them to be produced this morning.

Mr. Elkins: Under the Evidence Act, the record of a public official properly sealed is prima facie evidence of its contents.

Mr. Broadhurst: I don't know that such is the fact.

For the purpose of the record, it seems to me in view of the fact that at the begin-

ning of the proceedings on the day before yesterday, when we started to take this evidence, it appeared that the original record disclosed no administration *ad prosequendum,* but only General Letters.

(Argued.)

Mr. Elkins: I renew my offer of the Letters *ad prosequendum,* showing that on a certain date Alma Michelson was appointed Administratrix *ad prosequendum.* I also wish to ask leave to amend, under the Jarvis *v.* Johnson case.

I would also like to recall Mr. Swenson.

The Court: I would like to know if you can agree as to whether or not the intestate actually died and whether he died instantly, or whether he died at a later date.

Mr. Elkins: Well, according to the death certificate—

The Court: Well, the death certificate is not in evidence. You can have it marked if you wish.

Mr. Broadhurst: He was killed instantly on my information.

The Court: Well, let it so appear on the record for the purposes of the record.

Mr. Elkins: I want to recall Mr. Swenson to clear up one point with reference to the observation of this stake.

Mr. Broadhurst: I object to that, if your Honor please. It seems to me we have had this man on the stand and been all over that. I really feel it is not fair after having a day's adjournment, after having an opportunity to confer with the witness further, to bring this up again.

The Court: If there is anything counsel has overlooked, I will permit it.

GUSTAV SWANSON, recalled:

Direct examination by Mr. Elkins:

Q. Mr. Swenson, you testified that—

Mr. Broadhurst: I object to that. I don't think we ought to rehash the testimony. Let us ask him the question.

The Court: Get your question in.

Q. Will you kindly tell us, if you will Mr. Swenson, whether or not this stake, which you said was rotten, could be observed by looking at it from the outside.

Mr. Broadhurst: I object to that on the ground that this issue has been thoroughly thrashed over. The witness has testified thoroughly on this phase, both for your Honor, Mr. Elkins and I, as to the way it could be seen and what could be seen.

Mr. Elkins: I withdraw the question.

Q. Will you tell us whether or not this condition which you observed, could be seen by a person whether they were lumber men or anybody could see it; will you tell us whether they could see that condition which you observed.

Mr. Broadhurst: I object to that as calling for a conclusion of the witness. He has already testified as to what he observed. He can't testify to what others might have observed.

The Court: The only question, if there is a question, that has been in my mind: I

think this witness, who testified yesterday, upon cross examination as to whether or not, from his knowledge and experience of wood, was able to tell whether the condition he saw indicated rot, and he said he did. He was later asked whether or not anybody else who was not experienced, and of course that called for the same thing that is vicious in the question just asked. So that it left the situation as to just what this witness intended to convey, as to whether or not he himself relied and would have to rely entirely upon any expert knowledge that he had.

Mr. Broadhurst: I think both he and the other witness Anderson answered specifically. I was careful to ask whether or not it was not a fact that it was because of his knowledge of wood that he was able to determine that the coloring that he saw indicated rot and he said it was.

Q. Will you tell us whether or not, if you did not have a knowledge of wood, you could see this condition and understand it and know it by looking at it?

Mr. Broadhurst: I object to that on the ground that this makes this witness an expert on the knowledge of other people.

The Court: I think that you may ascertain whether or not the answers that he has given respecting this wood were statements based upon his expert opinion only, or whether from his casual observation, disassociated from any expert knowledge he knew that condition.

Q. With reference to the observation of the condition of the stake, will you tell us whether or not, leaving out your knowledge of wood, you could tell the condition and observe the outward appearance of the stake?

Mr. Broadhurst: I object to that question. It is a rather ambiguous question. I am willing to concede you could observe the outward condition of the stake.

The Court: The question is whether he relied alone on any experience in wood to ascertain whether what he saw indicated rot.

Q. Will you answer the question.

The Court: There is no question.

Q. Will you tell us whether you could tell this condition without your expert knowledge.

Mr. Broadhurst: I object to the question.

Q. Without the knowledge you obtained from your experience in the wood field?

Mr. Broadhurst: I object to that question on the ground that it calls for a conclusion as to what he could do under circumstances which did not exist.

The Court: That is correct, did he base his judgment as to the condition of the inside of the wood upon his experience as a woodman.

Q. Will you tell us now, whether or not the information you gave in your answer to the question was based upon expert knowledge or the knowledge that you had without the experience?

Mr. Broadhurst: Your Honor will allow me an exception to the question on the ground the witness has already testified on the subject, I don't see how it is possible he could disassociate his knowledge as an expert from his knowledge, without the experience.

The Court: For the purpose of the record, do you claim this witness has given an erroneous answer.

Mr. Elkins: No, I just want to clear it up so that the Jury may have the benefit of it.

The Court: What I mean is this: Do you claim that the answer given by this witness is correct, when he said that no one, unless he was expert in wood, would know from the condition observed that it was rotten on the inside.

Mr. Elkins: I don't intend that; I want to clarify what he said.

The Court: Do you insist the witness is not entirely correct or does not entirely understand the purpose of his answer.

Mr. Elkins: I say that he does not entirely understand the purpose of his answer. He said only expert knowledge could determine it.

The Court: If there is any question about that, you have the privilege of asking this witness if he desires to change his testimony upon the subject on which he has given testimony.

Q. Mr. Swenson, will you tell us what you meant by the statement, by the answer that you gave us that because of the knowledge you had of wood, you could give us that answer?

Mr. Broadhurst: That is not following your Honor's suggestion.

The Court: Mr. Witness, yesterday, upon cross examination, you were asked, in effect, whether anyone else not versed in the business of wood, as you were, would understand from the condition that you saw in this stake, that it was rotten, and I think you said no. Now, this morning, the only question we are concerned with is whether or not that is entirely correct or not, or whether you have anything to add to it, or take away from it?

The Witness: Well, I don't believe you had to be exactly an expert to see it.

The Court: What do you mean by that?

The Witness: Any of the other men could see it on the outside of it, and also on the end of it if you looked at it.

The Court: I would like to know from you, as an expert, something I have not elicited from this case yet, whether or not that condition which you saw there, and for the want of a concrete word that is better, I will use the word "discoloration," was a normal condition on this stake or not? If you wish to object, do so.

Mr. Broadhurst: I will object to that on the ground that I don't see how the witness can testify whether it was a normal condition.

The Court: Well, was this different from the stakes that are used in that kind of business usually showed?

Mr. Broadhurst: I will object to that on the ground that it is immaterial and irrelevant.

Cross examination by Mr. Broadhurst:

Q. The discoloration you refer to is the discoloration that you saw, isn't that so? A. That is what it is.

Q. And that is the discoloration on the bottom of the stake? A. And on the side.

Q. Did you testify you saw discoloration above the stirrup? A. Below the stirrup.

Q. About four inches from the bottom? A. Yes, sir.

JAMES J. KELLY, called as a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Elkins:

Q. Are you connected with the Surrogate's office? A. I am.

Q. Have you produced all the records in this case? A. I have.

Q. I show you a form and ask you what that purports to be? A. Application for letters of administration.

Q. What does it say on the bottom?

Mr. Broadhurst: I object to what it says until we get it in evidence.

Mr. Elkins: I offer it in evidence.

Mr. Broadhurst: I object as immaterial, the application. Are you going to offer the entire record in?

Mr. Elkins: Yes.

Mr. Broadhurst: I have no objection to that.

Mr. Elkins: I am offering this form.

The Witness: It says that the applicant

respectfully applies for letters of administration for the purpose of bringing suit.

(Paper accepted and marked as Exhibit P-1 of February 3, 1928.)

Q. I show you a form and ask you whether or not that is part of your records? A. It is.

Q. What does that purport to be? A. A petition for letters of administration *ad prosequendum.*

Q. What is that, the petition? A. Yes, sir.

Mr. Elkins: I offer that in evidence.

Mr. Broadhurst: That is objected to as immaterial and irrelevant, a petition to the Orphans Court for an order *nunc pro tunc.* I object to it because I don't think that I should be bound by the allegations in the petition which recites that letters of administration *ad prosequendum* were granted by the Surrogate back in 1927.

Mr. Elkins: He can object to it collaterally.

Mr. Broadhurst: I object to it on the further ground that it has not been filed.

Mr. Elkins: Mr. Kelly is from the Surrogate's office and has produced as part of the record this form. I think the objection is uncalled for.

The Court: This petition which is now shown you, is that on file in your office?

The Witness: Yes, sir.

The Court: Part of the record pertaining to the administration *ad prosequendum*?

The Witness: Yes, sir.

The Court: Actually filed?

The Witness: It is filed, yes, sir; filed yesterday.

Mr. Broadhurst: It was filed yesterday?

The Witness: Yes, sir.

(Accepted and marked as Exhibit P-2 of February 3, 1928.)

Q. Is that order on file in your office (handing witness paper)? A. Yes, sir.

Q. Is that part of the record in the case of Axel Michelson? A. Yes, sir.

Mr. Elkins: I offer this order in evidence.

Mr. Broadhurst: Now, if your Honor please, so that I will have my record straight. I will object to the entry of this order and the acceptance of this order in evidence on the ground first that it does not appear to have been filed and second that there is no authority under the Death Act for the Judge of the Orphans Court to either issue letters of administration *ad prosequendum* or to correct the records of the Surrogate on the issuance of letters *ad prosequendum.*

The statute says the letters shall be issued by the Surrogate of the County. There is no power for the Judge of the Orphans Court to issue letters of administration *ad prosequendum* or assist in the issuance or to make an order correcting the Surrogate's record.

The Court: This seems to be signed by a Judge of the Orphans Court.

Mr. Elkins: If your Honor please this is an order of the Court. How can he attack

that collaterally. If your Honor please, the Orphans Court has jurisdiction over the Surrogate's Court in matters of error in form or mistake application was made to the Surrogate for an order *nunc pro tunc.* Application was made to a Judge of the Orphans Court and he has authority to rectify an error which was made and to see that justice is done. Now, the Orphans Court has jurisdiction to change the records of the Surrogate where there is an error of the Surrogate.

The Court: Mr. Elkins, without arguing that any further it has always been my understanding with reference to matters concerning administration, that the Orphans Court has authority to hear appeals from the Surrogate. The Surrogate is just as much a court as the Orphans Court ever was and in fact has just as great antiquity in its favor. If there was a mistake in the record, either one of two things would have to be done. The Surrogate would either have to amend or if it was a case that could be appealed, it would have to be appealed if the Surrogate would refuse to do that which he was obliged to do you would have to go to the Supreme Court and get a Writ of Mandamus requiring him to do that which he should do.

(Argued.)

Mr. Elkins: I am offering this record as a record of the Surrogate and it seems to me that the order making up the record should be taken in.

I would like now to call Mr. Ryan of the Surrogate's Office.

MARK L. RYAN, called as a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Elkins:

Q. Mr. Ryan, are you connected in any official capacity with the County of Hudson? A. Yes, sir.

Q. Will you kindly tell the Court and jury what position you hold in this county? A. I am Deputy Surrogate of Hudson County.

Q. Are you familiar with the issuance of administration *ad prosequendum* forms? A. Yes, sir.

Q. I show you a paper and ask you what that purports to be? A. That is a certificate issued in a case of administration *ad prosequendum* in the estate of Axel Michelson.

Q. Will you tell us whether or not these are original papers of administration *ad prosequendum*?

Mr. Broadhurst: I object to that. How can the witness state that. He said it was a certificate. How can it be an original paper?

The Court: You have the right to find out.

The Witness: That is the original certificate I issued.

Q. Now, you call it a certificate. Is that the form of the administration papers given to the woman?

Mr. Broadhurst: I object to that.

Mr. Elkins: We have a right to know. He calls it a certificate. We have a right to know whether these are papers or whether it is a mere certification of a record.

Mr. Broadhurst: The paper speaks for itself.

The Court: Does that remain on record in your office or is it given to the person who qualifies? That is what we want to know, I think.

The Witness: The application for this paper is made a record of in the office.

The Court: That is the particular paper now shown you, is that the original letters?

The Witness: Yes, sir.

The Court: Which are made out of what?

The Witness: It is the original letters, yes, sir.

Q. There is no other entry than that of letters? A. Yes, sir.

Q. There is no other record? A. No.

Mr. Elkins: I offer the paper in evidence.

Mr. Broadhurst: I object to the offer of the paper. The paper on its face says that it certifies that on a certain date letters of administration were granted "by me to Alma Michelson to prosecute an alleged claim against the proper defendants" and that therefore on its face it is merely a certificate of an act that had been performed and is not the original letters.

I would state further that we have here in court the original book of the Surrogate in which the original letters are issued.

The Court: I might call the attention of counsel, if you will read the Act, that you will find that they are in the same words as given there. It seems to me that Section 33 contains the same wording.

I have asked if that is the original record and he says yes, so we must take it.

Mr. Broadhurst: May I have my exception.

The Court: Yes.

(Accepted and marked as Exhibit P-3 of February 3, 1928.)

The Court: It is admitted because the Surrogate has stated that it is the original and only record.

Cross examination by Mr. Broadhurst:

Q. Mr. Ryan, was there any ruling on this order of the Orphans Court?

Mr. Elkins: I withdraw the offer of the order at this time.

Q. Upon application being made for letters of administration *ad prosequendum,* is the granting of the letters issued recorded in any record of your office?

Mr. Elkins: I object to that as incompetent, irrelevant and immaterial and not proper cross examination. My examination was directed solely to the instrument which he issued and which he said was the original form and which is now in evidence. I object to the form of the question as to the procedure of the recording of it in any book. He said that this was the original paper.

The Court: If your theory is correct, if what you say is so, nobody can deny it. I don't see how they can at all. I overrule the objection.

Mr. Elkins: Exception.

(Question read as follows:)

"Q. Upon application being made for letters of administration *ad prosequendum,* is the granting of the letters issued recorded in any record of your office?" A. Yes, sir.

The Court: This line is admitted merely because the witness said that what was offered were the original letters.

Q. Are the books which I show you, one being liber or book number 45 and the other liber or book number 84, original books of your office in which the granting of the letters is recorded?

Mr. Elkins: I object to that if your Honor please on the ground that my questions were not directed to any books in his office and whether or not these are books of original entry in his office it seems to me is incompetent and irrelevant. How does that change the fact that he issued and says that we have the original papers here?

The Court: I don't know.

Mr. Elkins: I respectfully object.

Mr. Broadhurst: I can't get it all in in one question. I have to lay the foundation.

The Court: He has a right to show the witness is wrong.

(Question read as follows:)

"Q. Are the books which I show you, one being liber or book number 45 and the other liber or book number 84, original books of your office in which the granting of the letters is recorded?" A. Yes, sir.

Q. Is there any other book in your office other than these books in which the granting of the letters is recorded? A. Not that I know of.

Q. Would you know if there was a book as the Deputy Surrogate? A. Of course I am not familiar with the entire routine of the office. We have a clerk down there to take care of that.

Q. Now, I show you an application which was marked as Exhibit P-1 of February 3, 1928, in evidence and ask you whether or not that is an original record of your office (handing witness)? A. Yes, sir.

Q. And I ask you to refer to liber or book 45 of your office for the date of that application, January 27th, 1926, and ask you if that is the record of the granting of the letters to Alma Michelson of this estate?

Mr. Elkins: I object to that if your Honor please on the ground he has already testified that we have the original records, so it must be manifest that the matter about which he speaks must be a copy of the original. I contend that the original speaks for itself. I further object on the ground that he says he is not familiar with the record. Then on the further ground that it is incompetent and irrelevant and immaterial what the record shows. Certainly can't bind the plaintiff and it certainly does not alter the original papers.

The Court: Objection overruled.

Mr. Elkins: Exception.

(Question read.)

"Q. And I ask you to refer to liber or book 45 of your office for the date of that application, January 27th, 1926, and ask you if this is the record of the granting of the letters to Alma Michel-

son of this estate?" A. That is the office record of this petition.

Q. And so far as you know that is the original record of your office in this matter? A. Of this particular application, yes, sir.

Q. Now, that is on page 228 of this book. I don't suppose we have a right to mark that in evidence, but I ask that it be marked in pencil for identification.

(Marked Exhibit D-1 for Identification of February 3, 1928.)

Q. Now, I ask you if there is any other record in this book of the granting of the letters on this estate on this application other than the one you referred to?

Mr. Elkins: I object to that on the ground it is incompetent, irrelevant and immaterial, asking him to look at all the other pages of the book.

The Court: Overrule the objection.

Mr. Elkins: Exception.

A. No.

Q. You have looked entirely through the date of January 27th, 1926? A. Yes, sir.

Q. And you find no other record other than the one marked for identification D-1 of this date? A. No.

Q. Now, I ask you to refer to this paper which I show you, which purports to be bond of the National Surety Company on the estate of Axel Michelson and I ask you if this is an original record of your office?

Mr. Elkins: Objected to as incompetent, irrelevant and immaterial. Not proper cross

examination. No reference has been made to a bond on the direct examination and certainly I don't see how in cross examination that any record not referred to in the direct can be examined upon. And how does that in anywise affect the record about which he spoke, the bond, the record about which he spoke on direct examination?

The Court: It might. You see none of this is in evidence and he certainly has a right to identify the papers.

(Question read as follows:)

"Q. Now, I ask you to refer to this paper which I show you, which purports to be bond of the National Surety Company on the estate of Axel Michelson and I ask you if this is an original record of your office?" A. Yes.

Mr. Broadhurst: I ask that that be marked Exhibit D-2 for Identification of February 3, 1928.)

(Admitted and marked Exhibit D-2 for Identification of February 3, 1928.)

Q. Now, this paper which you identified and which has been offered in evidence as Exhibit P-3 of February 3, 1928, and which you say is an original paper. I observe that it bears your signature, Mark L. Ryan, as Deputy? A. Yes, sir.

Q. When was that paper actually prepared?

Mr. Elkins: I object to that. He is attempting to collaterally attack this record which is in evidence. It is an original and it seems to me he cannot at this time attack the record collaterally.

The Court: He is merely identifying the paper.

Mr. Elkins: He is asking when it was signed.

Mr. Broadhurst: Pardon me. This paper is in evidence.

The Court: Objection overruled.

A. Yesterday.

Q. What time? A. About 3:30.

Q. I observe that it states that you certify that letters of administration upon the estate of Axel Michelson were granted by the Surrogate of Hudson County, acting through you as Deputy, upon the estate of Axel Michelson. Will you show me in the original record of your office, namely, the books that have been referred to, the record of that administration? A. That administration was given on the order of Judge O'Regan of the Orphans Court.

Q. Then I take it it does not appear in the records of your office at all? A. It will appear but it does not appear now because we have not gotten to it yet.

Q. You mean it will appear by virtue of an order of Judge O'Regan which I show you? A. Yes, sir.

Mr. Elkins: I object to that.

Mr. Broadhurst: I haven't offered it in evidence.

Mr. Elkins: I object to that as immaterial, incompetent. By what right can an order to sign this paper which he says is the original and which is in evidence and was signed by him, by what right does he attach that? I can't see how he can do it, it seems to me.

Mr. Broadhurst: I am attempting to de-

velop whether or not the Surrogate's Office, on the arrival of this paper in the Surrogate's Office, what action was taken. Mr. Ryan stated that this paper was the original letters of his office and it now appears that this paper was prepared by him and issued out of his office yesterday, a matter of over a year from the time when the application was made which has been marked Exhibit P-1 of Feb. 3, 1928.

The Court: Is it your contention that the Surrogate has no right to amend his record?

Mr. Broadhurst: Well, your Honor, that question has not arisen at this trial.

The Court: It is arising in your mind?

Mr. Broadhurst: As to whether he would have a right to amend. My point is that they have exceeded their jurisdiction on this application by issuing any letters which are now in here. That they have no jurisdiction to grant letters of this character, having previously issued letters of a different character.

(Argued.)

Q. Mr. Ryan, what was the authority that you had for issuing yesterday these letters, P-3, which you say are the original letters of your office upon the estate of Axel Michelson?

Mr. Elkins: I respectfully object to the question upon the ground that it is irrelevant, immaterial and incompetent and on the ground that it is attempting to attack the instrument and his authority collaterally. He has not objected to his qualifications. If he is an officer of the County how can he

attack his authority, the authority of the Surrogate.

The Court: I think that is correct.

Mr. Broadhurst: Exception.

Q. Did you have any application made to you for letters of administration *ad prosequendum* by Alma Michelson upon the estate of Axel Michelsan before you prepared and issued this paper Exhibit P-3. You say that this paper was prepared and executed yesterday.

Mr. Elkins: The letters referred to are issued as of the 27th of January, 1926, and are in evidence as P-1 and I contend that it is immaterial whether he had an application or not before this was drawn, to determine whether he shall issue this paper. What difference does it make whether an application was made if he issued and granted administration to a person whom he has the authority and the right to do. What difference does it make whether the application was made or not in writing or orally?

The Court: Go ahead.

Mr. Elkins: Exception.

A. I don't remember any.

The Court: Have you already told us there is a petition?

Mr. Broadhurst: He has already testified that Exhibit P-1 which is marked in evidence on that application letters were granted as appears on this page 228 of his liber. I am now asking you whether or not, when he issued this certificate which was marked Exhibit P-3 yesterday, dated Jan-

uary 27th, 1926, he had any application before him by Alma Michelson on the state of Axel Michelson?

Mr. Elkins: I object to that on the ground he has already answered.

The Court: Had you?

The Witness: There was a petition made, I think it was yesterday morning, but there was no action taken on it.

Q. Is this the petition which you say was made yesterday morning (indicating)?

Mr. Elkins: I object to that as incompetent, irrelevant and immaterial, not proper cross examination. On the further ground that it is an act subsequent to the issuance of the letters of administration and can in no wise affect their authority or legality.

The Court: I think it becomes immaterial because he says he has no other application.

Q. I ask you whether or not the paper I show you is an application that was made yesterday morning and upon which you say no action was taken?

Mr. Elkins: I object to that upon the ground that it does not in any wise affect this paper, a paper which was made subsequent to its issuance.

The Court: He is not offering it in evidence.

A. I don't recognize that, because I did not sign it.

Q. Who did sign it?

Mr. Broadhurst: I ask that that be marked for identification.

(Marked D-3 for Identification of February 3, 1928.)

Q. If I understood you correctly, at the time you prepared and issued this paper marked P-3 which purports to be a certificate that on January 27th, 1926, letters of administration *ad prosequendum* were granted on the estate of Axel Michelson to Alma Michelson, you had no petition before you?

Mr. Elkins: I object to that as an erroneous statement of facts. The fact is, as it now appears on record, there was a petition filed for administration for the purpose of bringing suit. That is in evidence and is part of the record. It was filed on the day the papers were granted.

(Question read as follows:)

"Q. If I understood you correctly, at the time you prepared and issued this paper marked P-3, which purports to be a certificate that on January 27th, 1926, letters of administration *ad prosequendum* were granted on the estate of Axel Michelson to Alma Michelson, you had no petition before you?"

The Court: Did you?

Mr. Elkins: Exception.

A. No; issued on the order.

Mr. Elkins: I object to the answer and ask that it be stricken out.

The Court: Go ahead and finish.

The Witness: That certificate was issued on the order of the Judge of the Orphans Court.

Q. The order which you refer to. I ask you whether or not this is the paper which I show you and is filed in your office?

Mr. Elkins: I object to that upon the ground it is incompetent, irrelevant, immaterial and not proper cross examination. On the further ground that it has no materiality as to his authority or as to the issuance of this form nor does it attack this form.

The Court: Well I don't know. I haven't seen the paper. I don't know anything about it. It has not been offered in evidence and I can't rule on it.

A. Yes, sir.

Q. As part of this case?

Mr. Elkins: Objected to as incompetent, irrelevant and immaterial.

The Court: Yes.

Mr. Broadhurst: I ask an exception.

Mr. Broadhurst: I ask to have it marked as Exhibit D-4 for identification.

(Paper marked Exhibit D-4 for Identification of February 3, 1928.)

Q. I show you Exhibit P-3 for identification and ask you whether or not that is filed in your office?

Mr. Elkins: That is objected to on the ground that whether or not it is filed has no importance or materiality in this case.

The Court: It is not offered in evidence except for the purpose of identification and it may be marked.

Mr. Elkins: Exception.

Q. Is that filed in your office? A. I can't really

answer that. It looks like a regular application to me.

Q. Well, is the signature on there the signature of Mr. Norton? A. Yes, sir.

Q. Is it marked filed? A. No.

Q. What does it say there, "Filed February 2nd, 1928?" A. Yes, sir.

Q. Is that Mr. Norton's handwriting? A. Yes, sir.

Q. That is the Surrogate? A. Yes, sir.

Q. Now, do you know of your own knowledge whether any letters of administration *ad prosequendum* were issued by your office on this application which is marked D-3 for identification?

Mr. Elkins: I object to that on the ground it is an application filed subsequent to the date of the issuance of the papers in evidence and has no materiality at all with respect to the paper now in evidence.

The Court: You are wrong about that. He says it was filed before.

Mr. Broadhurst: That is D-2, the second application. I am asking whether he knows of his own knowledge whether any action was taken on D-3 which is another application for letters?

Mr. Elkins: He said no.

A. No.

Q. You don't know, or none was taken? A. None was taken.

Q. I ask you to look at this record here and tell me whether there is any record in there of letters granted in February of 1928, this book that I am referring to being liber 84 of your records downstairs. A. To Michelson? No.

Mark L. Ryan, redirect.

Redirect examination by Mr. Elkins:

Q. Will you tell us whether or not that is the form of application on which administration *ad prosequendum* is issued?

Mr. Broadhurst: Referring to P-1.

Q. Is that the form she filled out? A. No.

Q. Will you tell us whether or not that is an application for administration to bring suit. Is that right? A. That is what we take it to be.

Q. Upon this application? A. It says that.

Q. You issue administration papers, is that right? A. Yes, sir.

Q. This P-1 was the only paper filed in your office for an application for administration prior to February 2nd, 1928, is that right? A. Yes, sir.

Q. Is it a fact that this is the only application upon which P-3 was issued?

Mr. Broadhurst: I object to that on the ground that the witness has already said he issued P-3 on the order of another court which he has identified as D-4 for identification.

Mr. Elkins: Your Honor has ruled that is immaterial I think.

Q. Mr. Ryan, at the time of the issuance of this Exhibit P-3, will you tell us whether or not Exhibit P-1, the application for administration upon the estate of Axel Michelson, was the only instrument for administration filed in your office?

Mr. Broadhurst: If he knows?

A. Yes, that was the only one on file.

Q. Will you tell us whether or not this record,

your book has a copy of what was done by your office on D-1 for identification?

Mr. Broadhurst: I object to that. The record speaks for itself.

The Court: Is that a record of your office?

The Witness: Yes, that is the record on this application.

Mr. Broadhurst: Referring to P-1.

The Court: So that it appears you issued letters of general administration upon application for letters of administration *ad prosequendum.* A. The application is for general administration, general administration *ad prosequendum.*

Mr. Broadhurst: Exhibit P-1 you refer to?

The Witness: Yes, sir.

The Court: But P-1 does state, does it not, that the letters are asked for for the purpose of bringing suit for damages for injuries which caused the death of the intestate?

The Witness: Yes, sir.

Recross examination by Mr. Broadhurst:

Q. What do you say about that, was this form P-1, a form used by your office for the issuance of general letters?

Mr. Elkins: I object to that. The form speaks for itself.

The Court: It is a matter of developing the question you asked.

Q. Isn't that so? A. Yes, sir.

Q. This Exhibit D-3 is the form used by your

office for the issuance of letters of administration *ad prosequendum?* A. Yes, sir.

Redirect examination by Mr. Elkins:

Q. As a matter of fact, the forms are the same, aren't they, in print, isn't that a fact? A. No, a slight difference.

Q. The application, the upper part of the form, is the same? A. Yes, sir.

Q. And then you inserted the purpose for which the papers are applied for? A. Yes, sir.

Q. So that when you inserted that it is for the purpose of bringing suit for damages, on account of the death of the intestate, is what the woman wanted, is that right? A. Yes, sir.

Mr. Elkins: I respectfully move to amend the complaint so as to read, "Alma Michelson, Administratrix *ad prosequendum* of the estate of Axel Michelson, deceased."

Mr. Broadhurst: I move to strike out of evidence Exhibit P-3 as it appears from the testimony of Mr. Mark L. Ryan, the Deputy Surrogate of Hudson County that Exhibit P-3 was issued yesterday morning, February 2nd, 1928, from his office without any application having been made so as the Surrogate could obtain jurisdiction and that on its face it purports to be the granting of letters of administration *ad prosequendum* as of January 27th, 1926, when the testimony of Mr. Ryan himself indicates that it was issued and granted as of February, 1928, without a petition which is necessary in my opinion and, that the Surrogate had to have such a petition so as to obtain jurisdiction to issue these letters.

The Court: I can only deal with one motion at a time. The motion that is just before me is as to whether I should allow an amendment to the complaint to set forth that the person appearing here as the plaintiff is the administratrix *ad prosequendum*. Have you any objection to that?

Mr. Broadhurst: I do object on the ground that there is no proper evidence before the Court that any proper administratrix *ad prosequendum* is in existence at this time.

Then upon the further ground that under the statute the action must be brought within twenty-four calendar months of the death and that that is a condition precedent to recovery.

(Decision deferred after long argument.)

MARK L. RYAN, recalled by the Court.

By the Court:

Q. Will you please examine Exhibit P-1, which was shown to you when you were on the stand and which appears to be an application for letters with the words at the bottom, "For the purpose of bringing suit for damages for injuries which caused the death of the intestate" and which bears date January 27th, 1926. It is signed Alma Michelson. Then look at this Exhibit P-3 which purports to be letters of administration *ad prosequendum* dated January 27th, 1926, at least witnessed on that date, but stating that the certificate as of January 27th, 1926, for letters of adminisration *ad prosequendum* had been issued on Axel Michelson, were issued to Alma Michelson. Having these two in

mind, calling your attention now to Exhibit P-3, which is the last exhibit I showed you; can you state upon what those letters were issued. Was any application before you at that time by Mrs. Michelson upon which you or the Surrogate acted?

The Witness: There was application made which I see in the testimony this morning, signed by Mr. Norton himself, the Surrogate. I don't know what action was taken on it but this was issued on the order from Judge O'Regan.

Mr. Broadhurst: Referring to D-3 for identification?

The Witness: Yes, sir.

Q. Then I understand you don't know upon what authority Exhibit P-3 was issued? A. This was issued by order of Judge O'Regan.

Q. Were any letters of administration issued by your office upon application shown as Exhibit P-1 here, prior to January 27, 1926. A. On January 27th there was a regular administration.

Q. Was any action taken by your office on this Exhibit P-1 at the time it was filed by you, January 27th, 1926? A. Yes, sir.

Q. Have you that record before you? A. Yes, here.

Mr. Broadhurst: Indicating D-1 for identification.

Mr. Elkins: May I have the original letters marked?

(Marked as Exhibit P-4 of this date.)

Q. That is for general administration? A. Yes, sir.

Examined by Mr. Elkins:

Q. Mr. Ryan, when one person desires to get ad-

ministration *ad prosequendum,* they supply your office with certain information? A. Yes, sir.

Q. Will you tell us whether or not that information is recorded on a form in your office?

Mr. Broadhurst: How is that material? We have the record of what was done in this particular case.

Q. Is that form now, Exhibit P-1, is that the result of the information or is that what is referred to?

Mr. Broadhurst: It is in evidence and it speaks for itself.

Q. When a person makes application for administration *ad prosequendum,* is it a fact and is this application correct, when it is put in the application, "Suit for damages, etc?"

Mr. Broadhurst: Objected to.

The Court: Sustained. The instrument speaks for itself.

Q. Will you tell us whether in a suit for damages for injuries arising out of the death of the intestate, whether your office issued administration *ad prosequendum* on application where those words are used?

Mr. Broadhurst: I object to this reference to what was done.

Q. In other words, that Exhibit P-1 shows an application having been made for the purpose of suing, for the purpose of bringing suit for damages—

Mr. Broadhurst: I object to that. The record speaks for itself.

The Court: It must speak for itself. It is in.

Q. This record, as you say, P-1, is the form of application your office has for administration? A. Yes, sir.

Q. P-3 is the paper you gave to the person appointed, is that right? A. Not on that application.

Q. Is that right. Ins't that administration *ad prosequendum?* A. Yes, sir.

Q. And isn't it a fact that when a person asks for administration for the purpose of bringing suit, that is what they get? A. Yes, sir.

Q. And isn't it a fact that the only application you had on file in your office prior to yesterday was P-1? A. Yes, sir.

Q. And so as a matter of fact the only application upon which that could have been issued was that?

Mr. Broadhurst: What are you talking about, as to what was issued on P-3?

Mr. Elkins: P-3.

Mr. Broadhurst: I object to that.

(Question read.)

"Q. And so as a matter of fact the only application upon which that could have been issued was that?" Is this the application? In other words P-1 is the information incorporated in that form, is that right?

Mr. Broadhurst: I object to that if your Honor please. The record speaks for itself.

The Court: This Exhibit P-3 which is in evidence as of January 27th, 1926, was made by you?

The Witness: Made by me.

The Court: And when you did that, by what authority did you act, authority of the Surrogate or somebody else?

The Witness: The authority of the Judge of the Orphans Court.

The Court: Did you attempt, through the Surrogate's Office, without that order, to correct anything that had been theretofore issued in this matter or not?

The Witness: No.

The Court: So that acting for the Surrogate, you did not by this Exhibit P-3 intend to correct P-4?

Mr. Elkins: I object to that if your Honor please on the ground that the instrument speaks for itself.

The Court: I am trying to help you all I can in this case, Mr. Elkins, but you are now splitting hairs.

This Exhibit P-4 of this date, the original letters that were granted in this matter on January 27th, 1926, is the original record of the action of the Surrogate in this matter?

The Witness: Yes, sir.

The Court: Is that the original record?

The Witness: Yes, sir.

The Court: Now, when letters are granted or certificates are granted and are lost by you, do you issue new ones from the record that appears in this book number 45, letters of administration?

The Witness: Yes, sir.

The Court: Now what I want to get clear is this: A moment ago, when you were asked concerning Exhibit P-3, as to whether or not that was the original record, you mean to

say that that was the original paper that was given to the parties in this matter, or do you mean that it was a copy of the original record made in the book?

The Witness: January '27, this record you mean?

The Court: Yes.

The Witness: No.

Mr. Broadhurst: That would not be 1927, that is the difficulty.

The Court: What I mean is, whether book 45 which seems to constitute a record of your office that is the official original record of what has been done by you with reference to the granting of letters of administration and administration *ad prosequendum.*

The Witness: No.

The Court: Or whether the paper which you give out to the administrator at the time supersedes your records.

The Witness: The letters issued, those were regular administration .

Cross examination by Mr. Elkins:

Q. Mr. Ryan, isn't it a fact that when a person applies in the office for administration *ad prosequendum,* as soon as they go in there and you swear them, isn't it a fact that you give them a form like that, isn't that so? A. Yes, sir.

Mr. Broadhurst: I object to that. It is very leading. And I don't see how it makes any difference.

The Court: It is a matter of law I presume anyhow.

Mark L. Ryan, recross.

Q. Is that record made after the paper goes out of your office? A. Yes, sir.

The Court: Referring to what?

Mr. Elkins: The record in the book.

Mr. Broadhurst: I object to the time when it is made. If it is an original, it is an original regardless of when it was made.

Q. Isn't it a fact that the record in your book is kept of the original record?

Mr. Broadhurst: I object to that.

Q. Is this a fact that a record is kept of the original letter which your office issues? A. Yes, sir.

Mr. Broadhurst: I object to that.

The Court: What do you mean by that?

The Witness: This is a copy of the application that is made after the papers are issued.

The Court: You mean of the letters, book 45?

The Witness: Yes, sir.

Recross examination by Mr. Broadhurst:

Q. Which is the permanent record? A. The book is.

Q. Suppose that the paper, the certificate which you issued is lost or destroyed and you are asked for a new one, where do you go to get that information? A. The book.

The Court: There is no doubt from what I have heard of the testimony but I want to hear it again, when Exhibit P-3 was made up by you on February 2nd, 1928, that is when it was made, which was yesterday; is that right?

The Witness: Yes, sir.

The Court: And so prior to yesterday there never were any letters of administration *ad prosequendum* so far as your records show, granted to this woman?

The Witness: No, sir.

The Court: When I say this woman I mean the plaintiff in this case; is that right?

The Witness: Yes, sir.

The Court: So that when you put the date in here and the words, "witness my hand and seal" in Exhibit P-3 and you make it January 27, 1926, that is put back as of that date on record which you yourself made, and original record which you yourself made this morning.

The Witness: Yes, sir.

The Court: And it is not a correction of anything that had been theretofore made?

The Witness: No. Judge O'Regan said it shall be made as of January 27th, 1926.

Q. And that is the authority on which you did it? A. Yes, sir.

Q. And not because there is anything in the prominent record to authorize it? A. No.

Redirect examination by Mr. Elkins:

Q. As a matter of fact this woman in her application wanted papers in order to prosecute suit, *ad prosequendum?*

Mr. Broadhurst: The paper speaks for itself?

The Court: Yes.

(Adjourned till Monday, February 6, 1928, at ten A. M.)

February 6, 1928,
Monday, ten A. M.

The Court: The Court will grant the motion made by the attorney for the plaintiff to amend the complaint to read, "Administratrix *ad prosequendum* of the estate of Axel Michelson" instead of "administratrix of the estate of Axel Michelson" under the provision, however, that it must be typewritten and attached to the postea.

Mr. Broadhurst: Exception.

I also made a motion to strike from the record Exhibit P-3 which purports to be letters of administration *ad prosequendum* granted on February 27, 1926, to Alma Michelson, administratrix *ad prosequendum* of the estate of Axel Michelson on the ground that the evidence taken in the case from the Deputy Surrogate who prepared it shows that it was prepared on February 2nd, 1928, without any application having been made to the Surrogate for letters, and that the records disclose the original application made in January, 1926, upon which general letters of administration were granted and there was no attempt made by the Surrogate to correct any error, and the issuance of these letters was upon an order of the Orphans Court which I contend has absolutely no power or authority under the statute to order the issuance, and therefore what upon its face at the time it was offered may have been admissible because prima facially it was what it purported to be, it now appears without dispute that it

is not the result of any authorized act of the Surrogate.

The Court: The Court conceives this to be the record of a court, and it has been held in this State that the surrogate granting letters of administration acts in a judicial capacity, therefore the Court is without the power to go into the validity of letters that are thus granted. The order of the Court will be to strike from the record all testimony bearing upon an attempt to inquire into the validity of these letters for the reason that it would be a collateral attack upon the record of a court of competent jurisdiction, there being a distinction, for example, between where a suit is brought upon a judgment, by way of illustration, in a foreign jurisdiction. Suit may be brought attacking the judgment upon two grounds: First, that the jurisdiction is improper, and secondly, fraud. But that is not this case, because here the granting of the letter of administration *ad prosequendum* is a mere step in the chain of proof and is not the primary cause in issue, hence the courts, by well recognized distinctions hold that in such cases we must give absolute validity to the records such as this is, so that I will deny the motion to strike from the record Exhibit P-3 and allow you an exception.

Mr. Broadhurst: I note my exception. I also note my exception to your Honor striking from the record the testimony which has already been adduced showing the facts under which that was granted, because I

understood your Honor to say that you would strike that from the record.

The Court: That may stand because it is immaterial in view of the Court's ruling, and therefore, of course, the jury will disregard it as the Court must. It will stand, however, in view of the fact that no motion was made to eliminate it from the record.

Mr. Elkins: I take it your Honor desires me to make such a motion?

The Court: No, I do not desire it.

Mr. Elkins: Well, I will make the motion in order to conform with your Honor s remarks.

The Court: There is no necessity of doing that at all because the matter is on the record now, as the Court sees it, as immaterial testimony.

Mr. Elkins: The plaintiff's case is closed.

Mr. Broadhurst: I don't suppose your Honor will insist upon me going over again the grounds I covered on the merits? Your Honor recalls the grounds of my motion and the argument we had?

The Court: Yes.

Mr. Broadhurst: But in addition to that I now move for a nonsuit on the ground that from the evidence in the case it appears without dispute that there is no proper plaintiff before this court, no person properly appointed as administratrix *ad prosequendum,* and as that is essential to prove as a fact in order to recover in this suit and the plaintiff has wholly failed to establish her rights as such administratrix to prosecute this action.

The Court: That motion will be denied.

Mr. Broadhurst: You deny it upon both grounds?

The Court: Yes.

Mr. Broadhurst: On the merits as well?

The Court: Yes.

Mr. Broadhurst: Exception.

The Court: Upon further consideration I am inclined to allow you to make your motion to strike from the record only so much of the testimony as directly attacks the validity of Exhibit P-3.

Mr. Elkins: I make that motion.

The Court: And I will grant the motion.

Mr. Broadhurst: Exception.

DEFENSE.

CARL ANDERSON, recalled.

Direct examination by Mr. Broadhurst:

Q. I understood from your testimony the other day that you were in charge of the gang of men that did the unloading down there? A. Yes, sir.

Q. What I want to find out is, do you recall whether on the day of the accident you had cleaned up the unloading of the cars that were then in the place for unloading? A. Yes, sir.

Q. Had you cleaned them up? A. Not all of them.

Q. How many cars were left? A. That I could not tell you, sir. They used to come in right along.

Q. I mean the day before, were there any cars still unloaded? A. Why we had unloaded two the day before.

Q. But I mean were there any still to be un-

loaded there when you went to work the day before? A. Yes, sir.

Q. How many? A. That I could not tell you.

Q. I mean the day before, were there any cars still unloaded? A. Why we had unloaded two the day before.

Q. But I mean were there any still to be unloaded there when you went to work the day before? A. Yes, sir.

Q. How many? A. That I could not tell you.

Mr. Broadhurst: That is all.

Cross examination by Mr. Elkins:

Q. The matter of unloading of cars, that was a matter for you to take care of, is that correct? A. Yes, sir.

Q. And the matter of inspection, who was that under?

Mr. Broadhurst: I object, not proper cross examination. I only dealt with whether there were any cars to be unloaded at the conclusion of the day before the accident.

Q. Before the cars were finally unloaded, before you started to unload them, did you get any instructions from anybody, any official of the railroad company regarding what you were supposed to do as to unloading them?

Mr. Broadhurst: I object, not proper cross examination. All I asked this man on direct examination was whether or not there were any cars still to be unloaded the day before the accident.

The Court: I think that is so.

Mr. Elkins: That is all.

John Henry Rankin, direct.

JOHN HENRY RANKIN, sworn.

Direct examination by Mr. Broadhurst:

Q. Where do you live? A. 131 Dodd Street, Weehawken.

Q. Are you employed by the Erie Railroad Company now? A. No, sir.

Q. Were you so employed back in December 1925? A. Yes, sir.

Q. And what was your position? A. Conductor.

Q. Were you a yard conductor—or— A. I was a yard conductor.

Q. Now I show you a paper and ask you what that paper is, without telling us its contents, what is it? A. A train list.

Q. And what is the date of it? A. December 21, 1925.

Q. And what does it show? Has it the car numbers on it? A. Yes, sir.

Q. And the contents of the cars? A. Yes, sir.

Q. Now, did you ever see that train list before? A. Well, I would not say I saw this one, but I am pretty sure I saw the carbon copy.

Mr. Elkins: I object to the statement as to any carbon copy.

The Court: Yes. Let me interrupt the proceedings here. There may be some uncertainty with regard to this motion that was made to strike from the record the testimony attacking the validity of Exhibit P-3. Of course, I intend that the entire record, including the original application which is Exhibit P-1 and all the exhibits that have been marked in the record, will stand. But with reference to the proceedings had before the Orphans Court, testimony with regard to

that and testimony with respect to the authority upon which the Deputy Surrogate had acted in producing Exhibit P-3, those things were excluded, but those things that have been marked in evidence, presumably without objection, they stand for what they are worth.

Mr. Broadhurst: Does your Honor strike out the testimony under my cross examination which inquired as to whether any application had been made, and his statement that none had been made?

The Court: Yes, because that would be a direct attack upon the validity of Exhibit P-3.

Mr. Broadhurst: I presume my exception will cover that, but so that there may be no question about it, I shall note my exception again to it.

Q. Now, Mr. Rankin, I show you a book record here, referring to a card record, and ask you if that card is in your handwriting? A. Yes, sir.

Q. And what is this card which is contained in this book? A. That is a car placing slip.

Q. And what do you mean by a car placing slip? A. It is a record of all cars I have placed and the time at which they are placed.

Q. You made this, you say? A. Yes, sir.

Q. When was it made? A. December 21st, 1925. What particular car are you interested in?

Q. December 21st, 1925, would be the month, day and year, would it not? A. Yes.

Q. And is this J. H. Rankin your signature? A. Yes, sir.

Q. Now, I am trying to find how you make this

record up. As you place cars you note it on here? A. Yes.

Q. And is this your original record? A. Yes.

Q. What do you do with it when you get through with it? A. I turn it in to the clerk in the yard office.

Q. Now referring to this record, the card, does it indicate on December 21st, 1925, you directed the placing of a number of cars containing poles? A. Yes.

Q. And where is that on that record? A. There are eight cars I believe.

Q. That is right at the top of the record? A. Yes.

Q. And what was the name or the initials showing ownership of the cars?

Mr. Elkins: I object on the ground it is incompetent, irrelevant and immaterial what names were on the cars. They have admitted that they were cars of the defendant.

Mr. Broadhurst: No, no.

The Court: He is entitled to identify the car in order that he may state whether or not he received it.

A. They were Pennsylvania cars except one.

Q. And what was that? A. Seaboard Air Line.

Q. That is indicated by the initials in the first column? A. Yes.

Q. And under the heading, "number" is that the number of the cars? A. The number of the cars.

Q. Now, then, under the heading—there is another printed heading here with something written under that; what does that say there? A. Montgomery Street yard.

Q. What does that indicate? A. The yard I placed them in.

Q. Do you recollect where you placed them in the Monmouth Street yard? A. The particular track? No, sir.

Q. How big is the Monmouth Street yard? A. Well, it is quite a big yard.

Q. With reference to this particular track do you know where in the yard you placed them, near what street? A. Twelfth and Monmouth Street.

Q. Now, what time were they placed? A. 8.10.

Q. And what were their contents? A. Poles.

Q. That says, "Load, poles"? A. Yes, sir.

Q. And the balance of the cars on that slip, were they all placed by you during the same night? A. Later on, yes, sir.

Q. And does that 8.10 P. M. then indicate the hour at which you placed them on December 21st, 1925? A. Yes, sir.

Q. Do you recollect whether there were any other cars on that track where you placed these cars for unloading on this night? A. On that particular track I don't think there were any cars on that track.

Mr. Broadhurst: I will offer in evidence this car referred to by this witness. It has no number.

(Marked Exhibit D-1 of this date.)

The Court: Now can you tie up the car in question by this witness?

Mr. Broadhurst: No, except by the fact that there were six or eight cars; I cannot tie up the particular car.

Q. You did not see the accident? A. No, sir.

Q. Your placing time was 8:10 the night before the 22nd? A. Yes, sir.

Mr. Elkins: I object to the admission of this card in evidence on the ground that it is incompetent, irrelevant and immaterial.

The Court: It has been marked, hasn't it?

Mr. Broadhurst: If Mr. Elkins says his objection was intended to be made before it was marked I have no objection.

Mr. Elkins: I am objecting to it.

The Court: On what ground?

Mr. Elkins: On the ground that it does not show the delivery of the cars in question to the Snare Corporation. It merely shows delivery of six cars and I contend it does not identify nor prove the fact that there were two cars delivered to the Snare Corporation which were involved in this accident.

The Court: I do not understand that so far as he has gone, that that is his purpose.

Mr. Elkins: Then I will withdraw my objection if he links it up.

Q. Now referring to this sheet does this contain the same car numbers that Exhibit D-1 referred to, particularly these cars of poles? A. Yes, sir.

Q. This slip you have before you, does that travel with you at the same time the car does? A. That slip the yard office keeps for their record and I get a carbon copy.

Q. When do you get that? A. When I leave Weehawken with my train.

Q. Do you check the slip against your train at any time while you have your train in your possession in order to see that the train list and the train are the same? A. Yes.

Q. And then what do you do with your carbons after you get through with it after you check it?

A. After I get finished placing the cars, throw it away.

Q. Does your train list show the two cars we are talking about? A. Yes.

Q. What time does that train list indicate that you received this train containing these cars at Weehawken?

Mr. Elkins: I object on the ground—

Mr. Broadhurst: I withdraw the question.

Q. Does your train list show the time of your departure out of Weehawken? A. Yes, sir.

Q. And what does that show? What time does this train list show that you departed from Weehawken? A. Seven P. M. on the 21st.

Mr. Broadhurst: I offer that in evidence.

Mr. Elkins: No objection.

(Admitted and marked Exhibit D-2 of this date.)

The Court: Does that refer to all the trains in that yard?

The Witness: No sir, just the trains I handled.

Q. In other words seven P. M. indicates that this train containing these cars which we checked out against this book record left Weehawken at seven P. M. with you in your train? A. Yes, sir.

Q. And according to this record they were delivered at eight P. M. at Monmouth and Twelfth Street yard? A. Yes, sir.

Mr. Broadhurst: Cross examine.

Cross examination by Mr. Elkins:

Q. Now Mr. Rankin, you do not know how long

the cars remained in Weehawken yard before you got them, do you? A. No, sir.

Q. And when you take the cars out of Weehawken do you do anything regarding the inspection of the cars? A. No, sir.

Q. Whose duty is it—

Mr. Broadhurst: I object as not being within the scope of cross examination.

The Court: Yes.

Q. Well, were there any other members of the crew with you on that night? A. Why, certainly.

Q. What does your crew comprise? A. Two brakemen, a conductor, engineer and fireman, five men.

Q. What do you do on the train?

Mr. Broadhurst: Objected to. The direct examination of this witness—

Mr. Elkins: I withdraw the question.

Q. These five men on the train, do they merely conduct the movement of the train?

Mr. Broadhurst: Objected to, not proper cross examination.

The Court: Sustain the objection.

Q. Now, on this particular train which you said carries these cars to the Monmouth Street station, did you direct the movement of cars yourself? Were you in charge there? A. Yes, sir.

Q. And what were your duties with respect to the movement of cars from Weehawken to the Twelfth Street yard? A. To deliver them to the Monmouth Street yard for unloading.

Q. That was your only purpose? A. Yes, sir.

Q. That was your only duty? A. Yes, sir.

Q. Now, you finally got to the Twelfth Street yard? A. Yes, sir.

Q. And you just placed the cars on the tracks? A. Placed them in position to be unloaded.

Q. And, of course, you do not know what condition the logs were in or the stakes? A. No, sir.

Q. Of course you did not look at them, did you? A. No, sir, it is not my business to look at them.

Q. The reason being it is not your business to do it? A. No, sir.

Q. That is not your particular work?

Mr. Broadhurst: It seems to me that Mr. Elkins is going far beyond the scope of the direct examination.

The Court: It is merely repetition.

Q. You had delivered cars previously to the Snare Corporation, is that right? A. Yes.

Q. A lot of cars? A. I do not know how many of them.

Q. And do you know for how long a time previous to December 21st, 1925, you had delivered cars there, for how long a time? A. I could not tell you exactly how long, but several times, I am pretty sure of that, but not always poles.

Q. And in the delivery of cars of poles, they would all come in the same way on flat cars with stakes holding them up, that is right, is it?

Mr. Broadhurst: I object. That is outside the scope of the direct examination.

Mr. Elkins: I withdraw the question.

Q. On the day of this accident, the delivery of these cars containing poles, will you tell us whether or not the stakes holding them up looked the same to you on that particular day as they did on the other deliveries?

Mr. Broadhurst: I object, not proper cross examination.

The Court: Sustain the objection.

Mr. Elkins: That is all.

HAROLD STEIN, sworn.

Direct examination by Mr. Broadhurst:

Q. Mr. Stein, you were employed by the Erie Railroad Company? A. Yes, sir.

Q. As what? A. Flagman—acting conductor.

Q. Were you so employed in December, 1925? A. Yes, sir.

Q. I show you two sheets of paper and ask you what they are? A. A train list.

Q. And is this train list the copy which you carry when you move the train from one place to another? A. Yes, sir.

Q. This train list is prepared by the office, is it? A. The yard office.

Q. And this copy was given to you? A. Yes, sir.

Q. Then do you check this train against this list? A. No, sir.

Q. Well, how do you know that the cars you move are all the cars of your— A. The clerk checks up my list. I take the list of trains and I give it to the clerk.

Q. Well, then he prepares this list? A. Yes, sir, gives me the bills.

Q. Gives you the bills to carry? A. Yes, sir.

Q. Then he gives you this copy, is that the idea? A. Yes, sir.

Q. Now, then, how do you account for the cars that you take out from one place on this list when you get them to your destination?

Mr. Elkins: I object, incompetent, irrelevant and immaterial.

The Court: How do you keep your record?

The Witness: I do not keep a record of the cars.

Q. But how do you account for the various cars? How do you know you have delivered them? A. Why, when I get to Weehawken I give this train list to the yard office and they check it off.

Q. They check it off against the train you bring in? A. Yes, sir.

Q. And if there were a car missing would that be drawn to your attention? A. He let the yard office from where I brought the car know about it.

Q. Does this train list show on it the movement of these cars? Will you check it with me. Follow your list while I read it. (Reading.)

Mr. Elkins: May I suggest that if Mr. Broadhurst tells me his purpose I might admit it.

Mr. Broadhurst: I am trying to connect up when these cars arrived in Weehawken and when they left Weehawken to be able to prove the inspection during that period.

Mr. Elkins: I will admit they delivered these cars from Weehawken to Monmouth Street yard to save all that time.

Q. When did these cars arrive at Weehawken from Croxton? A. It takes twenty-five minutes—

Mr. Elkins: I object. I will admit the delivery of cars from Weehawken to Jersey City.

Mr. Broadhurst: I want to prove by this

witness that these cars arrived in Weehawken—that they left Croxton at six-thirty P. M. December 20th, 1925 for Weehawken.

Q. How long did they take to get to Weehawken? A. Twenty-five minutes running time.

Q. So that they would arrive at approximately five minutes to seven P. M. on December 20th, 1925, is that right? A. Yes, sir.

Mr. Broadhurst: I have to establish the period of time they were there for the purpose of inspection. Now if Mr. Elkins will concede that it will curtail the record.

Mr. Elkins: I will admit it if the records show it. December 20th, 1925?

Mr. Broadhurst: The cars left Croxton December 20th, 1925 at six-thirty P. M. and arrived at Weehawken twenty-five minutes later.

Mr. Elkins: It does not show when the cars came in to Croxton, does it?

Q. Does this record show when the cars came into Croxton? A. No, sir.

Mr. Elkins: I will admit that.

Q. Do you know from your experience where the transfer point is between the Pennsylvania Railroad Company and the Erie Railroad Company?

Mr. Elkins: I object unless it can be shown that he is personally familiar with it, and on the further ground that it is incompetent, irrelevant and immaterial.

Q. How long have you worked there? A. Off and on, several years.

Q. Do you know where the interchange point is? Where does the Erie Railroad Company get cars from the Pennsylvania Railroad Company?

Mr. Elkins: I object.

The Court: Don't you see he has to show a point in which he has to make an inspection. He could not go over on their lines and make an inspection.

A. They are delivered at west end. The Erie takes them at west end.

Q. Takes them where? A. Down to the yard.

Q. What yard? A. D Yard of the Erie.

Q. Is that the yard referred to as Croxton? A. Yes, sir.

Q. Where is the west end yard, up at Marion? A. Yes, sir, up on Newark Avenue, Marion.

Mr. Broadhurst: That is all. I will not have to offer these in evidence.

Cross examination by Mr. Elkins:

Q. You have nothing to do with the inspection of cars? A. No, sir.

Q. You do not know their contents? A. No, sir.

Q. And you say the cars arrived at Croxton on December 20th, 1925, at six thirty P. M., is that correct? A. I do not know when they arrived at Croxton. They left Croxton on December 20th.

Q. Left Croxton at six-thirty on December 20th? A. Yes, sir.

Q. And how long did it take from Weehawken to Jersey City? A. Twenty-five minutes running time.

Q. From Weehawken to Monmouth Street? A. I do not know, I never had that run.

Q. It takes twenty-five minutes from Croxton to Weehawken? A. Yes, sir.

Q. Can you give us an estimate as to how long it takes from Weehawken to Monmouth Street, train time? A. I guess about ten or fifteen minutes if you have good luck.

Q. What does good luck depend upon? A. If you do not have any derailments or broken couplings; something might happen on the way over; the engine might break down.

Q. That all happens on the railroad? A. Sure.

Mr. Elkins: That is all.

GEORGE TOMECKE, sworn.

Direct examination by Mr. Broadhurst:

Q. Mr. Tomecke, you are employed by the Erie Railroad Company? A. Yes, sir.

Q. As what? A. Car inspector.

Q. How long have you been a car inspector for the Erie Railroad? A. Over ten years.

Q. Where did you work on December 20th, and 21st, 1925? A. In the Weehawken yards.

Q. Now, is there any record kept of the trains and the cars that you inspect? A. No, we went through the yards and we only kept a record of anything wrong on the car.

Q. In other words if you inspected a train of twenty cars and there was nothing wrong with any car in the train, no record is made of that? A. No.

Q. But if you find a car with something the matter with it, you make a record of that? A. Yes, sir.

Q. Were you on duty on December 20th and December 21st, 1925? A. Yes, sir.

Q. And what were your hours of work during those two days? A. From four P. M. to twelve P. M.

Q. Now then, was there anybody else working as Inspector at the time other than yourself on that track, from four P. M. to midnight on those two days? A. Another man inspected with me Sunday; there is only one day's work.

Q. Was one of these days a Sunday? A. December 20th I was working by myself.

Q. December 20th was a Sunday? A. Yes, sir.

Q. And you were working by yourself? A. Yes, sir.

Q. On December 21st there was another man inspecting with you? A. Yes, sir.

Q. When you have another man working with you do you both inspect the same train at the same time or do you inspect different times? A. No, the same train both.

Q. Now can you tell us whether or not you inspect every train or whether or not you did inspect on December 20th and December 21st while you were working, every train that went in or out of Weehawken? A. Yes, sir, I inspected that train on December 20th, because I got only one train.

Q. You inspected that train on December 20th because you had only one train? A. Yes, sir.

Q. When you make an inspection of a train what do you do, just tell us what you do.

Mr. Elkins: I object on the ground that the question is too broad. It does not identify an inspection made of this car.

The Court: It may be they do not require him to make any inspection. We have to find that out.

Q. When you make an inspection of the train, just tell us what you do. A. The first thing I looked the cars over right underneath, the brakes, the rigging, the brake hangers and the safety plates.

Q. Then what do you do? A. And after we look at the sides.

Q. When you say the sides what do you mean? A. If there is anything wrong, anything broken on the sides of the cars.

Q. And how do you make this inspection? Do you get on the cars or do you walk alongside of them or do the cars roll by you while you are standing still? A. No. I just bend myself right under the car and look, then look the car over from top to bottom.

The Court: While they are moving?

The Witness: No, sir, the cars are standing still.

Q. In other words you walk along the ground from one end to the other? A. Yes, sir.

Q. Now then, if you find anything wrong with a car, if it is a small job who repairs it? A. We do.

The Court: You mean by that you yourself do it?

The Witness: Yes, sir.

Q. Now then, do you make a note of that in the book if you do that? A. Yes, sir.

Q. Now, if it is a bigger job, something larger that might have to be fixed, what do you do then? A. We send the car in the shop. We hold the car and send it down to the dock to reload it if the load has shifted.

Q. What do you do about the goods? A. If it is anything like a car of lumber and something is broken, we send the car to the dock and shift the load and fix it.

Q. You send the car down to the dock? A. Yes, sir.

Q. Shift the load and fix it? A. Yes, sir.

Q. Now produce that book that you have that you used on December 20th and December 21st, 1925. Have you got that book with you? A. Yes, sir.

The Court: Is this a book that is required to be kept by the railroad company?

Q. What is this book here that you have? A. In this book we mark down westbound trains going out from the Weehawken yard.

Q. That is this book shows westbound trains out of Weehawken? A. Yes, sir.

Q. And who keeps this book? A. The car dispatcher.

Q. Do you write in it? A. Yes, sir.

Q. Now then, looking at December 20th, 1925, in whose handwriting is this? A. This is my handwriting. These are the trains I sent out.

Q. The black is your handwriting? A. Yes, sir.

Q. And this blue is somebody else's? A. That is the other shift.

Q. Now this train here, number 3001, conductor Stein—? A. That was fifty-five cars going out.

Q. Fifty-five cars in the train? A. Yes, sir.

Q. What is the time? A. 7:40 and 7:35.

Q. What does that mean, the time it came in? A. No, that is the time we tested the air.

Q. The time you inspected it? A. Yes, sir.

Q. Now, is that an incoming train into Weehawken? A. No, sir, that is going out.

Q. With Conductor Stein? A. Yes, sir.

Q. Now is there any book kept of trains going into Weehawken from Croxton? A. They got them in the office. We do not mark the cars coming into Weehawken, we just keep the records going out.

Q. This other book which you have, is that the book you keep? A. In that book I mark any small repairs I make, and after I make the slips.

Q. Suppose there is anything the matter with a car, you put it in this book? A. Yes, sir.

Q. Now will you turn to this book for December 20th when you were on duty from four P. M. to twelve, and for December 21st when you were on duty for the same time, and tell me if you have any exceptions noted or any defects in these cars?

Mr. Elkins: I object.

Mr. Broadhurst: Do you want him to read all the cars in which he found defects?

Mr. Elkins: It has not been shown he made any inspection of the cars in question and any other inspection of other cars seems to me does not concern us. He has told us what he has done about the inspection. Now it seems to me that any defect shown on other cars is immaterial.

Q. Referring to this book for December 20th and December 21st, 1925, will you tell me if you have any exceptions for P. R. R. car, 939667.

Mr. Elkins: I want to object to the use of this book by this witness on the ground that it does not appear—

The Court: He made it himself.

Q. Did you make this book yourself? A. Yes, sir.

Q. Where did you get the book from to bring it here? A. The office.

Q. In the office? A. The Car Inspector's office.

Q. You mean the railroad company's office? A. Yes, sir.

Q. And was it in that office when you got it to bring here today? A. Yes, sir.

Q. Now referring to this book for December 20th and December 21st, 1925, will you tell me if you have any exceptions for P. R. R. Car 939667? A. No, sir.

Q. For car P. R. R. 949552? A. No, sir.

Q. For car P. R. R. 928007? A. No, sir.

Q. For car P. R. R. 925318? A. No, sir.

Q. For P. R. R. car 426040? A. No, sir.

Q. For P. R. R. car 425512? A. No, sir.

Q. For P. R. R. car 939736? A. No, sir.

Q. For car S. A. L. 43813? A. No, sir.

Q. Did you put in this book under that date everything on each car if there was anything wrong with it that you found on your inspection? A. Yes, sir.

Mr. Broadhurst: Cross examine.

Cross examination by Mr. Elkins:

Q. Now are you the only person who made an inspection of whatever kind on those cars which came into the Weehawken yard, is that right? A. Yes, sir.

Q. Now will you tell us whether or not on December 20th, 1925, you yourself made the inspection of all the cars? A. Yes, sir.

Q. And on the 20th of December, 1925, will you

tell us whether or not the cars containing the logs came into the yard, is that right? A. Yes, sir.

Q. And you made an inspection yourself of all those cars? A. Yes, sir.

Q. Now, what time did the cars arrive at Weehawken? A. About seven o'clock.

Q. And how long did it take? How many cars were there?

Mr. Broadhurst: You are speaking now of the entire train?

Q. The entire train? A. I do not know how many.

Q. Five, six, eight, ten, twelve or how many? A. More than that.

Q. Twenty? A. About 40 or 45.

Q. And this train left Weehawken a half hour later, didn't it? A. Yes.

Q. And in the half hour you inspected forty cars? A. No, sir.

Mr. Broadhurst: I object. That was one day and one hour later.

Q. How long did it take you to examine forty cars? A. About an hour and a half.

Q. In an hour and a half you examined forty cars? A. Yes, sir.

Q. And you went underneath each car? A. I didn't go underneath, I just got to look underneath.

Q. Do you remember looking underneath a car containing logs of wood? A. Yes, sir.

Q. And this examination was done in the night time, wasn't it? A. Yes, sir.

Q. And it was dark? A. Yes, sir.

Q. What light did you have to make the examination with? A. I got a big lamp.

Q. What do you do, go underneath and look with the aid of this lamp? A. Yes, sir.

Q. Now do you remember having looked at the stakes holding these logs? A. Yes, sir.

Q. And each one of them? A. Yes, sir.

Q. How many stakes are there on the cars? A. Some got four and some got five.

Q. And do you recall having looked at two flat cars containing sixty foot logs. Do you remember that? A. Yes, sir.

Q. Very clearly? A. Yes, sir.

Q. This is two years ago? A. Yes, sir.

Q. What is it about this particular car that makes you say now that you looked at it? What is there about it now that makes you remember that so clearly at this time? A. Because there are not many cars coming in like that. My boss told me—

Q. What I want to know is what was there about these cars containing logs that makes you so positive that you examined them? Was there anything peculiar about the stakes that makes this clear in your mind? A. No, sir.

Q. So that there is nothing about the car that makes you fix it so clearly in your mind? A. No, sir.

Q. Now, if you come to a car containing stakes holding logs and it shows the stakes are rotten underneath what do you do?

Mr. Broadhurst: I object—I withdraw the objection.

Q. What do you do? A. We would look at the stakes underneath the socket—we look on the side

to see there is no cracks and if there is no cracks we pass the cars O. K.

Q. So do you want to change your story now so that you only looked on the sides instead of underneath?

Mr. Broadhurst: I object. I don't think the witness said anything of the kind.

Q. Isn't it a fact Mr. Witness that in inspecting these cars containing logs you looked underneath the socket holding the stake, you looked underneath? A. We do not look underneath, we look to see if the stake is O. K. and would not start to break.

Q. Are you familiar with lumber? A. Yes, sir.

Q. If you saw a piece of lumber with reddish color would that indicate anything to you, yes or no? A. We do not pay attention for that—

Q. Yes or no would that mean anything? A. We were not seeing anything cracked.

Q. You said a minute ago you knew wood, is that right? A. Yes, sir, I know wood.

Q. And the fact that it was colored a reddish color on the outside, would that indicate to you or show you there was something wrong with the lumber, yes or no? A. I don't know.

Q. And if that condition existed you would not know whether or not the stakes were rotten or good, would you, yes or no? A. Yes.

Q. You would know it? A. Yes, sir.

Q. So that if you saw a car with stakes on the outside which appeared to be red, would that indicate to you that the stake was rotten inside, yes or no? A. Well, I don't know. I don't look inside. I don't know about the inside.

Q. I ask you whether or not if the outside of the

stake was red colored different from the other colors of logs, would that mean anything to you? Would you think anything was wrong by the appearance of the wood? Would you know whether there was anything wrong by that color of the stake? A. No.

Q. And it would not make any difference to you by reason of the fact that the stake was colored which indicated it was rotten? That would not make any difference to you would it? Not knowing the condition?

Mr. Broadhurst: I object to Mr. Elkins inserting in the question that it indicated it was rotten.

Mr. Elkins: I withdraw the question.

Q. Now if a stake was broken what would you do to take care of it? A. Hold the car in the yard.

Q. What would you do with the stake? Tell us what you would do, take the stake up or put a new stake in? A. Put a new stake in.

Q. Would you put a mark on the car indicating that the stake was wrong? A. Yes.

Q. What kind of a mark would you put? A. We put a chalk mark on and would have to put in a card and report it to the boss. If we cannot do it the boss does it the next day, repairs the car, sends it down to the dock, something like that.

Q. Now, Mr. Witness, are you supposed to inspect every type of material, every type of merchandise that is in the cars? A. Yes, sir.

Q. Are you an expert in wood? A. Yes, sir.

Q. You are? A. Yes, sir.

Mr. Broadhurst: Better ask him what he means.

The Witness: I don't know what that

means. We inspect the load and if there is anything wrong on the load we halt the car.

Q. You said little repairs you make yourself? A. Yes, sir.

Q. You mean little repairs about the brakes or the car itself, the mechanical part of the car you fix yourself? A. Yes, sir.

Q. Is there anything to stop you from fixing the stake? Could you fix that if you wanted to? A. If we can do it we do it. If we could not do it we halt the car to the next day.

Q. Can you tell us whether on December 20th, 1925, you examined these two flat cars containing the sixty-foot poles which went to the Snare Corporation and delivered to them at Twelfth and Monmouth Streets; can you tell us positively you examined the two cars I refer to that were involved in this accident? Did you examine them? A. I examined all cars coming in on that train.

Q. How many cars containing logs did you examine on that day, on the 20th? A. That is all I can tell.

Q. As a matter of fact, the only car containing logs you examined yourself on the 20th of December, 1925? A. Yes, sir.

Q. And those cars that you examined left Weehawken when? Did they leave the same night? A. No, sir.

Q. When, the next morning? A. I don't know.

Mr. Broadhurst: The record shows 8:10 on the 21st.

Q. Again I ask you if you examined explosives that were piled on cars could you tell whether they were properly in the car and properly fitted so

that they would not fall off? Could you tell that about explosives? A. Yes.

Mr. Broadhurst: I object. What difference does it make what he knows about explosives. We are dealing here with poles.

Mr. Elkins: I withdraw the question.

Q. Now, these books, when do you make them up, after you finish your work? A. Right on the job there, as soon as I make a repair I put it in right there.

Q. If a car containing logs, if the load was leaning up against the stakes or the stake was cracked would you make a note of it in the book? A. Yes, sir.

Q. And why would you do that? We halt the car up until the next day to shift the load, put in new stakes and give the report to the boss.

Q. Why, because the stake was not strong enough to hold the logs? A. Yes, sir.

Q. And if the stake was rotten and it was all colored and softened, would you hold that car too?

Mr. Broadhurst: I object. I don't know what he means by softened.

Q. Will you tell us whether or not if a car containing logs had a stake on the side of it which was all colored red, indicating that it was rotten—

Mr. Broadhurst: I object to the indicating part.

Mr. Elkins: That is the testimony.

Mr. Broadhurst: It is not. This witness has said three or four times that red would not mean anything to him.

The Court: If he found stakes with that color, what would he do?

Q. Yes, if a car containing logs had a stake on it showing the stake to be red, reddish color, jelly color, would you halt that car? A. What kind of wood? They all have different colors. I don't pay attention to the colors because I don't know what kind of wood it is, whether it is yellow pine or chestnut. Sometimes they use hard wood sticks and they have a different color in the wood too.

Q. If a stake was rotten inside can you tell us what color would appear on the outside?

Mr. Broadhurst: I object—

A. No, sir.

Mr. Broadhurst: I object,—he said no.

Q. You do not know? A. We do not look inside the stake, we look outside to see if it is good and we pass it.

Q. In other words you do not know anything about the wood itself, do you? A. No.

Mr. Elkins: That is all.

Mr. Broadhurst: That is all.

TUNIS K. ROSS, sworn.

Direct examination by Mr. Broadhurst:

Q. You are employed by the Erie Railroad as a special claim agent? A. Yes.

Q. And did you investigate this case after it had occurred? A. I did.

Q. And among other investigations did you take a written statement from the witness, Gustav Swanson, the gentleman seated back there? A. I did.

Q. And is this paper marked D-6 for identification the statement which you took? A. It is.

Q. Did he sign it? A. He did.

Q. Do you recollect where the statement was taken? A. In the office of the Frederick Snare Corporation, where the work was being carried on.

Q. Where would that be, down in Twelfth Street? A. Down in that vicinity.

Q. How did you get the information from him to put down? A. He told me what had occurred there.

Q. Did you write it down? A. I wrote it down.

Q. In question and answer or narrative form? A. Why, I would ask him what it was and then wrote down what he had told me—not verbatim.

Q. And did he read it after it was written? A. He did.

Q. Did he sign it after he read it? A. He did.

Q. Did he make any objection to any part of it as being not accurate? A. Nothing.

Q. Now then, did he say to you in that statement, "There were four stakes on the car. We removed the middle stakes and we could not move the third stake as the piles were heavy against the stake, and Michelson started to chop the stake. He had gone through the stake about one inch when it gave way. The other stake was rotten and when the one which he was chopping gave way the rotten one went also"? A. Yes.

Mr. Broadhurst: I offer in evidence the statement.

Mr. Elkins: I object to it as immaterial, irrelevant and incompetent.

The Court: Your objection is as to the whole statement?

Mr. Elkins: Yes.

The Court: You may read to the jury just that portion which you desire to use for contradiction.

Mr. Broadhurst (Reading): "There were four stakes on the car. We removed the middle stakes and we could not move the third stake as the piles were heavy against the stake and Michelson started to chop the stake. He had gone through the stake about one inch when it gave way. The other stake was rotten and when the one he was chopping gave way, the rotten one went also."

Mr. Broadhurst: Cross examine.

Cross examination by Mr. Elkins:

Q. Now Mr. Ross, you are now employed by the Erie Railroad Company? A. I am.

Q. How long have you been so employed? A. Seventeen years.

Q. And your purpose is to go down and get statements from witnesses, is that right? A. Absolutely.

Q. In every case? A. All cases.

Q. And you always have the interest of your company at heart when you go down there, is that right? You are always working for your company? A. Always.

Q. And that is your purpose, to prevent the payment of money where you can, that is right? A. No, sir.

Q. Isn't it a fact that it is always your purpose to save money for the company, that is right, isn't it?

The Court: He would be discharged if he didn't.

A. If possible.

Q. You would be discharged, as the court said, if you did not? A. It all depends upon what the examination might determine.

Q. But you are down there to prevent the payment of a claim such as this one, that is right, isn't it?

Mr. Broadhurst: I object.

A. No.

Q. That was your purpose in going down there? A. No, sir, my purpose in going down there was to get a statement.

Q. Did you get any information about this rotten stake? A. Why, I had it right in the statement.

Q. Did you get any information about whether or not the stake was examined in the yard?

Mr. Broadhurst: From Swanson?

Q. From anybody down there before the accident?

Mr. Broadhurst: I object.

Mr. Elkins: I withdraw it.

Q. Did you get any statement that this man died instantly and he left a widow and four children?

Mr. Broadhurst: I object and ask that it be stricken out as entirely immaterial.

The Court: He has given you what he got. It is in writing.

Q. Did you read this statement to Mr. Swanson before he signed it? A. He read it himself as I recall.

Q. Now, as a matter of fact, there is a cross on this statement, isn't there? A. There is, in pencil.

Q. And that was made by you after you got it, is that right? A. No, that was made by Mr. Taylor, the engineer of the Frederick Snare Corporation.

Q. In other words, the statement was corrected after it was signed, that is right, is it? A. No, before it had been signed.

Q. Well, you had it signed in ink, didn't you? A. I did.

Q. And you made the change in pencil? A. No, sir, I said Mr. Taylor did.

Q. And you saw him do it? A. I did.

Q. So that the statement was changed after it was written? A. Yes, sir.

Mr. Elkins: That is all.

Redirect examination by Mr. Broadhurst:

Q. Was it changed before it was signed? A. Yes, sir.

Q. Now, the change that you made that you refer to was to change the word brought to the word broke? A. Yes, sir.

Q. That was a mistake in the use of English? A. Yes, sir. My mind was traveling faster than my pencil, perhaps.

Mr. Broadhurst: That is all.

Recross examination by Mr. Elkins:

Q. When was this statement made Mr. Ross? A. If you will show me the statement I can tell you. According to the statement April 2nd, 1926.

Q. Will you tell us what brought you down there to get the statement? What was it made you go down there? A. Why, I had received word that the case of Michelson was in suit and I should go down there and find the facts in the matter.

Q. Did you get any notification before that? A.

I had never gotten any notification until the file came into my office that the matter was in suit.

Q. You knew about the accident before this suit? A. No, sir, I did not.

Q. Now, the Frederick Snare Corporation and the Erie entered into a contract regarding the delivery of cars—

Mr. Broadhurst: I object.

Mr. Elkins: I withdraw the question. That is all.

(Witness excused.)

Mr. Broadhurst: At this time I would like to have read the deposition taken of Francis M. Taylor taken on February 3rd, 1928, before James A. McKeever, Supreme Court Examiner.

The Court: You may read it.

(Deposition read as follows:)

"FRANCIS M. TAYLOR, sworn.

"Direct examination by Mr. Broadhurst:

"Q. By whom are you employed? A. The Frederick Snare Corporation.

"Q. Were you employed by the Frederick Snare Corporation in December, 1925? A. I was.

"Q. And where were you engaged in your work at the time? A. At the yards of the Erie Railroad.

"Q. And what was the Frederick Snare Company building there? A. The viaduct.

"Q. The viaduct that leads into the vehicular tunnel? A. Yes.

"Q. That is the new concrete viaduct that goes up over the Erie yards? A. Yes, sir.

"Q. What was your position with the company? A. Field engineer.

"Q. As field engineer did you, among other duties, sign for the receipt of cars of piles? A. I did.

"Q. I show you a record of the Erie Railroad Company for cars 528318 and 525007, and ask you whether the 'Frederick Snare Corporation, Taylor,' is your signature? A. That is my signature.

"Q. Do you recollect signing for these particular cars as an individual transaction? A. No, I do not.

"Q. Did you sign for other cars while you were doing that work than these two, or was this the only transaction? A. I signed for most of the cars that came in.

"Q. Do you recollect about what time of the day you would sign for the cars, that is, would it be morning or afternoon or when? A. Well, I don't know just what time of day I would sign for them.

"Q. Would it vary on different days or not? A. Yes, perhaps in the morning or the afternoon.

"Q. And where would you sign these, down at the yard? A. Yes, right at the yard.

"Q. And that slip you have said has your name on it is the one marked in printing 8040 at the top? A. Yes.

"Mr. Broadhurst: I offer that record in evidence.

"Mr. Elkins: I object on the ground that it does not show that they were the cars involved in this accident, and furthermore that it is incompetent, irrelevant and immaterial on the grounds that the records do not in any wise show the condition of the cars when they were received.

"Mr. Broadhurst: I will state for your

benefit that they are not offered for the purpose of showing the condition of the cars.

"Mr. Elkins: I object on the ground that they are incompetent, irrelevant and immaterial.

"Mr. Broadhurst: We will have it marked for identification.

"(Admitted and marked Exhibit D-8 for identification.)"

Mr. Elkins: I withdraw my objection.

(Exhibit D-8 for identification marked in evidence D-8 of this date.)

"Cross examination by Mr. Elkins:

"Q. You do not know, Mr. Taylor, whether these cars you were supposed to sign for, whether they were the cars containing the logs involved in this accident, do you? A. No, sir.

"Q. Do you know whether the cars you signed for were inspected by you? A. No, they were not.

"Q. Who inspected them?

"Mr. Broadhurst: I object as outside the scope of the direct examination.

"A. I do not know.

"Q. What are you supposed to sign for? A. That we received the car.

"Q. And is it supposed to show the condition of the car? A. No, sir.

"Q. Who is supposed to know that, you?

"Mr. Broadhurst: I object as being outside the scope of the direct examination."

The Court: The objection will be sustained.

"Q. Are you the man in charge of the receipt of cars? A. Yes, sir.

"Q. Are you supposed to look at them before you sign for them?

"Mr. Broadhurst: I object as being outside the scope of the direct examination."

Mr. Elkins: I withdraw that.

"Q. Before you sign it are you supposed to know what you are getting? A. Certainly, to know what we are getting.

"Q. Who tells you what you are getting? A. The bill.

"Q. You do not look at the cars? A. No.

"Q. Who notifies you as to the cars themselves, that they are received there? A. We get a notification of shipment from the Railroad Company.

"Q. By mail? A. By mail.

"Q. And have you got that notification? A. No, I have not.

"Q. What does the notification disclose? A. It simply shows that in this case a carload of piles was shipped to us from a certain point on a certain day.

"Q. And that you were supposed to come down and get them, is that right? A. Well, they were right on the job.

Q. You were getting a lot of other cars there? A. Yes.

"Q. How long before December 22nd were you getting cars of logs?

"Mr. Broadhurst: I object on the ground that that is outside the scope of the direct examination."

Mr. Elkins: I withdraw the question.

"Q. How long, a week, two weeks, three weeks,

a month before December 22nd, 1925? A. Maybe three weeks.

"Q. And you were getting these logs pretty often? A. Yes.

"Q. In the notification was there anything said about the condition of the car and the inspection of it? A. No."

Mr. Elkins: That is all.

"Redirect examination by Mr. Broadhurst:

"Q. Who did these notifications come from, your consignor? A. Yes, sir.

"Mr. Broadhurst: That is all.

"Recross examination by Mr. Elkins:

"Q. The railroad company would notify you. You would not know whether the cars came in there until the railroad notified you, is that right? A. I do not know whether they did or not. Of course in this case we would see the cars right there. They would be right on the job and we would know they were the cars from the notice we got from the shipper.

"Q. How would you know? Would somebody from the railroad show you the cars and say, 'These are your cars'? A. No, we would have the notification from the shippers that they shipped so many piles in such a car, a tally of them, and when we would see a car of piles in there and take the number of that car, if it was the same as the shipment number we would know that was our car and proceed to unload it.

"Q. Would anybody in the railroad yard point out the cars, or would you have to go looking around for them? A. We would not have to look

for them. They would be right there where we unloaded them.

"Q. The railroad put them right where you could get them? A. Yes, sir.

"Mr. Elkins: That is all.

"Redirect examination by Mr. Broadhurst:

"Q. And before you would sign this receipt were the cars to be placed right on your job? A. Yes, sir.

"Mr. Broadhurst: That is all."

Mr. Broadhurst: I desire to offer in evidence Defendant's Exhibit D-4 for identification of February 3rd, 1928, which was the order of Judge Daniel O'Regan of the Hudson County Orphans Court, marked "Filed February 2nd, 1928, by Mr. L. Ryan, Surrogate" and which Mr. Ryan testified was his authority for the issuance of Exhibit P-3, which are the letters of administration *ad prosequendum* offered in evidence in this case.

Mr. Elkins: I object on the ground that it is incompetent, irrelevant and immaterial and on the further ground that it is an attempt to attack collaterally the authority and powers of Judge O'Regan and the Surrogate under the case of Bloom against the Institution.

The Court: Sustain the objection.

Mr. Broadhurst: I would like to point out to your Honor, so that the record will be clear, that the petition to Judge O'Regan in this case on which this order was made

was marked in evidence over my objection Friday as Plaintiff's Exhibit P-2.

The Court: That will be stricken from the record. That is one of the exhibits that is not to go to the jury.

Mr. Broadhurst: Then your Honor will allow me an exception to your refusal to mark Exhibit D-4 for Identification of February 3rd, 1928, in evidence?

The Court: Yes.

Mr. Broadhurst: And an exception to striking from the evidence Plaintiff's Exhibit P-2 which was the petition addressed to Judge O'Regan.

The Court: Yes.

Mr. Broadhurst: Now, I also offer in evidence Defendant's Exhibit D-3 for Identification of February 3rd, 1928, which is marked "Filed February 2nd, 1928, by James F. Norton, Surrogate of Hudson County" and which was identified by Deputy Surrogate Ryan as an application made on February 2nd, 1928, for letters of administration *ad prosequendum* for Alma Michelson on the estate of Axel Michelson and which says, "And that such letters be issued as of January 27, 1926, in compliance with an order of the Orphans Court dated this day."

Mr. Elkins: Same objection.

The Court: Sustain the objection.

Mr. Broadhurst: Exception.

Mr. Broadhurst: I offer in evidence Defendant's Exhibit D-2 for Identification of February 3rd, 1928, which purports to be a bond of the National Surety Company and Alma Michelson to the ordinary of the

State of New Jersey in the sum of One thousand dollars, signed and sealed in the presence of John F. Callahan and filed and recorded in the office of the Surrogate of the County of Hudson on January 27th, 1926, liber 88 of administration bonds, page 208.

Mr. Elkins: Same objection.

The Court: That seems to have been part of the original proceedings. That may be marked.

Mr. Elkins: I object to it on the ground that it is incompetent, irrelevant and immaterial. I do not know what its real purpose is, but I take it that it is an attempt to attack collaterally the proceedings.

The Court: No, that is part of the original application and record.

Mr. Elkins: Exception.

(Exhibit D-2 for Identification of February 3rd, 1928, marked in evidence as Exhibit D-7 of February 6th.)

The Court: I might say for the purpose of the record that these rulings are based upon the principle that you must give veracity to the letters issued by the Surrogate in an attack such as this is, and that it is a court question in any event, and these papers are either admitted or excluded in view of the ruling on the admissability of Exhibit P-3.

Mr. Broadhurst: And my position in offering them is so that we can get, one way or another, the whole thing before the court.

Mr. Broadhurst: I also offer in evidence power of attorney filed January 27, 1926, by John F. Callahan, Deputy Surrogate, County

of Hudson, given by Alma Michelson, as the administratrix of the estate of Axel Michelson, constituting James F. Norton, Surrogate, Hudson County, as lawful attorney upon whom original process in all actions could be served. I offer this as being another document, a part of the original grant of administration.

Mr. Elkins: I object to that. How is that material?

The Court: It is part of the original record. It may be received.

Mr. Elkins: Exception.

(Admitted and marked Exhibit D-5 of February 6.)

WILLIAM MILANOWICZ, sworn.

Direct examination by Mr. Broadhurst:

Q. Your name is Milanowicz? A. Yes, sir.

Q. Did you work for the Erie Railroad Company in December, 1925? A. I did.

Q. Did you see an accident in which some logs rolling off a couple of cars injured a man in December, 1925? A. I did.

Q. Where were you? How far were you from the place where the accident happened? A. Well, about fifty feet.

Q. And where were these cars that the logs rolled off, where were they standing? A. They were in the Monmouth Street yard.

Q. Do you know on what track, by any chance? A. I do not know the track they were on.

Q. And where were you, on the ground or in a car or in a shop, or where? A. Sitting in a car, in a passenger car.

Q. A passenger coach? A. Yes, sir.

Q. What were you doing sitting in there? A. I was waiting for the carpenter I was helping. He was over in the store room.

Q. At that time you were a carpenter's helper and you were waiting for him to come back? A. Yes, sir.

Q. Now, what kind of a day was it, rainy or clear or what? A. Well, it was not raining that day. It was pretty clear.

Q. And what kind of day did the accident happen, about? A. It was in the afternoon.

Q. After dinner, you mean? A. After dinner.

Q. Now, did you see these men begin to unload this car? A. I did.

Q. And will you just tell us in your own words now what you saw them do and what you saw happen. A. I was just sitting in a car looking at them unloading that load of logs. They started to take the wires off the top of the stakes which extended from one stake to another, and they started taking the two middle stakes out. They got to those end stakes—

Q. First, did they get the wires off the tops? A. They did.

Q. And did they get the two middle stakes out? A. They did.

Q. Then what did you see them do? A. Then they started—Michelson started chopping the end stake that was on the south end of the car and—

Q. How many men were there that you recollect seeing there? A. There was a man standing next to him.

Q. Standing next to Mr. Michelson? A. Michelson, and there was a few men up on top of the car too.

Q. What did you see Michelson do and what happened? A. Well, they started chopping the stake and had gone through the stake, I don't know how far or how deep, and the logs gave way and both stakes came down about the same time, and Michelson started running the way the stakes were going down and they just pinned his feet together and the logs fell on top of him.

Q. Were you looking at it all the time? A. I was. Me and the surveyor that was in the car, but I do not know who the surveyor was.

Q. You do not know who he is? A. No.

Q. Was he a surveyor of the railroad company or a surveyor of Snare and Company? A. He was appointed by the State Highway.

Q. And which one of the stakes broke first, do you know from what you saw? A. Well, the one he was chopping broke first.

Mr. Elkins: I object on the ground that he has already answered that the stakes both gave way at the same time. I say that it is certainly improper at this time to ask him, "Which one broke first," when he has already answered that both gave way.

Mr. Broadhurst: I am trying to find out.

Q. Are you able to tell us from what you saw? Were you looking right at the men when the stakes broke? A. I was.

Q. Are you able to tell us whether one broke first or the other broke first or that they both gave way together? That is what I am trying to find out from you. A. Well, you could not tell. The whole load simply came down, I will say, at the same time.

Q. And when it came down I understand Michelson was chopping at this stake? A. He was.

Q. From where you were I don't suppose you could see how far through the stake he was? A. I was just opposite to where he was chopping. He was chopping like where you are and I was sitting here in the coach and he was just chopping away at it.

Q. The man that was alongside of him, did he run also? A. He must have run or else he would have gotten hit with them too.

Q. When you say he was standing alongside of him, how close was he to him? A. About three or four feet away.

Mr. Broadhurst: Cross examine.

Cross examination by Mr. Elkins:

Q. Just indicate from where you are sitting how far away you were from the car on the day of this accident.

Mr. Broadhurst: You mean in the courtroom?

Mr. Elkins: Yes.

Q. What is fifty feet in your estimation? A. Well, from about here to the end of the courtroom.

Q. That is from here you were able to observe these men working on the cars? A. About three tracks away, it was.

Q. And it was a clear day? A. It was.

Q. And you had no difficulty in seeing? A. No difficulty at all.

Q. How long a time were you watching these men, half an hour, an hour, or five minutes? A. Well, just after getting through with dinner the carpenter said, "I am going over to the storeroom

to get a couple of panes of glass." We had to put the glass in the coaches, and I was sitting there waiting for him.

Q. Dinner is between twelve and one, isn't it? A. Yes.

Q. And right after dinner, you mean right after one o'clock. A. It was not right after one o'clock. After two, I guess it was.

Q. What makes you say it was after two? What is there about the time that fixes it so clearly in your mind? Did you have a watch? A. I did have a watch.

Q. What was there about the time that makes you so positive? What is it about the case that makes you so clear that it was after two o'clock? A. Because first there was some work being done in the shop which took about an hour, then we came out and went through the train and he said he was going over to the storeroom to get some glass and stuff, whatever he needed.

Q. And you figure that all took an hour? A. Yes.

Q. So that you got there about two o'clock? A. Yes.

Q. You figured two o'clock, is that right? A. The exact time I could not tell you.

Q. Then you are not sure of the time? A. I am not sure of the time, no.

Q. Might have been one, three or four? You are not sure as to the time, are you?

Mr. Broadhurst: Which question do you want answered first?

Mr. Elkins: I am giving him his choice.

Q. Which is it?

Mr. Broadhurst: Which is what?

Q. Which is your answer as to how you fix the time? A. About two o'clock.

Q. You say it was about two o'clock? A. About two o'clock when I got into the train.

Q. Now, when you got to the car was the seat in which you sat facing these cars? A. Well, say that was the car and I was sitting this way.

Q. Just the way you are? A. Yes, sir.

Q. Sitting in that manner and the cars were off fifty feet away? A. Yes, sir.

Q. Well, at the time you sat in the car you at first were facing forward, is that right? I mean, the front of the car in which you were sitting when you first sat down, you were seated so that you faced it, looking toward the front of the car, is that right? A. Right, I was looking that way.

Q. Now of course you had seen men unloading logs before, hadn't you? A. I had.

Q. How old were you at the time? A. About eighteen.

Q. Don't you know how old you were? A. Eighteen years old.

Q. Then you are twenty now? A. Yes.

Q. And you were working as a carpenter's helper? A. Right.

Q. And you had seen on many occasions men unloading logs from cars? A. Yes, sir.

Q. So that that was nothing new to you? A. No.

Q. And that fact in itself was not sufficient to attract attention to the scene, was it? A. No.

Q. For how long a time did you observe the movement of these men?

Mr. Broadhurst: Before the accident?

Q. Yes, how long? You said they took off the

wires from the cars. How many wires, might I ask? A. Four.

Q. Then you counted each one? A. I didn't count each one. There was only one right across each stake. There were four stakes on the car.

Q. Now are you guessing as to the number or are you positive? A. Positive. They always come there with four.

Q. Did you see them actually cut four wires while you were looking on? A. Right.

Q. You were looking on? A. I was.

Q. Where was the first wire you saw cut by these men? A. I didn't see the first wire cut, I don't know.

Q. Where was the first wire cut. You say you positively saw four on the car. Which one was first cut? A. I don't know which one was first cut.

Q. Do you know where the second was cut, yes or no? A. No.

Q. Do you know where the third was cut? A. No.

Q. Do you know where the fourth was cut? A. No.

Q. So that as a matter of fact you never saw the wires at all? A. I seen them take them off the stakes and throw them off, throw them right off the cars.

Q. You saw them cut more wires? A. Yes, sir, but which they cut, first, second, third or fourth I do not know.

Q. Where did they throw the wires—I withdraw the questtion.

Q. Where were the wires attached before they were cut? A. From one stake to the other.

Q. What part of the stake, the lower part or the top? A. The top.

Q. How many wires were on the stakes, the first one you saw that went from the top to the other side—did you see any any other place?

Mr. Broadhurst: I object as being an impossible question to answer.

The Court: It seems to be.

Mr. Elkins: Exception to your Honor's ruling.

Q. How many wires were there on each stake, one or two across? A. I don't know how many went across, I know there was wires.

Q. How long a time did it take for the men to take off the four wires which you say you saw then, throw them away and take off the two stakes and the other things they did, how long a time? A. I don't know how long it would take them.

Q. Well, was it five minutes, ten minutes? A. I don't know. They just take the axe and cut right through the wires and the wires went off and they simply took them away.

Q. What was there about this thing that drew your attention? A. Nothing at all.

Q. You were looking front first then you turned you say and saw these other things? A. Just the surveyor was looking at the way they were chopping the stake and I happened to look over—we were looking before and then we were talking and he was writing something in a book or a piece of paper at the time and we were both looking at it.

Q. Right after the accident you made a statement, did you not? A. I did.

Q. Are you working for the railroad company now? A. Employed by them, but I am laid off just at present.

Q. You are not working for the railroad, you are laid off? A. Yes.

Q. But employed by them? A. Yes.

Q. You do not know when you are going back to get your job, do you? A. No.

Q. You are waiting for them to call you? A. Yes.

Q. And before you came there you spoke to somebody about this case, didn't you? A. I didn't speak to anybody.

Q. You did not speak to anybody? A. No, sir, just I read my statement over.

Q. You just read your statement? A. Yes.

Q. Did you speak to Mr. Broadhurst about the case before you got on the stand this morning with the exception of reading the statement? A. No.

Q. Did you speak to Mr. Ross? A. No, Ross called me over and showed me the statement, that is all.

Q. In other words did you speak to anybody about this case from the time it happened until today? A. Not at all.

Q. Not a soul? A. Not a soul.

Q. You are positive? A. Positive.

Q. You are as sure about that as you are about the four wires, is that right? A. Right.

Q. Now you said that both stakes appeared to you to come down together. A. Right.

Q. Of course you do not know what made the stakes come down, do you? A. No, sir.

Mr. Elkins: That is all.

Redirect examination by Mr. Broadhurst:

Q. You were asked about a statement you made to the company? A. Yes.

Q. Is this the statement you made? A. That is it.

Q. And when was it made? At the date down here, March 10, 1926? A. Yes, sir.

Mr. Broadhurst: I offer it in evidence.

Mr. Elkins: I object. He simply said he made a statement.

Mr. Broadhurst: You object its going into evidence?

Mr. Elkins: Yes.

Mr. Broadhurst: Then I will withdraw it.

Recross examination by Mr. Elkins:

Q. Who was paying you for the time you were coming here? A. Why the Erie is paying for my time coming here.

Mr. Elkins: That is all.

JOHN HUGHES, sworn.

Direct examination by Mr. Broadhurst:

Q. Mr. Hughes, what is your position with the railroad company? A. Foreman in charge of inspection and maintenance of cars.

Q. And were you foreman there in charge of maintenance of cars in December, 1925? A. Yes, sir.

Q. And where were you located? A. Weehawken.

Q. Was this car inspector we had on the stand this morning, Mr. Tomecke, working under you? A. Yes, sir.

Q. At Weehawken? A. Yes, sir.

Q. And for how many years have you been engaged in inspecting cars? A. On and off for seventeen years.

Q. How long has he worked under your supervision? A. He has worked under my supervision for seven years.

Q. And have you personally observed him in the performance of his work? A. Yes.

Q. Is he a competent car inspector in your opinion?

Mr. Elkins: I object, if your Honor please, on the ground it is incompetent, irrelevant and immaterial.

The Court: Sustain the objection. That is for the jury to say.

Mr. Broadhurst: Exception.

Q. Mr. Hughes, is there any record kept by the company of the inspection of cars where no exception is taken to their condition?

Mr. Elkins: Objected to on the ground that the man who actually did the work has already answered the question. I do not see its materiality.

The Court: Isn't this the man in charge of that work?

Mr. Broadhurst: Yes.

The Court: He may answer.

Mr. Elkins: Exception.

A. No, there is no record.

Q. And is the only record kept the record of where exception is taken to the cars? A. That is all.

Q. Now I want you to tell us the type of inspection—do you inspect the cars yourself, by the way? A. I do.

Q. I mean have you in the past before you had your present position? A. Yes, sir.

Q. Do you supervise the inspection work done by Tomecke at Weehawken? A. Yes, sir.

Q. And you still do? A. Yes, sir.

Q. I want you to tell us the type of inspection that is made of cars departing from Weehawken or arriving in Weehawken? A. We make a running inspection.

Q. What do you mean by a running inspection? A. Pass alongside of the train and see if any defects exists that are noticeable. If there are we take exceptions to them and make repairs or else mark the car for the shop.

Q. Do you make a minute inspection of all the various parts, the loads and stakes and doors, and so forth? A. Well, if a load has shifted we take exception to it.

Q. Of course you could see if the load was shifted, I suppose? A. Yes, sir.

Q. What I am trying to find out is how would you describe the examination you make. You call it a running inspection, which is a railroad term.

The Court: What do you mean by that?

The Witness: A running inspection is what you might call a passing inspection, you pass alongside the cars and if you notice anything wrong, why you take exception to it.

Q. If you see anything wrong you take exception to it? A. Yes, that is the idea.

Mr. Broadhurst: Cross examine.

Cross examination by Mr. Elkins:

Q. You mean the man goes along the side of the car and more or less runs over the side, that is what you mean? It is a running inspection, it

means just what it implies, more or less, running alongside the side and observing— A. It is not that he runs along.

Q. Well, I don't mean run fast but— A. He walks along.

Q. As I would, just like this, walk along like this, something like that? A. He bends down and looks underneath.

Q. Underneath too? A. Yes.

Q. And he would naturally look under a stake on a lumber car if the outside was discolored, he would look underneath? A. No.

Q. Then he looks underneath the stakes as you said, he looks underneath? A. No, he would not.

Q. So, in spite of the fact that he looks underneath the car, he pays no attention to the stake which is right at the side? A. Not underneath.

Q. He just lets that go and if it is rotten or anything the matter he does not see it? A. If it is down out of sight he could not see it.

Q. That is if he looked underneath with his lamp as you say he looks underneath and the base of it was rotten he would see that, wouldn't he? A. He looks underneath the car to see if there are any defects existing.

Q. That is, the mechanism of the car? A. That is the idea.

Q. And he pays no attention to the underneath part, the bottom part of a wooden stake holding up a carload of sixty-foot logs? A. No.

Q. What about the stakes themselves, the outside, if it was discolored would that indicate to you as his boss that there was anything wrong with the lumber? A. No.

Q. Are you familiar with conditions of lumber? A. No.

Q. You do not know if a log is good or bad by looking at it, yes or no?

Mr. Broadhurst: That is not the question. You have been asking him about discoloration.

Q. Would you know the condition of a log by the mere sight of it? A. No.

Q. And, of course, a man who does not know the general conditions of wood such as if it was discolored, if it was rotten, the rotten part being a different color— A. He would not know that.

Q. Unless he looked at it.

Mr. Broadhurst: I object—

Mr. Elkins: I withdraw the question.

Q. This man who is under you, he does all the inspection alone? A. He did on the night of December the 20th.

Q. And if a log or a stake was cracked he would see it naturally would be not? A. He is supposed to see it.

Q. And he is supposed to do something with reference to that stake? A. He is.

Q. And isn't it a fact that the only thing he knows is a cracked stake, is that it?

Mr. Broadhurst: I object. How could he possibly answer that?

Mr. Elkins: I withdraw it.

Q. I ask you as the man in charge, is the only thing within your knowledge regarding a stake a crack? Is that the only thing you know about a log? A. No.

Q. You know more about it, don't you? A. I would not say I know more about it.

Q. Well, you are familiar with the conditions when you inspect this car—you are familiar enough to know what is wrong and what is right? A. Yes.

Q. Whether it is a stake or a log, that is so, isn't it? A. I don't say about the logs.

Q. Well, I mean the stakes that are holding the logs, if there is anything wrong with the stakes you would know about it? A. If it is visible.

Q. Well, if it is on the outside of the stake it is visible.

Mr. Broadhurst: That is very evident.

Q. Now, in a running inspection, of course, it is probable that a man walking along rapidly at night with a lantern, having forty cars to inspect—of course he does not see every defect on the outside, does he?

Mr. Broadhurst: What kind of a defect are you talking about?

Q. I mean as to the stakes on the sides of the car, does he find everything? A. Well—

Mr. Broadhurst: How could the witness possibly answer that?

The Court: He was not doing this work.

Q. Assuming that you were making this running inspection at night with a lantern, of forty cars, making it in an hour and a half, would you say it is probable that you would examine everything in the car or on the side, with reference to the stakes?

Mr. Broadhurst: I object. The witness described the character of the examination.

The Court: Yes, what it would disclose

is for the jury to say. You may elicit what inspection this man required.

Mr. Elkins: That is all.

Mr. Broadhurst: That is all. That is the defendant's case, if the Court please.

Mr. Elkins: No rebuttal.

Mr. Broadhurst: I wish to make a motion for the direction of a verdict on the following ground:

1. There is no proper plaintiff before this Court to prosecute this action, as the undisputed evidence discloses that there is no proper party who has ever been appointed by anyone having the authority to make such appointment.

2. The undisputed evidence in the case indicates that the defendant was not negligent in any one of the manners as alleged in the complaint.

3. That the undisputed evidence in the case indicates that there is no evidence that the defendant's negligence, if there were any, in any respect was the proximate cause of the happening of this accident.

4. That the conditions that existed on this carload were as obvious to the plaintiff's intestate as they were to any of the defendant's servants or agents, and that his negligence contributed to the happening of the accident proximately, thereby barring plaintiff's recovery.

5. That the conditions were as obvious to the plaintiff's intestate as they were to any agent or servant of the defendant, and

that he assumed the risk of injury which he received by the collapse of these stakes and the unloading in the manner in which it was being done.

The Court: I think it is a question for the jury.

Mr. Broadhurst: Exception to your Honor's ruling.

The Court thereupon charged the jury as follows:

The Court: Gentlemen of the Jury, Alma Michelson, as Administratrix *ad prosequendum* of the Estate of Axel Michelson, deceased, has brought this action against the Erie Railroad Company, in which she claims that on December 22nd, 1925, while her husband Axel Michelson was working for the Snare Corporation, in the course of unloading piling from two flat cars joined together upon which the piling had been conveyed, he was killed. The claim is that one of the stakes at the north end of these two flat cars was in a defective condition and that in the course of the operation leading up to the unloading of these logs, that stake gave way and that by reason thereof the logs rolled down and upon the plaintiff's intestate, causing his death.

Now prior to 1884 in this state, where death resulted from an alleged negligent act of another person, there could be no recovery; no cause of action survived the death of the person who was involved in an accident growing out of a negligent act, but in that year an act was passed known as the Death Act, whereby a cause of action was allowed to survive for the benefit of the surviving husband or wife or next of kin of the deceased person, the action to be brought in the name of

a personal representative of the surviving husband or wife, as the case may be, and the next of kin. It is under that act that this suit is brought.

Now, you have heard considerable discussion during the course of the trial as to whether or not Mrs. Michelson is properly before the court as administratrix *ad prosequendum* of her husband, but with that gentlemen you are not at all concerned because the Court has taken the responsibility of allowing such an amendment to the complaint herein as makes this widow a party plaintiff here as administratrix *ad prosequendum* of her husband's estate.

So proceeding in an orderly presentation which must govern your deliberations when you go to the jury room to decide this case, it seems I should first admonish you that the mere happening of this accident and the death, unfortunate although it is, of Mr. Michelson, standing alone, will not entitle you to bring in a verdict in favor of the plaintiff and against the defendant, because, gentlemen, the defendant railroad company—and you must always remember this,—was not an insurer of the safety of Mr. Michelson, who, at the time of this accident, was an employee of another corporation, and so the plaintiff has the duty of establishing to your satisfaction, by a fair preponderance of the evidence in this case that this defendant, the Erie Railroad Company, was negligent in some duty that it owed to this plaintiff and that such negligence was a proximate cause of the death of the plaintiff's intestate. Those elements must be established in the first instance by the plaintiff by a fair preponderance of the evidence in the case before you are required to take up the defense as raised in this case by the defend-

ant that this plaintiff's intestate assumed the risk of an accident such as happened and was guilty of contributory negligence.

The charge of negligence must be with reference to some claim of negligence which is set forth in the plaintiff's complaint, and that complaint, gentlemen, specifies the following grounds of negligence, namely, that while the intestate of the plaintiff was aiding in the unloading of certain piles from a flat car of the defendant, by reason of the failure of the defendant to use reasonable care in the loading, handling, shipping and fastening of said piles, the said piles were caused to roll and fall from said flat car against and upon the intestate of the plaintiff, killing him.

It might be proper at this time to call your attention to the fact that there is no evidence before you that this defendant railroad company had anything to do with the loading of these logs nor with the handling of these logs and with respect to shipping them. It is not claimed that the defendant was a shipper of these logs unless you use the term shipper in a very narrowed and restricted sense pertaining to a duty which would arise upon the part of the defendant railroad company in receiving in course of shipment a car from another railroad company.

I have already indicated, and you must certainly have in mind, that the plaintiff's intestate was an employee of the Snare Corporation which at that time was engaged in driving piling, as I recall the testimony, somewhere in the vicinity of where these cars were standing, preparatory to being unloaded. The Snare Company is not a defendant in this case and so you are not at all concerned, gentlemen, with any duties owed by the

Snare Company to the plaintiff's intestate to furnish the plaintiff's intestate a reasonably safe place in which to work and so forth. This case, of course, is not brought upon any such theory. You are only concerned with the duty which this defendant, the railroad company, may have owed to the plaintiff's intestate under the circumstances of this particular case.

Now, these flat cars as I understand the testimony, were not the cars of this defendant company. They were received by this company from another company and our courts have said, gentlemen, with respect to such a situation as this that on receiving a car for transportation the company is entitled to assume that the car had been properly constructed of suitable materials and that would include the appliances that were with the car for the purpose of transporting the load that was being conveyed. I repeat, that they were entitled to assume that the car was properly constructed of suitable materials for all the purposes for which the owner intended them to be used. Upon receiving the car the company is bound to make such an examination as would be likely to discover conditions rendering a car so constructed unfit for safe transportation on the company's line. This examination has been called a cursory examination, an examination not of a very minute character, an inspection for defects visible or discernable by ordinary examination.

Now in the first place, gentlemen, the plaintiff must prove that this accident was caused by a defect in the stake supporting the logs on the north end of these coupled flat cars because that is the only claim which is made upon the part of this plaintiff here and, of course, the duty rests

upon the plaintiff of proving it to your satisfaction by a fair preponderance of the evidence in this case.

When we use the phrase fair preponderance of the evidence, we do not necessarily mean the greater number of witnesses on one side nor on the other but the reference is more particularly to the quality rather than to the quantity of the proof. We are referring to the weight of the testimony.

So, gentlemen, if this accident was not due to a defect in this stake but was due to some other cause, for example due to the chopping of the other stake or stakes on this car by the plaintiff's intestate or his assistant, disassociated from a defect in the stake which it is claimed was the cause of this accident. That of course could not be chargeable to this defendant because as I have indicated to you, this defendant is not an insurer of the safety of those who may go to its tracks and alongside of its cars for the purpose of unloading materials from it.

But if you reach the conclusion that this accident resulting in this unfortunate death was due to a defect in the stake, then the plaintiff must prove further by a fair preponderance of the evidence in this case that it was such a defect as could and should have been discovered upon a cursory examination within the rule of duty which I have already given you, and the same repaired or the car retired from service until the defect was rectified.

Now, if it was such a defect as a cursory inspection would not disclose, then, of course, gentlemen, the defendant would not be responsible for this accident because the defendant was not held to a higher degree of duty than that which

I have indicated to you in the extract I have read from the leading case in this State. So it would follow that if such a rotten condition of this stake in question did actually exist there but it was such as would not be disclosed upon a cursory examination such as is required of a railroad company under the circumstances of receiving cars, not their own, from other company's lines, then don't you see it would never do to say that this defendant was responsible for the condition which eventually was found to have existed. If the defendant, however, failed in its duty to make such a cursory examination, then this defendant was negligent, but even though you find that that was the situation here, you would not be privileged even then to bring in a verdict in favor of the plaintiff and against the defendant because the plaintiff must further prove and establish to your satisfaction by a fair preponderance of the evidence in this case that any such failure of duty on the part of this defendant was a proximate cause of the accident and the death which followed from it.

By proximate cause we mean that cause which naturally and probably lead up to and in the ordinary course of events might have been expected to produce or bring about the very thing that happened. It is the moving efficient cause of an accident without which the accident would not have happened. And so in this case, even though you find that the conduct of the defendant company has not squared with the duty which I have told you is required of it under the circumstances of this case, but, nevertheless, you also at the same time find that such failure was not the proximate cause of this accident and the death of the plaintiff's intestate, then again you should bring in your

verdict in favor of the defendant and against the plaintiff, a verdict of no cause of action.

But, gentlemen, if within the rules I have given you respecting the duty of this defendant company you find that the defendant company was negligent and that such negligence was a proximate cause of this accident, then it is for you to determine whether or not the plaintiff's intestate assumed the risk of such an act or was guilty of contributory negligence.

The duty rests upon the defendant, gentlemen, of establishing these defenses to your satisfaction by a fair preponderance of the evidence in this case, and failing to do so cannot have the benefit of any such defense.

It is undoubtedly true that if this plaintiff's intestate observed or in the exercise of reasonable care could have observed the condition which existed there and of which complaint is now made, or failed to exercise due care with respect to the situation, then of course the plaintiff's intestate assumed the risk of a condition which reasonable care on his part would have disclosed. Then further, gentlemen, this plaintiff's intestate was at all times required to exercise reasonable care for his own safety. He could not shut his eyes to the conditions in which he worked. He could not proceed to take down these poles and be blind to the surrounding circumstances because he was required to make such observations and take such care for himself under the conditions that existed there as a reasonably prudent person would have done confronted with the same circumstances. If he failed in this particular, gentlemen, no matter in what degree, that would prohibit the plaintiff

in this case from obtaining a verdict against this defendant.

In cases such as this, you are not privileged to weigh the relative degrees of negligence. If both parties concerned in an accident are negligent, even though in unequal degrees, that would preclude the recovery of a monetary verdict by either of the parties against the other, and so in a case such as this you are not privileged for example to say, by way of illustration, if one of the parties is ninety-five per cent. negligent and the other only five per cent. negligent that you could bring in a ninety-five per cent. verdict in favor of the one who was only five per cent. negligent. That is not permitted. Negligence on the part of the plaintiff in a case which contributes to the happening of an accident in a suit such as this bars a recovery.

But if after weighing this testimony you reach the conclusion that this defendant company was negligent with respect to the duty that it owed to the plaintiff's intestate, confining that inquiry within the bounds I have already indicated (the duty on the part of this defendant company with respect to cars that were turned over to it not belonging to it, to make such cursory examination as the rule requires to discover defects, not in the load but in the stake which is supporting the load), and you find that such negligence is the proximate cause of this accident, and you further find from the evidence in this case that the plaintiff's intestate was free from contributory negligence under the rules I have given you, and did not assume the risk of such an accident as did happen in this case, then of course the plaintiff should have your verdict, and if that is the conclusion which you

reach, gentlemen, then this act under which this case is brought known as the Death Act gives you the measure which you should apply in assessing the damages to be awarded. The act says, speaking of a case of death growing out of a negligent act, "In every such act the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, to the wife, surviving husband or next of kin of such deceased person."

So you see, gentlemen, this act as it has been construed by our courts limits the recovery to the pecuniary loss to the surviving wife and the next of kin of course, they, especially in this case, being the child or children. It is the testimony here that there were four children. By pecuniary loss is meant the deprivation of a reasonable expectancy of pecuniary benefit. That does not include pain and suffering. It does not include burial expenses. It does not include sorrow nor distress, but the recovery is limited to the pecuniary loss that resulted from this death to these persons I have indicated.

Now in determining this question, gentlemen, you are to take into consideration all the probabilities and possibilities of this case. This man might have met his death in the natural course shortly after this unfortunate occasion if it had not taken place; he might not have lived to be any great benefit to his next of kin.

Furthermore, he and his wife and his children may have separated and so far as the children are concerned, upon arriving of age they may have gone off from their father's home and not been in a position to have received any pecuniary benefit. You have heard what the ages of these children

were. You have heard of monetary returns this widow received before the accident. Of course, gentlemen, even though a certain weekly stipend was turned over to this woman, out of that she had to run the house and she did not have the benefit of the entire amount. Further, gentlemen, any amount that you may find, if you do find that the plaintiff is entitled to a verdict, might have come to the widow and next of kin here from this deceased person in all probabilities would have come in installments. That was the course of practice during the time before his death. The money was turned over to this plaintiff at intervals. Of course you would have to discount such installments, gentlemen, to their present worth because you would now be giving a verdict for a lump sum which, if this decedent had continued to live would have been extended over a period of years. By way of illustration, if you should find that this man had turned over every week a certain amount of money and that he probably would have lived a certain length of time this same sum would have continued to have been received by the widow and next of kin but it would never do for you to total up these amounts and find that as your verdict, because you would be giving now what if the decedent had lived would have been spread over a period of years, so that you have to discount that and give its present worth, that is, give in present worth what those installments would represent in money now.

If the course of summation counsel has told you the amount for which this suit is brought. The Court must admonish you that it makes no difference what amount this suit is brought for. You are governed by the measure of damages which is

set forth in the Death Act which I have just given you. Very often, almost continuously, suits are brought for sums which it is never intended nor expected may be recovered, so that is no criterion.

Counsel has indicated to you that by reason of the fact that this trial has been protracted and many difficult questions have arisen that therefore it would be so much labor lost if you should bring in a verdict in favor of the defendant at this time. Gentlemen, that is no argument for you to consider. You will take the law as the Court has given it to you and apply it to the facts as you find them from the evidence which has been adduced here. If you do that conscientiously you will have performed your duty. We all realize that where a death has resulted from an accident there is an unconscious and perhaps I should say almost an uncontrollable tug at the heartstrings in the interests of sympathy, but in this case gentlemen you must discard all sympathy, bias or prejudice. You must not charge up to either attorney anything he may have done in the course of this trial. They may have, without knowing it, prejudiced their client's interests and if anything of that sort entered into your verdict, it would not be a just verdict.

In giving you this case to consider I am going to ask you to disregard entirely the Court's ruling upon the motions made throughout the trial for both sides. There have been motions for nonsuit and for the direction of a verdict and you should not assume from the rulings that the Court thinks your verdict should be for any particular side. The Court in passing upon these motions was merely passing upon questions of law. The Court found that in this case in its judgment there were

facts that should be submitted to you so that you might find out what the facts really were. That is all the Court did in passing upon these motions.

I have been requested to charge certain additional propositions of law by the attorney for the defendant.

Mr. Broadhurst: I think your Honor has covered a number of them. Your Honor has charged in substance numbers, one, two, three, four, nine, ten, eleven, twelve and fourteen. I do not think that your Honor has charged five, six, seven and eight and I take it from your charge that you intend to deny request number thirteen.

The Court: Do you wish number thirteen charged?

Mr. Broadhurst: Yes.

The Court: Then I will consider the request to charge on the part of the defendant waived with the exception of five, six, seven, eight and thirteen.

5. I charge you as a matter of law, that there is no evidence in the case that the defendant loaded the poles upon the flat cars, and you, therefore, cannot find a verdict against it on that ground.

I so charge you.

6. I charge you, as a matter of law, that there is no evidence in the case that the defendant was negligent in handling said piles or poles, because there is no evidence that the defendant took any part in the handling of said piles or poles and she cannot recover on that ground.

I think I have already charged that, but probably not as concisely. I so charge you.

Seven I refuse to charge except as I have already charged. As I stated to you, there is no evi-

dence in this case that this defendant shipped these poles and so far as the charge of negligence in shipping is concerned, there is no evidence before you unless under the theory of shipping there can be included a duty at the time the goods were received of giving a cursory examination under the rule I have already given you in that respect.

The eighth request I refuse to charge you except as I have already charged. I think I have given you a full explanation of the scope of the charge of negligence in this connection and you will apply the rule I have already given you with respect to this inspection with reference to the condition or equipment of cars after the cars came into the possession of the defendant company.

Request number thirteen I refuse to charge except as I have already charged.

Mr. Broadhurst: I will note separate exceptions to each of the defendant's requests to charge which your Honor denied.

Mr. Elkins: I desire to except to that part of the Court's charge wherein your Honor stated that if the plaintiff's intestate assumed a risk then he cannot recover. I except on the ground that the defendant cannot set up as a separate defense any assumption of risk. The defendant merely states that the plaintiff's intestate was guilty of contributory negligence.

Mr. Broadhurst: I think the charge of contributory negligence covers the entire scope.

The Court: Then you are satisfied with the charge on contributory negligence?

Mr. Broadhurst: Yes.

The Court: Gentlemen of the Jury: Then you may eliminate from my main charge what I said on the assumption of risk. There is a very fine

distinction between assumption of risk and contributory negligence. As this case stands now the defense is that this plaintiff's intestate was guilty of contributory negligence. The plaintiff's intestate was required to exercise reasonable care for his own safety under the rules I gave you under that head in my main charge and it may be considered now that the technical definition of assumption of risk has been withdrawn. Does that cover the subject, Mr. Elkins?

Mr. Elkins: Yes.

The Court: You may now retire, gentlemen.

DEFENDANT'S REQUESTS TO CHARGE.

1. The burden of proof is on the plaintiff to establish her case by the greater weight of the evidence. If she has failed to do so, then she cannot recover and your verdict must be for the defendant.

2. The mere fact that an accident has happened in which the plaintiff's intestate sustained injuries, does not justify any verdict against the defendant, and if all you find is that an accident happened, then the plaintiff cannot recover, and your verdict must be for the defendant.

3. The mere fact that the plaintiff has brought suit for an accident which has happened does not entitle her to any verdict at your hands. She cannot recover even though she has brought suit, unless she has convinced, by the testimony under oath and by the greater weight of the evidence, that the defendant was negligent in one or more of the respects alleged in the complaint, and that the defendant's negligence was the proximate cause of the accident, and even then, she cannot

recover if her intestate was guilty of negligence which contributed proximately to the happening of the accident.

4. The only negligence charged in the complaint, upon which the plaintiff seeks to recover, is that while her intestate was aiding in the unloading of certain piles from the flat car of the defendant, by reason of the failure of the defendant to use reasonable care in the loading, handling, shipping and fastening of the said poles, the said poles were caused to roll and fall from said flat car against and upon the intestate of the plaintiff, killing him. If the plaintiff has not satisfied you by the greater weight of the evidence that the accident was caused by the negligence of the defendant in one or more of these respects, she cannot recover. Her recovery is limited to the charges of negligence alleged in the complaint.

5. I charge you as a matter of law, that there is no evidence in the case that the defendant loaded the poles upon the flat cars, and you, therefore, cannot find a verdict against it on that ground.

6. I charge you as a matter of law, that there is no evidence in the case that the defendant was negligent in handling said piles or poles, because there is no evidence that the defendant took any part in the handling of said piles or poles, and she cannot recover on that ground.

7. I charge you as a matter of law, that there is no evidence in the case of any negligence on the part of the defendant in shipping the said poles, and the plaintiff, therefore, cannot recover on that ground.

8. I charge you as a matter of law, that there

is no evidence in the case that the defendant fastened the said poles, or was negligent in fastening said poles, and there cannot be any recovery on that ground.

9. Plaintiff's intestate was an employee of the Snare Corporation, a company entirely separate and distinct from defendant, and as between the Snare Corporation and the plaintiff's intestate there was the contractual relation of master and servant, and the Snare Corporation was under a duty to the plaintiff's intestate as his employer, or as the so-called master, to use reasonable care to provide him with a reasonably safe place in which to work and with reasonably safe instrumentalities to work, and that duty of his employer could not be delegable to anyone else, because it was a non-delegable duty of the intestate's employer, any claim that the plaintiff might have against intestate's employer, the Snare Corporation, is not before you, and that claim which she has against his employer is not before this Court for decision.

10. Any claim that the plaintiff may have against intestate's employer arising under the Workmen's Compensation Act of the State of New Jersey, to be paid weekly compensation, is not before you for decision, and that claim can be pursued by the plaintiff as against intestate's employer, in the Workmen's Compensation Court, and your decision in this case, if against the plaintiff, does not affect her rights to compensation as against her intestate's employer in the slightest degree.

11. If you find that plaintiff's intestate was guilty of negligence, then she cannot recover, and your verdict must be for the defendant.

Defendant's Requests to Charge.

12. Even though you find the defendant was negligent and that the defendant's negligence was the proximate cause of the accident, if you should find that the plaintiff's intestate contributed by his negligence, to the accident; in other words, if you should find that both the plaintiff's intestate and the defendant were negligent, then the plaintiff cannot recover and your verdict must be for the defendant, because the law does not attempt to measure how much each contributed to an accident, but where it finds that both contributed, no matter in what degree, then the law leaves the parties where it finds them, and your verdict, as stated, must be for the defendant.

13. There is no allegation in the complaint in this case that the defendant was negligent in failing to inspect the car or cars in question, and therefore, no recovery can be had for any alleged failure in that respect.

If the Court refuses to charge the above request, the defendant, as an alternative request, desires the following charged.

14. A railroad company on receiving a car for transportation, is entitled to assume that the car has been properly constructed of suitable materials for all the purposes for which the owner intended it to be used. On receiving the car the railroad company is bound to make such examination as would be likely to discover conditions rendering a car, so constructed, unfit for safe transportation on the company's line. This examination has been called cursory examination—an examination not of a minute character; an inspection for defects visible or discernible by ordinary examination. If you should find that a cursory examination or one

not of a minute character would not disclose the defect claimed in the stake, then the defendant would not be responsible in this case, even though the defect, in fact, existed and a minute examination might have disclosed it.

Exhibit P-1 of February 3, 1928.

To the

Surrogate of the County of Hudson, New Jersey.
Alma Michelsen,
5720 6th Ave.,
Brooklyn, N. Y.

respectfully represents that she is the widow of Axel Michelsen who departed this life intestate at Jersey City in the County of Hudson and State of New Jersey on the #22 day of December, A. D. 1925. That said intestate was at the time of his death a resident of Brooklyn, New York and left surviving the following named heirs and next of kin, to wit:

Your applicant widow			
Hjordes Michelsen	daughter	(Age 11 years)	
Agny Michelsen	"	(" 9 ")	
Edna Michelsen	"	(" 6 ")	With Applicant.
Arnold Michelsen	son	(" 2 ")	

That administration has not been granted in this or any other State.

That the said intestate was possessed of no goods chattels, rights or credits as near as can be ascertained.

Therefore the said applicant respectfully applies for letters of administration for the purpose of

bringing suit for damages for injuries which caused death of intestate.

Dated, January 27, 1926.

ALMA MICHELSEN.

HUDSON COUNTY: ss.

ALMA MICHELSEN

named in the above application, being duly sworn, on her oath says that the matters and things set forth in the above application are true to the best of her knowledge and belief.

ALMA MICHELSEN.

Sworn to before me at Jersey City.
January 27, 1926.

JOHN F. CALLAHAN,
Deputy Surrogate.

(The following is the back to Exhibit P-1 of February 3, 1928.)

63520.

ESTATE OF
AXEL MICHELSEN
Deceased.

Application
-for-
LETTERS OF ADMINISTRATION.

Filed January 27, 1926.

JOHN F. CALLAHAN,
Deputy Surrogate.

Letters granted.

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Entered Liber 72 of Admin. App'ns page 89.

Exhibit P-2 of February 3, 1928.

HUDSON COUNTY ORPHANS' COURT.

In the Matter of The Application for Administration *ad prosequendum* of the Estate of Axel Michelsen, deceased.	PETITION.

To DANIEL O'REGAN,
Judge of the Hudson County Orphan's Court.

The petition of Alma Michelsen of No. 6751 Fifth Avenue, Brooklyn, New York, respectfully shows:

1. That she made due application to the Surrogate of the County of Hudson for administration *ad prosequendum* upon the estate of Axel Michelsen, late of the County of Hudson, who died intestate and that said application was duly made on the 27th day of January, 1926.

2. That a copy of the said application is as follows:

To the Surrogate of the County of Hudson:

The petition of Alma Michelson of No. 6751 Fifth Avenue, Brooklyn, New York, respectfully shows:

1. That she is the widow of Axel Michelson who departed this life intestate at Jersey City, in the County of Hudson and State of New Jersey, on the 22nd day of December, A. D. 1925.

2. That said intestate was at the time of his

death, a resident of Brooklyn, New York, and left him surviving the following named heirs and next of kin, to wit: your applicant, widow, Hjordes, daughter, age 11 years, Agney, daughter, age 9 years, Edna, daughter, age 6 years and Arnold, son, age 2 years.

3. That administration has not been granted in this or any other State.

4. That the said intestate was possessed of no goods, chattels, rights or credits as near as can be ascertained, for the purpose of bringing suit for damages for injuries by reason of the death of intestate, Axel Michelson.

Dated January 27th, 1926.

ALMA MICHELSEN,
Petitioner.

3. That the said Alma Michelson filed a bond for general administration upon the estate of the said Axel Michelson, deceased.

4. That the said Alma Michelsen requested administration *ad prosequendum* upon the estate of Axel Michelsen, deceased, based upon the application heretofore recited.

5. That it was desirous also of receiving general administration so that she might obtain certain moneys in the bank of the City of New York.

6. That on the said 27th day of January, 1926, the Surrogate of the County of Hudson did appoint the said Alma Michelsen, general administratrix of the estate of Axel Michelsen, deceased, and that on said day, there were granted to her general letters of administration upon the estate of Axel Michelsen, deceased.

7. That there was also granted to her on the said 27th day of January, 1926, administration *ad prosequendum* upon the estate of the said Axel Michelsen, deceased, which was upon the application filed with the said Surrogate of the County of Hudson and more particularly referred to heretofore.

8. That inadvertently the Surrogate of the County of Hudson, through his subordinates, failed to enter in the record of the Surrogate's office of the County of Hudson, the fact that your petitioner was granted administration *ad prosequendum* of the estate of Axel Michelsen, deceased, nor were the papers granted to her.

9. That it was the intention of your petitioner to be appointed administratrix *ad prosequendum* of the estate of Axel Michelsen, deceased, for the purpose of bringing suit against the proper defendants, and the filing of her petition is indicative of that fact.

10. That through no fault of hers, no record was made of said appointment, although as a matter of fact, the filing of the petition was for that purpose.

Therefore, your petitioner prays that an order be made by the Surrogate of the County of Hudson, granting to your petitioner administration *ad prosequendum* of the estate of Axel Michelsen, deceased, late of the County of Hudson, as and of the 27th day of January, 1926, and that an order *nunc pro tunc* be made so that that fact might more fully appear as of record.

ALMA MICHELSEN,
Petitioner.

State of New Jersey, }
County of Hudson, } ss.:

ALMA MICHELSEN, being duly sworn according to law upon her oath deposes and says that she is the petitioner named in the foregoing petition and that the matters and things therein set forth are true to the best of her knowledge and belief.

ALMA MICHELSEN.

Sworn and subscribed to before me }
this 2nd day of February, 1928. }

ARCHIE ELKINS,
Attorney at Law of N. J.

(The following is reverse side of Exhibit P-2 of February 3, 1928.)

HUDSON COUNTY SURROGATE'S COURT.

In the Matter of the Application for Administration *ad prosequendum* of the estate of Axel Michelsen, deceased.

PETITION.

ALEX. SIMPSON,
Proctor for Petitioner,
921 Bergen Avenue,
Jersey City, N. J.

Filed Feb. 2, 1928.

MATT. L. RYAN,
Deputy Surrogate.

Exhibit P-3 of February 3, 1928.

State of New Jersey, }
County of Hudson, } ss.:

I, JAMES F. NORTON, Surrogate of the County of Hudson, do certify that on the 27th day of January, in the year of our Lord one thousand nine hundred and twenty-six Administration *ad prosequendum* upon the estate of Axel Michelsen late of Brooklyn, N. Y. who died intestate was granted by me to Alma Michelsen of Brooklyn, N. Y. for the purpose of enabling her to prosecute an alleged claim against the proper defendants. These letters of administration, however, do not authorize the said administratrix to receive any moneys in settlement of any claim, either before or after suit or to receive any assets of said estate such claim, moneys or assets to be paid to a general administrator when appointed.

WITNESS, my hand and seal of Office, the 27th day of January in the year of our Lord, one thousand nine hundred and twenty-six.

JAMES F. NORTON,
(Seal) Surrogate.

MARK L. RYAN,
Deputy.

Exhibit P-4 of February 3, 1928.

(D-1 FOR IDENTIFICATION.)

State of New Jersey, }
County of Hudson, } ss.:

I, JAMES F. NORTON, Surrogate of the County of Hudson, do certify that on the 27th day of January, in the year of our Lord one thousand nine hundred and twenty-six Administration of the goods and chattels, rights and credits which were of Axel Michelsen late of Brooklyn, N. Y. who died intestate, was granted by me to Alma Michelsen, of Brooklyn, N. Y., who is duly authorized to administer the same agreeably to law.

Witness my hand and seal the 27th day of January in the year of Our Lord one thousand nine hundred and twenty-six.

(L. S.)

JAMES F. NORTON,
Surrogate.

per JOHN F. CALLAHAN,
Deputy Surrogate.

Exhibit D-1 of February 6, 1928.

ERIE RAILROAD COMPANY

CONDUCTORS RECORD OF PICKING UP AND PLACING CARS.

Station Weehawken Siding

Shippers Time Date

Consignees Time Date 12/21/25

J. W. RAUB
Conductor.

CAR INITIALS	CAR NUMBER	CONTENTS	SEALS NORTH	SEALS SOUTH	SEALS ENDS	SEALS HATCHES
PRR	939667		Mon St Yd	8:10PM	Load Poles	
"	947552					
"	928007					
"	925318					
"	426040					
"	425512					
"	939736					
"	43813					
ERIE	115209		Coal Car	8:50AM	1348	1349
"	93584				1347	1346
B & O	74726				490445	490438
PRR	706126				490442	490452
G R C X	1974			9:30PM	Load Coal	
U P	18826				18997	18998
111 X	698					
Erie	91126		J. C.	9:48PM	Load Box	
C P	310099				Load Flat	
Erie	35037		Power House	11:40PM	Load Coal	

Exhibit D-2.

ERIE RAILROAD COMPANY

Train List.

Departure Whkn Time 7 P.M. Date 12/21/25
Arrival Mom. St. Time Date
Train Eng. 62 Conductor Rankin

Car. No.	Initials	Contents	Total Wt. of Car & Landing	Destination
7100	L.N.	Oil		Armour Co.
18826	N.P.	Steel		Ault Weborg
74726	B.O.	Steel Plate		Low Can Co.
91864	E.	" "		" " "
236	I.S.T.X.	Oil		Armour
377	Atl			
939667	P.	Poles		Snare Co. Mom. St.
947552	"	"		" " " "
928007	"	"		" " " "
925318	"	"		" " " "
426040	"	"		" " " "
425512	"	"		" " " "
115209	E.	Tin Plate		Low Can Co.
93584				
1974	G.R.C.	Oil		Ault Welborg
939736	P.	Poles		Snare Co. Mom. St.
43813	Sal			
62118	E.	Mty		Armour Co.
85125		Ice		Hud. Term. Ice

Exhibit D-3 for Identification of February 3, 1928.

To the
Surrogate of the County of Hudson, New Jersey

Alma Michelsen
5720-6th Ave.,
Brooklyn,
N. Y.

respectfully represents that she is widow
of Axel Michelsen

who departed this life intestate at Jersey City in the County of Hudson and State of New Jersey, on the 22nd day of December, A. D. 1925.

That said intestate was at the time of his death a resident of Brooklyn, New York and left him surviving the following named heirs and next of kin, to wit:

Your applicant
Hjordes Michelsen daughter age 13 years)
Agney Michelsen " " 10 ")
Edna Michelsen " " 8 ") With
Arnold Michelsen son " 5 ") Applicant

That letters of administration *ad prosequendum* are required for the purpose of bringing suit against the proper defendants for causing the death of said intestate.

Therefore the said applicant respectfully applies for letters of administration *ad prosequendum* for the purpose above set forth, and that such letters be issued as of January 27th, 1926, in compliance with and order of the Orphans Court dated this day.

February 2, dated A. D. 1928.

ALMA MICHELSEN.

Hudson County: ss.

Alma Michelsen

named in the above application, being duly sworn on her oath says that the matters and things set forth in the above application are true to the best of her knowledge and belief.

ALMA MICHELSEN.

Sworn to before me at Jersey City.
February 2, 1928.

JAMES F. NORTON
Surrogate.

(The following is the back on Exhibit D-3 of February 3, 1928.)

Estate of
Axel Michelsen
Deceased.

Application
-for-
LETTERS OF ADMINISTRATION
AD PROSEQUENDUM

Filed February 2, 1928

JAMES F. NORTON,
Surrogate.

Exhibit D-4 for Identification, of February 3, 1928.

HUDSON COUNTY ORPHAN'S COURT.

In the Matter of The application for administration *ad prosequendum* of the Estate of Axel Michelsen, deceased.	ORDER.

Upon due application and good cause being shown, it is on this 2nd day of February, 1928, ORDERED and DECREED that letters *ad prosequendum* of the estate of Axel Michelsen, deceased, be granted and issued to Alma Michelsen, and that said appointment and granting of letters *ad prosequendum* be as of the 27th day of January, 1926, and that the records of the Surrogate of the County of Hudson, be made to conform accordingly.

DANIEL T. O'REGAN
Judge.

(The following is back to Exhibit D-4 for Identification of February 3, 1928.)

HUDSON COUNTY SURROGATE'S COURT.

In the Matter of The application for administration *ad prosequendum* of the Estate of Axel Michelsen, deceased.	ORDER.

Alex. Simpson,
Proctor for Petitioner,
921 Bergen Avenue,
Jersey City, N. J.

Filed Feb. 2, 1928.

MARK L. RYAN
Surrogate.

Exhibit D-5 of February 6, 1928.

(Laws of New Jersey 1912, Chapter 313.)

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS.

That I, Alma Michelsen, Administratrix of the estate of Axel Michelsen, residing at No. 5720-6 Ave. Brooklyn, N. Y. do hereby constitute James F. Norton, Surrogate of Hudson County, New Jersey, and his successors in office, my true and lawful attorney, upon whom all original process, if any action at law or in equity against the said

estate, may be served; and I hereby agree that any original process so served against the said estate shall be of the same force and effect as if duly served on me as such Administrator.

Witness my hand and seal this 27th day of January nineteen hundred and twenty-six.

ALMA MICHELSEN.

Signed in the presents of
JOHN F. CALLAHAN

State of New Jersey
County of Hudson } ss.

BE IT REMEMBERED That on this 27th day of January, A. D. 1926, before me

personally appeared Alma Michelsen who, I am satisfied is the person named in and who executed the within instrument or writing, and, I having first made known to her the contents thereof, she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

JOHN F. CALLAHAN
Deputy Surrogate.

(The following is the back to Exhibit D-5 of February 6, 1928.)

63520.

ESTATE OF
AXEL MICHELSEN
Power of Attorney

Filed January 27th, 1926.

JOHN F. CALLAHAN,
Deputy Surrogate.

Exhibit D-7 of February 6, 1928.

(Seal.)

Home Office 115 Broadway

WORLD'S LARGEST SURETY COMPANY.

Know All Men by these Presents:

That we, Alma Michelsen, of Brooklyn, New York as Principal, and the National Surety Company, as Surety, are held and firmly bound unto the Ordinary of the State of New Jersey, in the sum of One thousand and 00/100 ($1,000.00) Dollars, lawful money of said State, to be paid to the said the Ordinary, his Successors or Assigns; To which payment well and truley to be made, we bind ourselves, our Heirs, Executors, Administrators and Successors, jointly and severally; firmly by these Presents—SEALED with our SEALS, and dated the 27th day of January, Anno Domini, one thousand nine hundred and Twenty-six.

The Condition of This Obligation is Such. That if the above bounden Alma Michelsen, Administratrix of all and singular the Goods, Chattels and Credits of Axel Michelsen, deceased, do make or cause to be made a true and perfect inventory of all and singular the Goods, Chattels and Credits of the said deceased, which have or shall come to the hands, possession or knowledge of the said administratrix or into the hands or possession of any other person or persons for the said administratrix, and the same so made to exhibit, or cause to be exhibited into the Registry of the Prerogative Court in the Secretary's Office of this State, or into the Surrogate's Office of the County of Hudson at, or before the expiration of three calendar months,

from the date of the above written Obligation, and the same Goods, Chattels and Credits, and all other Goods, Chattels and Credits of the said deceased at the time of his death, which at any time after shall come into the hands or possession of the said administratrix or into the hands or possession of any other person or persons for the said administratrix, do well and truly administer according to law; and further do make, or cause to be made, a just and true account of her administration within twelve calendar months from the date of the above written Obligation; and all the rest and residue of the said Goods, Chattels and Credits, which shall be found remaining upon the account of said Administration, the same being first examined and allowed by the Judges of the Orphan's Court of the County, or other competent authority, shall deliver and pay unto such person or persons respectively as is, are, or shall by law be entitled to receive the same. And if it shall hereafter appear that any last Will and Testament was made by the said deceased, and the Executor or Executors therein named, or any other person or persons do exhibit the same in the said Prerogative Court or the Surrogate's Office of the County of Hudson, making request to have it allowed and approved; if the said Administratrix, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) to the said Court, then the

above Obligation to be void and of no effect, or else to remain in full force and virtue.

ALMA MICHELSEN.

Sealed and Delivered
in the presence of

JOHN F. CALLAHAN.

NATIONAL SURETY COMPANY,

By C. L. MEISEL,
Resident Vice-President.

(Seal)

Attest:

By RALPH H. CHAPMAN,
Resident Assistant Secretary.

State of New Jersey,
County of Hudson,
City of Jersey City,

On this 27th day of January, 1926, before me, the subscriber, a Notary Public of New Jersey duly commissioned and sworn, personally came Ralph H. Chapman who, being by me duly sworn, on his oath, saith; That he is the Res. Asst. Sec'y of the NATIONAL SURETY COMPANY of the State of New York, and that he resides in the City of River Edge, N. J. that he knows C. L. Meisel, Resident Vice-President of the NATIONAL SURETY COMPANY, and he knows too, the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal; and it was affixed by the said C. L. Meisel and the said Instrument signed by the said C. L. Meisel as Res. V. Pres. of said Company, attested by deponent as Res. Asst. Sec'y by order of the Board of Directors of said Company in deponent's presence as the voluntary act and deed of

said Company, that said Company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902; that the good available assets of the Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said Chapter; that the NATIONAL SURETY COMPANY is duly incorporated under the laws of the State of New York; and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter; and has on deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value at least Two hundred Thousand Dollars ($200,000) held for the security of its obligations and has a fully paid up, safety invested, and unimpaired capital of Ten Million Dollars and Said Company has appointed the Commissioner of Banking and Insurance of New Jersey and his successor in office as its true and lawful Attorney in the State of New Jersey, upon whom process of Law can be served, and has filed in the office of the Commissioner of Banking and Insurance, a written instrument duly signed and sealed, certifying such appointment, together with the residence and office of such Attorney, within the State of New Jersey; and that the following is a true copy of a By-Law duly adopted by the Board of Directors of the said NATIONAL SURETY COMPANY on the 6th day of February, 1912, at a regular Meeting, to wit:

ARTICLE XIII.

SECTION 1.—Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in

the nature thereof, shall be signed by the President, a Vice-President, a Resident Vice-President, or Attorney-in-Fact, and shall have the seal of the Company affixed thereto, duly attested by the Secretary, an Assistant Secretary, or Resident Assistant Secretary. All Vice-Presidents and Resident Vice-Presidents shall each have authority to sign such instruments, whether the President be absent or incapacitated, or not, and the Assistant Secretaries and Resident Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent or incapacitated, or not; and the Attorneys-in-Fact shall each have authority in the discretion of such Attorneys-in-Fact, to affix to such instruments an impression of the Company's seal, whether the Secretary be absent or incapacitated, or not, or to attach the individual seal of the Attorney-in-Fact thereto, or a seal of paper or other similar substance affixed thereto by mucilage, or other adhesive substance, or use the word "SEAL" or the letters "L. S." opposite the signature of such Attorneys-in-Fact, as the case may be.

Sworn and subscribed in the City of Jersey City in the County of Hudson and State of New Jersey this 27th day of January, A. D. 1926 before me a Notary Public of New Jersey duly commissioned and sworn. (Seal)

P. E. Wiles.

(Seal)

Hudson County: ss.

Alma Michelsen the Administratrix above named, being duly sworn according to law, doth

depose and say, that she will well and truly administer all and singular the Goods and Chattels, Rights and Credits, which were of the deceased at the time of his death, that have or shall come to her possession or knowledge, or to the possession of any other person or persons for her use; and that she will make and exhibit into the Surrogate's Office of the County of Hudson, a true and perfect inventory of all and singular the said Goods and Chattels, Rights and Credits, and render a true and just account of her Administration.

ALMA MICHELSEN.

Sworn to before me at Jersey City, on the 27th day of January, A. D. 1926.

JOHN F. CALLAHAN,
Deputy Surrogate.

(The following is the back for Exhibit D-7 of February 6, 1928.)

Estate of 63520
Axel Michelsen,
Deceased.

Administrators Bond.

Filed and Recorded in the Office of the Surrogate of the County of Hudson, N. J., January 27, A. D. 1926, in Liber 88 Admir. Bonds. Page 208.

JOHN F. CALLAHAN,
Deputy Surrogate.

Exhibit D-8.

ERIE RAILROAD COMPANY 804

New York, 1925

Prr 928 318

Float No. Car No. and Initial 925 007

NK Date of Way-bill	No. of Way bill	To Whom Consigned	Description of Articles and Marks
		12/34608 34609	
Georgetown Del		Frederick Snare Corpn. Monmouth St. J. C. N. J.	
97200	12/17/25 1959		Twin Piling

Date of Delivery	Packages Delivered	No. of Cart
12/22/25	T 6	

The undersigned acknowledged to have received in good order from the Erie Railroad Company the articles annexed to their respective names.

FREDK. SNARE COMPANY
TAYLOR

Verdict.

(Entered February 8, 1928.)

This case was tried before Honorable Henry E. Ackerson, Jr., Judge, and a jury, at the Hudson Circuit on February 1st, 2nd, 3rd and 6th.

The jury rendered a general verdict in favor of the plaintiff and against the defendant for $46,800.00.

HENRY E. ACKERSON, JR.,
Judge.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Final Judgment.

(Entered February 8, 1928.)

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of forty-six thousand, eight hundred dollars, besides costs to be taxed *nisi*.

Entered February 8, 1928.

On motion of

ALEX. SIMPSON,
Attorney.

Damages $46,800.00
Costs

$

R. to S. C.

A true copy.

EDWARD J. KELLEHER,
Clerk.

Rule to Show Cause.

(Filed February 7, 1928.)

On due application:

ORDERED, that the plaintiff show cause before the Supreme Court at the next day of term thereof, why the verdict rendered in her behalf against the defendant on February 6, 1928, should not be set aside and a new trial ordered; and

It is FURTHER ORDERED, that all objections of exceptions taken by the defendant during the course of the trial be and the same are hereby reserved to the defendant for argument on appeal.

Signed February 7th, 1928.

HENRY E. ACKERSON,
Circuit Court Judge.

Rule actually entered this 7th
day of February, 1928,

On motion of

COLLINS & CORBIN,
Attorneys of Defendant.

Reasons.

(Filed March 5, 1928.)

The defendant, Erie Railroad Company, a corporation, writes down the following reasons upon which it rests its motion for a new trial in the above case.

1. The verdict is excessive.

Dated, April , 1928.

COLLINS & CORBIN,
Attorneys of Erie Railroad Co.

Service acknowledged March 1, 1928.

ALEX. SIMPSON,
Attorney of Plaintiff.

Opinion on Rule to Show Cause.

(Filed Jan 16, 1929.)

NEW JERSEY SUPREME COURT

No. 50 May T., 1928.

ALMA MICHELSEN, Admx. *ad pros.*

v.

ERIE RAILROAD COMPANY.

DEFENDANT'S RULE TO SHOW CAUSE.

Argued before GUMMERE, Chief Justice, and Justices PARKER and KATZENBACH.

For the rule, EDWARD A. MARKLEY and CHARLES W. BROADHURST.

Contra, ALEXANDER SIMPSON.

PER CURIAM.

The present suit is brought under the statute entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default." (*Comp. Stat.*, p. 1907).

The plaintiff's husband, Axel Michelsen, while engaged in the service of the Frederick Snare Corp., was directed by his employer to assist in unloading two carloads of poles, which belonged to it and which had been transported over the defendant's railroad. While engaged in this work, the poles, by reason of the negligence of the defendant company, fell upon him, so injuring him that he died shortly afterward. The trial of the

case resulted in a verdict in favor of the plaintiff, the award being $46,800. The present rule was thereupon allowed, and we are now asked to make it absolute upon the sole ground that the verdict is excessive.

The decedent at the time of his death was forty years old, and was earning $57.50 per week; that is approximately $3,000 a year. The interest on the amount awarded at six per cent, would be over $2,800 annually; that is as much as the earnings of the decedent had he continued in good health permanently, and it be assumed that the expenses incurred for his own maintenance were not less than $200. In other words, the wife and the next of kin, consisting of four children, will have as much annually from the investment of this fund as would have come to them if the husband and father had continued to live, and will in addition have the total principal of the award. In view of this fact, we consider that the contention of the defendant is entirely justified; in other words, that the verdict is clearly excessive, for the statute referred to limits the amount of the recovery to the pecuniary loss sustained by the widow and next of kin of the decedent.

If the plaintiff will consent to accept a reduction of the award to $25,000, she may enter judgment for that amount. Otherwise the rule to show cause will be made absolute.

Order Making Rule Absolute Unless Plaintiff Accept Reduction of Verdict.

(Filed January 21, 1929.)

NEW JERSEY SUPREME COURT.

ALMA MICHELSEN, Administratrix *ad prosequendum* of the estate of Axel Michelsen, deceased, *Plaintiff*,

v.

ERIE RAILROAD COMPANY, *Defendant*.

Action at Law.

The defendant's rule to show cause why the verdict rendered in favor of the plaintiff should not be set aside and a new trial ordered on the ground that the said verdict was excessive having been argued at the May Term 1928; the Court after considering the said argument and the briefs of the respective parties, submitted on this 19th day of January, 1929, ORDERS that the verdict in favor of the plaintiff in the amount of $46,800 be and the same hereby is set aside and a new trial ordered, unless the plaintiff within twenty days from the making of this order, shall file with the clerk of this Court, her consent in writing to accept a reduction of the award to $25,000.

On Motion of
COLLINS & CORBIN,
Attorneys of Defendant.

Consent to Reduction of Verdict.

(Filed January 21, 1929.)

NEW JERSEY SUPREME COURT.

ALMA MICHELSEN, Administratrix *ad prosequendum* of the Estate of Axel Michelsen, deceased, *Plaintiff*, *v.* ERIE RAILROAD COMPANY, a corporation, *Defendant.*	Action at Law.

Rule to show cause having been heretofore issued in the above cause, as to the granting of a new trial on the grounds of excessive damages and the Court having heard argument on the said rule and being of the opinion that the damages are excessive and having determined that a new trial should be granted unless the plaintiff would consent to accept reduction of the award to $25,000.00, and

Now therefore the plaintiff by Alexander Simpson, her attorney, in pursuance of the opinion of the Court in the above cause filed January 16th, 1929, hereby consents to the reduction of said verdict from the sum of $46,800.00 to $25,000.00, and to entry of judgment for $25,000.00 in favor of plaintiff and against the defendant.

Dated January 21st, 1929.

ALEX. SIMPSON,
Attorney of Plaintiff.

Final Judgment.

(Filed February 8, 1929.)

NEW JERSEY SUPREME COURT.

ALMA MICHELSEN, Administratrix *Ad Prosequendum* of the Estate of Axel Michelsen, Deceased,
Plaintiff,

v.

ERIE RAILROAD COMPANY, a corporation,
Defendant.

Action at Law. On Postea.

Alex Simpson, Attorney.

Judgment entered this eighth day of February, A. D. nineteen hundred and twenty-eight in favor of plaintiff and against the defendant for the sum of twenty-five thousand dollars damages and costs.

$25,000.00

$

WM. S. GUMMERE,
C. J.

A true copy.

FRED L. BLOODGOOD,
Clerk.

Notice of Appeal.

(Filed February 8, 1929.)

NEW JERSEY SUPREME COURT.

ALMA MICHELSEN, Administratrix *ad prosequendum* of the estate of Axel Michelsen, deceased, *Plaintiff*, *v.* ERIE RAILROAD COMPANY, a corporation, *Defendant.*	Action at Law.

To

ALEXANDER SIMPSON, Esq.,
Attorney of Plaintiff.

SIR:

TAKE NOTICE that the defendant 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 January 31, 1929.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

Service acknowledged February 1, 1929.

ALEX SIMPSON,
Attorney of Plaintiff.

Grounds of Appeal.

(Filed Feb. 11, 1929.)

NEW JERSEY COURT OF ERRORS

AND APPEALS

ALMA MICHELSEN, Administratrix *ad prosequendum* of the Estate of Axel Michelsen, deceased, *Plaintiff-Respondent,* *v.* ERIE RAILROAD COMPANY, a corporation, *Defendant-Appellant.*	Action at Law.

The appellant states the following grounds of appeal:

1. The trial judge erroneously refused to nonsuit the plaintiff when thereunto moved by counsel for the defendant, whereas said motion should have been granted on one of the following grounds urged in support of said motion:

(a) There was no evidence of any negligence on the part of the defendant as alleged in the complaint which was the proximate cause of the accident.

(b) The evidence disclosed without dispute that the plaintiff was not a person properly appointed as administratrix *ad prosequendum* and, therefore, there was no proper party plaintiff before the Court.

2. The trial judge erroneously refused to direct a verdict in favor of the defendant when there-

unto moved, whereas said motion should have been granted on one or more of the following grounds urged in support of said motion:

(a) There was no proper plaintiff before the Court to prosecute the action, as the undisputed evidence disclosed that the plaintiff had never been appointed by proper authority as administratrix *ad prosequendum.*

(b) The undisputed evidence in the case indicated that the defendant was not negligent in any one of the manners alleged in the complaint.

(c) There was no evidence that any negligent act of the defendant was the proximate cause of the accident.

(d) The plaintiff's intestate was guilty of contributory negligence as a matter of law.

(e) The plaintiff's intestate assumed the risk of the injury which he received.

3. The following questions were overruled:

(a) To the witness Mark L. Ryan:

"Q. Mr. Ryan, what was the authority that you had for issuing yesterday these letters, P-3, which you say are the original letters of your office upon the estate of Axel Michelsen."

"Q. The order which you refer to. I ask you whether or not this is the paper which I show you and is filed in your office?"

"Q. As part of this case?"

(b) To the witness John Hughes:

"Q. Is he a competent car inspector in your opinion?"

4. The trial judge erred in admitting into evidence exhibit P-3 of February 3, 1928.

Grounds of Appeal.

5. The trial court erred in denying defendant's motion to strike exhibit P-3 of February 3, 1928, from the record.

6. The trial court erred in allowing the plaintiff to amend the complaint to read "administratrix *ad prosequendum* of the estate of Axel Michelsen," in the place of "administratrix of the estate of Axel Michelsen."

7. The trial court erred in striking from the record all the testimony produced during the trial attacking or inquiring into the validity of exhibit P-3.

8. The trial court erred in refusing to admit in evidence the following exhibits marked for identification:

(a) Exhibit D-4 for identification, February 3, 1928.

(b) Exhibit D-3 for identification, February 3, 1928.

9. The trial court erred in striking from the evidence the following exhibit:

(a) Exhibit P-2.

10. The trial court erroneously refused to charge the following request to charge submitted by the defendant:

> "7. I charge you as a matter of law, that there is no evidence in the case of any negligence on the part of the defendant in shipping the said poles, and the plaintiff, therefore, cannot recover on that ground."

11. The trial court erroneously refused to charge the following request to charge submitted by the defendant:

"8. I charge you as a matter of law, that there is no evidence in the case that the defendant fastened the said poles, or was negligent in fastening said poles, and there cannot be any recovery on that ground."

12. The trial court erroneously refused to charge the following request to charge submitted by the defendant:

"13. There is no allegation in the complaint in this case that the defendant was negligent in failing to inspect the car or cars in question, and therefore, no recovery can be had for any alleged failure in that respect."

COLLINS & CORBIN,
Attorneys of Defendant-Appellant.

Service acknowledged Feb. 5, 1929.

ALEXANDER SIMPSON,
Attorney of Plaintiff-Respondent.

New Jersey Court of Errors & Appeals

ALMA MICHELSEN, Administratrix *ad prosequendum* of the Estate of AXEL MICHELSEN, deceased,
Plaintiff-Respondent,
vs.
ERIE RAILROAD COMPANY, a corporation,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT.

Statement of Facts.

This was a suit for damages for the death of Axel Michelsen. On the 22nd of December, 1925, the decedent was employed by the Frederick Snare Corporation (State of Case, P. 5). He went to the Erie Railroad Yard at 12th Street, Jersey City, to a car in possession and in control of the Erie, to get some logs which were on a car. The logs were on top of two flat cars (State of Case, P. 6). He, with a man named Swanson, went to one of the cars to unload the logs (State of Case, P. 7). The logs were held by stakes and wires. There were four stakes on each side and the wires were on top of the stakes binding the stakes, and the stakes held the logs (State of Case, P. 8). The men started to unload the logs in the usual way

(State of Case, P. 11, line 18). After the wires were cut decedent started to chop one of the stakes. Another stake that was rotten gave way (State of Case, P. 11, line 21; State of Case, P. 13, lines, 22, 23) and the logs rolled out on him and killed him. If the stake had not given way he would not have been killed. While he was chopping about three-quarters of an inch on one stake, another that was rotten gave way. Two stakes broke; one was produced in court that did not break. You could tell that the stake which broke was rotten and that it was in bad condition by inspection (Pp. 18, 19, 20, 21, 22, 23 and 24 of State of Case) and the rotten condition was not a latent defect. An inspection was made by the defendant of the car and its appurtenances which, if properly made, would have disclosed the condition of the rottenness of the defective stake (P. 119, State of Case, especially P. 126 from line 10 up to and including pages 127, 128 and 129). If the inspection had revealed, which it should, the condition, the stake would have been removed (Same pages).

POINT 1.

Negligence.

If this car which was a car that had not been loaded by the defendant was received by it in its Yard, a cursory inspection would have shown that one of the stakes was rotten, which inference is justified from the testimony, then the jury might find that, inasmuch as it was a receiving carrier, it was bound to use reasonable care to make a

cursory inspection of the car when it received it; that it was clear that any cursory inspection would indicate that the stake which broke was rotten and liable to give way at any moment. Either the cursory inspection was not made or it was improperly made, or, if made by the defendant, and it revealed the condition of rottenness and danger, the defendant presented this car for unloading without any effort to remedy this defect, which is negligence and would warrant a finding of a failure of duty. The Court of Errors and Appeals, in effect, says as follows, in the case of Griffin vs. Payne, 95 N. J. L., State of Case, P. 491: "that the defendant was chargeable with knowledge of the inherent danger, incident to one who, in the performance of his duty of opening the car, would necessarily incur without some warning or notice of the latent defect, and that such a situation, (rotten wood), imposed upon the defendant the duty of exercising due care to warn the consignee and its employes of this latent danger, by exhibiting upon the door, or at some point adjacent thereto, a sign or cautionary notice indicative of the danger incident to such act."

In the case of Cork vs. Lehigh Valley Railroad Company, 98 N. J. Law, Chief Justice Gummere speaking for the Court of Errors and Appeals on page 146 said: "We think the question of the existence of negligence *vel non* was a question to be determined not by the court but by the jury. A railroad company is under a legal obligation to its employes to make a reasonable inspection of cars hauled over its road at convenient places

during their journey for the purpose of discovering defects likely to occur in the course of transportation. Anderson vs. Erie Railroad Co., 68 N. J. Law 647, 649; Griffin vs. Director General, 95 *Id.* 490. The fact that the car door when the plaintiff attempted to open it was so out of repair that it fell from its fastenings was some proof that there had been failure on the part of the defendant company, or its agents charged with that duty, to make proper inspection of the condition of the door, and this is especially true in view of the fact that no evidence whatever was offered by the defendant company to show the performance of that duty. The contention that the plaintiff is conclusively presumed to have assumed the risk of the injury which he received we also consider to be without merit. Viewed in the aspect most favorable to the defendant company, the question was one for the jury to determine, and not the court. If the jury had found, as they might properly have done, that there had been a failure to make proper inspection of the car, and that this failure was the proximate cause of the accident, then the neglect was that either of the defendant itself or of a fellow-servant of the plaintiff employed by the company to make proper inspection. Manifestly, the danger out of which the risk arose was not obvious, so far as the testimony discloses." In the foregoing case no inspection was made. The case here is much stronger because an inspection was made of the stakes by a car inspector who said he knew the surface manifestations of rotten wood, and yet the car was passed and the stakes were passed. It was therefore for the jury to say whether a

proper inspection had been made. In the witness Swanson's testimony on State of Case, P. 32, if believed by the jury, was sufficient to indicate surface indications of rottenness which were at the end of the stake where it came out of the bottom of the socket. There were red V-shaped patches on the outside. The stake produced in Court showed no signs of rottenness and it was the breaking of the rotten stake that caused the bending of the stake produced in Court. The witness, Swanson, was a wood worker and had a knowledge of wood conditions (State of Case, P. 35, lines 19 to 40):

"Q. In other words, you would have taken the second one out from the north end? A. The rotten one.

Q. In other words, in order to see this you would have to get quite close to it, that is what you mean? A. That is right.

Q. Get right up and look at it, is that it? A. Yes, sir.

Q. And I suppose you would have to have some knowledge of wood? In other words, you know as a carpenter, I suppose, that redness on a piece of oak indicates that there is some rottenness inside? A. Yes, sir.

Q. But you would have to know something about wood to know that, wouldn't you? A. Yes, sir.

Q. Above the socket on the outside you could not see from the outside that it was rotten? A. No, sir.

Mr. Broadhurst: That is all."

Above the iron socket on the outside there was no indication to Michelsen that the wood was rotten. The indication was at the bottom of the wood where it came out of the socket (State of Case, P. 35). The same witness so testified on direct on State of Case, Pp. 20, 21, 22, 23 and 24 to line 25.

From line 40 on page 23 to line 26 on page 24 we have the following testimony:

"The Court: Now, from the experience you have had, are you in a position to say whether or not that red condition there was a rotty condition or due to paint or due to some other discoloration?

The Witness: No, your Honor, it is red when it starts to rot.

The Court: From your experience in the laying business could you say whether or not that reddish condition was indicative of any rottenness in that log of itself alone, not getting down and looking in, but just looking at that color.

The Witness: Yes, sir, that I can.

The Court: And that indicated what?

The Witness: That indicates rot on the inside.

The Court: Do you know what character of wood the stake was made of?

The Witness: Yes, sir, I do.

The Court: What was it?

The Witness: Oak."

So from this testimony that there were surface indications of rottenness which would be observable to one inspecting the car, as the car inspector said he did (State of Case, Pp. 129 and following and 126, 127, 128 and 129), who, as the car inspector testified, had knowledge of wood, which would indicate the rottenness of the stake, left it clearly for the jury to say whether the rottenness would be apparent upon a cursory inspection, and whether it was remedied or not; and it was for the jury who had a right to say that either the inspection was not a proper cursory inspection, as laid down in the cases of Griffin vs. Payne, and Cork vs. Lehigh Valley, *supra,* or if the inspection was properly made it revealed the rotten con-

dition of the stake, and the condition was not remedied. In either event, they had a right to find the defendant guilty of negligence. In the brief of the appellant they cite State of Case on P. 18 the case of Anderson vs. Southern Railway, 2 Fed. (2nd) 71. The case in 2 Fed. (2nd) 71, is "The Hurricane," being an admiralty case. The Anderson case is found in 20 Fed. (2nd) 71. The facts there are different than the facts in this case. This is a case from South Carolina and it is a federal case, and being a federal case, the rule in the Federal Court is that where there is a scintilla of evidence that will not prevent the direction of a verdict, which is not the rule in the state courts. In the Anderson case, *supra,* the rule laid down in point 5 of the syllabus is as follows on page 73: "Where there is no conflict in the evidence, or where no materially different inferences may be reasonably drawn from the evidence, a verdict in accordance with the law may be directed, citing Delk vs. Railroad, 220 U. S. 587." In addition to that the load began to go in the Anderson case as soon as the wires were cut, which was not the situation in the instant case because the condition was safe after the wires were cut; nor was there any proof of a defective stake in the Federal case. The contention of negligence in the Anderson case was laid upon the insufficient number of stakes, the case holding that the load was secure until the deceased himself destroyed the security, that is, by having the wires cut, so that this case does not apply because the rule for bringing a verdict of nonsuit is different in a Federal Court action from the State Court; and secondly, the facts are not the same as in the instant

10 20 30 40

case. In the Anderson case, *supra,* the Court on page 73 said: "The evidence does not disclose any fault or negligence on the part of the defendant" and further it states that "the condition of the car was apparent to anyone who would look." This is not so in the instant case because there was no danger after the wires were cut. There was no proof of a rotten stake in the Anderson case. The thing there was an improper number of stakes and the Court said: "It is uncontradicted that, as the wires were cut, the load began to shake and settle, and that just before the last wire was cut, while Blackman and the deceased were on top of the load, Blackman said to the deceased, 'Tom, when I cut this wire, if these stakes break, what is to become of me and you'? Deceased said, 'We will try to stay on the south side; go ahead and cut.' Blackman went around and cut the wire, and everything went; all the stakes giving way on both sides of the car." This is an entirely different situation from the instant case. The other following cases cited by the appellant do not contravene the rule in Anderson vs. Erie, Griffin vs. Payne and Cork vs. Lehigh Valley, *supra.*

Contributory Negligence.

There is no evidence that the intestate of plaintiff was anywhere where he could see the exterior condition which would indicate the rottenness of this stake, at the bottom of the stake, below the metal socket. He had a right to assume that the car had been inspected by the Erie and that a cursory inspection showed it to be safe, and there-

fore, he was not chargeable with contributory negligence.

Assumption of Risk.

This is not a master and servant case; therefore, the doctrine of assumption of risk is not in the case. All that is in the case is negligence and contributory negligence.

POINT 2.

The plaintiff was a proper party because it was shown that letters *ad pros* had been granted to her, both by proof and by the letters (State of Case, P. 183, Ex. P. 3). The letters are dated January 27, 1926. Under the case of Grijnuk vs. McAdoo, 95 N. J. L. 256, this was the proper proceeding. There an amendment was allowed. In this case no amendment was necessary or, if necessary, could be made in the Court of Appeals because it appears she was a proper party plaintiff. The case has already been considered in the Supreme Court on the question of damages, and the verdict was reduced to $25,000. In the case of Grijnuk vs. McAdoo, *supra,* the situation was similar to the instant case except the reverse as to the kind of administration. In Grijnuk vs. McAdoo, the plaintiff had been made administrator *ad pros* and at the close of the case there was a motion to non-suit because the plaintiff was not general administrator. Letters were applied for and granted by the Surrogate with full administration as required by the federal statute, and an amendment was allowed, and the case proceeded to judgment, which was affirmed, the Court hold-

ing that such a procedure was proper. In the instant case the position is better because the record shows that letters of administration *ad pros* were granted by the Surrogate as appears by Ex. P. 3, dated January 27, 1926, and testimony was taken in an attempt to go behind these letters, but the Court properly held that the letters could not be collaterally attacked. The late case of Wilson vs. Dairymen's League, decided by this Court on October 15, 1928, and found in 143 At. 454, seems to the plaintiff to be dispositive of this question, as it is on all fours with the instant case. In the case of Wilson vs. Dairymen's League, Point I of the syllabus holds: "A suit under the Death Act (2 Comp. St. 1910, Pp. 1904-1911, Pars. 1-9) was instituted by the plaintiff as the general administratrix of the estate of the deceased. The action was commenced within 6 months. The error in the designation of the plaintiff was not discovered until after 24 calendar months. At the trial an amendment designating the plaintiff as administratrix *ad prosequendum* was allowed over objection. The trial judge then directed a nonsuit on the ground that at the time of the appointment of the plaintiff as administratrix *ad prosequendum* the limitation as to the time in which suit could be brought under the Death Act had elapsed and the right of action had become barred. This ruling held to be erroneous."

See also the case of Brice v. Atlantic Coast Rwy., 132 Atl. 253, where an amendment was allowed.

POINT 3.

The complaint clearly charged, as part of the negligence, "fastening of the said piles." The proof was that a rotten stake fastened the piles and the proof was clearly within this allegation of the complaint—that the negligence was fastening the piles and the proof was a rotten pile. The failure of the Court to charge the requests of the defendant specifically did not harm the defendant because the charge of the Court covered every contention of the defendant (State of Case, Pp. 163, 164, 165 and 166). The brief of the appellant has three points, none of which are headed "Contributory negligence." The plaintiff insists that there was no contributory negligence as a matter of law. The deceased could assume the defendant had done its duty. He need not inspect and look at the ends of the stake to see below the end of the iron socket. That was the duty of the defendant and the defendant said it was done. See testimony of the car inspector (State of Case, Pp. 119 to 130).

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

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ALEX. SIMPSON,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

New Jersey Court of Errors and Appeals

ALMA MICHELSEN, Administratrix *ad prosequendum* of the Estate of Axel Michelsen, deceased,
Plaintiff-Respondent,

v.

ERIE RAILROAD COMPANY, a corporation,
Defendant-Appellant.

Action at Law.
On Appeal from Supreme Court.

BRIEF OF COLLINS & CORBIN IN BEHALF OF THE APPELLANT.

(1)

Statement of the Case.

This appeal brings before this Court for review, a judgment of the Supreme Court in favor of the plaintiff-respondent (hereinafter called the plaintiff) and against the defendant-appellant (hereinafter called the defendant), in an action wherein the plaintiff sought to recover damages for the pecuniary loss sustained by herself and the next of kin of Axel Michelsen, deceased, due to his death on December 22, 1925. The plaintiff's intestate was an employee of the Frederick Snare Corporation, which company was engaged in constructing a viaduct leading from the new vehicular tunnel in lower Jersey City to the Bergen Heights,

in that City. At the time of the accident, plaintiff's intestate was engaged with other employees of the Frederick Snare Corporation in unloading a car of wooden piles which had been delivered to the Frederick Snare Corporation by the defendant in its yard at Monmouth and Twelfth Streets, Jersey City, at which point the viaduct was being constructed over the defendant's yards. While so engaged, the stakes which held the piles upon the car gave way, letting the piles roll from the car on to the decedent.

The case was tried before Honorable HENRY E. ACKERSON, JR., in the Hudson Circuit, and the jury rendered a verdict in favor of the plaintiff for $46,800 (p. 199, lines 1-10). A rule to show cause was allowed the defendant by the Trial Judge, returnable before the Supreme Court, reserving all exceptions noted during the course of the trial for argument on this appeal (p. 200, lines 10-20). The only question argued on the rule to show cause was the excessiveness of the verdict (p. 201, lines 1-10). The Supreme Court in an opinion filed January 16, 1929, held that the verdict was excessive and unless the plaintiff would consent to a reduction of the award to $25,000, the rule to show cause would be made absolute (p. 202-204). On January 21, 1929, the plaintiff filed her written consent to a reduction of the verdict and judgment final was entered in that Court February 8, 1929, in favor of the plaintiff and against the defendant for $25,000 (pp. 205-206). The present appeal is now taken to this Court by the defendant to consider the legal questions presented by the record and reserved for argument in the rule.

(2)

Grounds of Appeal.

The grounds of appeal which will be argued are as follows (pp. 208-211):

1. The Trial Judge erroneously refused to nonsuit the plaintiff when thereunto moved by counsel for the defendant, whereas said motion should have been granted on one of the following grounds urged in support of said motion:

(a) There was no evidence of any negligence on the part of the defendant as alleged in the complaint which was the proximate cause of the accident.

(b) The evidence disclosed without dispute that the plaintiff was not a person properly appointed as administratrix *ad prosequendum* and, therefore, there was no proper party plaintiff before the Court.

2. The Trial Judge erroneously refused to direct a verdict in favor of the defendant when thereunto moved, whereas said motion should have been granted on one or more of the following grounds urged in support of said motion.

(a) There was no proper plaintiff before the Court to prosecute the action, as the undisputed evidence disclosed that the plaintiff had never been appointed by proper authority as administratrix *ad prosequendum.*

(b) The undisputed evidence in the case indicated that the defendant was not negligent in any one of the manners alleged in the complaint.

(c) There was no evidence that any negligent act of the defendant was the proximate cause of the accident.

4. The Trial Judge erred in admitting into evidence Exhibit P-3 of February 3, 1928.

5. The Trial Court erred in denying defendant's motion to strike Exhibit P-3 of February 3, 1928, from the record.

6. The Trial Court erred in striking from the record all the testimony produced during the trial attacking or inquiring into the validity of Exhibit P-3.

7. The Trial Court erred in refusing to admit in evidence the following exhibits marked for identification:

(a) Exhibit D-4 for Identification, February 3, 1928.

(b) Exhibit D-3 for Identification, February 3, 1928.

8. The Trial Court erred in striking from the evidence the following exhibit:

(a) Exhibit P-2.

9. The Trial Court erroneously refused to charge the following request to charge submitted by the defendant:

> "7. I charge you as a matter of law, that there is no evidence in the case of any negligence on the part of the defendant in shipping the said poles, and the plaintiff, therefore, cannot recover on that ground."

10. The Trial Court erroneously refused to charge the following request to charge submitted by the defendant:

> "8. I charge you as a matter of law, that there is no evidence in the case that the defendant fastened the said poles, or was negligent in fastening said poles, and there cannot be any recovery on that ground."

(3)

BRIEF OF THE ARGUMENT.

I.

There was no evidence of any negligence on the part of the defendant as alleged in the complaint which was the proximate cause of the accident.

This point is raised by the refusal of the Trial Judge to nonsuit the plaintiff or to direct a verdict in favor of the defendant when thereunto moved at the conclusion of the plaintiff's case and of the defendant's case respectively, by counsel for the defendant. Exceptions were noted to the ruling of the Trial Court on those motions (p. 58, lines 10-20; p. 159, line 10; p. 160, line 10). The exceptions noted to the rulings of the Trial Court on those motions are preserved for argument on this appeal in the grounds of appeal (p. 208, line 20 to p. 209, line 20).

The alleged negligence of the defendant was stated in the complaint as follows (p. 2, lines 20-30):

> "6. The negligence of the defendant consisted in this:
>
> "That while the intestate of plaintiff was aiding in the unloading of certain piles from a flat car of the defendant, by reason of the failure of the defendant to use reasonable care in the loading, handling, shipping and fastening of the said piles, the said piles were caused to roll and fall from said flat car, against and upon the intestate of the plaintiff, killing him."

It will be observed that the complaint charged negligence in four respects, namely, (1) loading;

(2) handling; (3) shipping; (4) fastening. The Trial Judge specifically charged the jury as requested by the defendant, that there was no evidence the defendant loaded the poles upon the flat cars or took any part in handling of the said poles, and, therefore, no verdict could be found against it on those grounds (p. 171, lines 20-40). The Trial Judge also eliminated any negligence on the part of the defendant in shipping the poles (p. 172, lines 1-10). In fact, the single issue on the question of negligence, which the Trial Judge submitted to the jury, was whether or not the accident was caused by a defect in the stake supporting the logs on the north end of the car, which defect could have been discovered by a cursory examination, that is, not an examination of a very minute character, but one for defects visible or discernible by ordinary examination (p. 163, lines 20-40). This is the correct rule of law as enunciated by this Court in *Anderson* v. *Erie R. R. Co.*, 68 N. J. L. 647. It is our contention under this point that there was no evidence of any defects in the stakes referred to which a cursory examination would disclose. As the presentation of this point requires a summary of the evidence, we will refer to the witnesses in the order in which they were called.

Swanson worked for the Snare Company with decedent, driving and unloading piles. On December 22, 1925, there were two flat cars containing piles in the yards of the defendant at Twelfth and Monmouth Streets, Jersey City, which he and decedent went to unload. The piles were held on the cars by four stakes on each side with wires fastened from the stake on one side of the cars, to the corresponding stake on the other side of the cars. They first cut the wires that were fastened to the two center stakes (p. 6, lines 1-40; p. 8, lines 20-40). After cutting the wires, they lifted

out the two center stakes. They then cut the wire fastened to the stakes on the south end of the cars and then the wire on the north end of the cars. The decedent then started with an axe to cut the stake on the south end of the cars (p. 10, lines 1-40). While doing this the two remaining stakes gave way and the logs rolled off the car. The decedent ran, but stumbled on one of the adjoining tracks about ten feet away, and the rolling piles caught up with him and rolled on him, causing injuries from which he died (p. 11, lines 20-40). After the accident he examined the two stakes and found the one that had been on the north end was "kind of rotten inside" (p. 13, lines 10-20; p. 15, lines 20-30; p. 16, lines 1-10). You could not see that it was rotten inside from an examination of the outside (p. 16, lines 10-20). They did not inspect the stakes before cutting the wires (p. 16, lines 20-30). While it was on the car you could not tell that it was rotten inside and it was only after it was off and broken that you could see it if you looked at it (p. 19, lines 20-30). The stakes were set into a socket or stirrup on the side of the car. The lower end was sharpened to a point and fit in this stirrup or socket about four inches below the bottom of the stirrup (p. 20, lines 1-40). His inspection of the stake after the accident and after it had been removed from the stirrup, showed that at the bottom or pointed end of the stake, it was red in color. This redness also showed on the side of the stake for several inches up from the bottom (p. 21, lines 20-40). This redness was below the stirrup (p. 22, lines 10-30). You could not tell from this redness alone, without anything further, that it was rotten, but that fact could only be disclosed after the stake was cut or broken (p. 22, lines 30-40). From his knowledge of wood he said that when

oak begins to turn red, it indicates that it has begun to rot on the inside (p. 23, line 20, to p. 24, line 20). The stakes were of the kind customarily use for holding piles on cars (p. 25, lines 20-30). They were eight or nine feet high (p. 26, lines 30-40), and about six inches in diameter with the bottom end that fit in the socket or stirrups sharpened so as to reduce the size to fit (p. 27, lines 10-20). The stirrups on the ends of the cars were located about ten feet from the end of the car. The next stirrups from which they had removed the two stakes were located about four feet from the end stirrups (p. 26, lines 1-20). The stirrups are nothing more than an iron band fastened permanently on the side of the car, open on top and bottom, in which the stakes can be set (p. 27, lines 1-10). When they took the two center stakes out before the accident, the decedent was on top of the load of piles pulling on the top of the stakes, and the witness was on the ground pushing them up (p. 28, lines 1-20). After these two stakes had been removed, the piles on the car were leaning against the two end stakes so that they could not be removed in the same way (p. 30, lines 30-40). The decedent was chopping the stake on the south end of the car at about the level of the car floor (p. 30, lines 1-10). He had cut into it about an inch with the axe, when it bent and broke, as well as the one on the north end. The stake on the south end which the decedent was chopping was offered in evidence as Exhibit P-1, and shows that the stake did not snap, but bent over, apparently permitting the top of the load to come off the car (p. 31, lines 1-30). The witness was standing within four feet of the decedent watching him chop the stake, and he could not say which of the two stakes gave way first, as the first thing he knew, the logs came rolling off the car (p. 31, lines 30-35). The

cars were about 42 feet long and the piles were about 60 feet long (p. 31, lines 35-40). He was 50 or 60 feet from the north stake, as was the decedent (p. 32, lines 1-10). The reddish color on the bottom end of the north stake which he observed after the accident, was in a V shape on the side at the bottom, with the point of the V toward the top of the stake, and it extended up about three inches (p. 32, lines 10-40. This was the only thing that could be observed on the outside of the stake at all. When lifting out the center stakes, he was within four feet of this stake and did not observe the red marks on it at that distance (p. 35, lines 1-10). In order to see the red mark you had to get right close to the stake (p. 35, lines 10-20). In order to know that the red mark indicated a decay was going on inside of the stake, it was necessary to have a knowledge of oak wood, as you could not tell from the outside that decay was going on inside (p. 35, lines 20-40). Even to see the discoloration it was necessary to get right up alongside of the stake and examine it (p. 37, lines 20-30). The witness was recalled during the second day of the trial and the plaintiff's attorney endeavored to get him to change his testimony that you had to be an expert in wood in order to know that the redness he observed on the outside of the stake indicated a decay was going on inside of the stake. He did not succeed, however, as all the witness testified to upon being recalled, was that you did not have to be an expert to see the red mark on the outside of the stake if you examined it closely. He did not change his previous testimony that this red mark would indicate anything as to the condition of the inside unless you had an expert knowledge of oak wood (p. 72, lines 1-30).

Anderson, a foreman of the Snare Company, came to the scene of the accident after it occurred.

He inspected the stakes after the accident (p. 39, lines 1-40). The one on the north end was red in color, or, as the witness described it, jelly color. This indicated to him that the stake was rotting on the inside (p. 40, lines 1-40). He stated that both stakes were the same (p. 39, lines 30-40). The stake on the south end being Exhibit P-1 in evidence, he was asked to demonstrate what on it he considered would indicate a rotten condition on the inside, but was unable to do so, and in fact, Exhibit P-1, although broken, does not appear to be rotten in any respect, although it has red on it on the outside, which is apparently the inner bark (p. 42, lines 30-40). He observed the condition of the stake at the bottom of it and could not tell by looking at the bottom that it was rotten (p. 43, line 40 to p. 44, line 10). This decayed condition was on the inside of the stake (p. 44, lines 10-15). It did not break, but bent like P-1. The fibers of the wood were still holding the stake together after the piles rolled off the car (p. 40, lines 15-25). He said that the stake was red in color for some distance from the bottom up the stake (p. 46, lines 30-40). When asked to explain what color he meant by jelly color, he referred to a neck tie in the Court which was brown (p. 50, lines 20-30). The stake had bark on it which was also brown in color, and this bark was only off the stake in spots. He could not tell how far up the discoloration on the stake extended unless all the bark was peeled off (p. 53, line 30 to p. 54, line 10). Unless a person had a knowledge of wood and an experience in dealing with wood, you could not tell from the outside that the stake was rotting inside (p. 54, lines 20-30).

The above represented the entire testimony of the plaintiff on the question of the defendant's negligence and with the case in that posture, a motion for a nonsuit was made on the ground that

there was no evidence of any negligence on the part of the defendant as alleged in the complaint. This motion being denied and exception being noted, the defendant proceeded to prove the length of time the car was in its possession and the inspection that it made.

Stein, one of the defendant's conductors, testified that the cars in question were Pennsylvania Railroad cars received from the Pennsylvania Railroad Company at Marion, a local transfer point in Jersey City, and from there taken to Croxton, the adjoining transfer point of the Erie Railroad Company in Jersey City (p. 118, lines 10-20). He took them, upon their arrival in Croxton at 6:30 P. M., December 20, 1925, in a train to Weehawken, where he arrived about 30 minutes later, or 7 P. M., December 20, 1925 (p. 117, lines 1-20).

Rankin, one of the defendant's conductors, took the cars from Weehawken and delivered them at the point where the accident happened. His records showed there were eight cars of piles, seven of which belonged to the Pennsylvania Railroad Company, and one to the Seaboard Air Line. His original records, which were offered in evidence, showed the movement and placing of the cars. They were placed in the Monmouth Street yard at 8:10 P. M., December 21, 1925, or approximately 24 hours after their arrival at Weehawken (pp. 107-110). They left Weehawken at 7 P. M., or about one hour and ten minutes before they were placed (p. 112).

Tomecke was a car inspector of ten years' experience, located in the Weehawken yards. Records are kept by him of the inspection of cars, which records show if anything is defective on the cars. No record is made if the car passes inspection (p. 119, lines 20-40). He inspected the train of cars, of which these cars were a part, on De-

cember 20th, which was a Sunday, and he was the only inspector working that day (p. 120, lines 1-30). The inspection consisted of looking underneath the cars at the brakes, brake rigging, brake hangings and safety appliances. It also consisted of looking at the sides of the car to see if anything was broken or if the load had shifted. He walks from car to car making this inspection. If any small repair is required he fixes it. If a heavy repair is required, the car is marked to go to the shop and taken out of the train (p. 121, lines 1-40). He produced his record of the inspection of this train and it showed in his handwriting, that he inspected the train which conductor Stein had brought in from Croxton to Weehawken, of 55 cars, at 7:40 P. M. on December 20, 1925, and there were no exceptions noted on the cars and piles which were seven in number, six Pennsylvania cars and one Seaboard Air Line car (p. 124, lines 1-40). It took him approximately one and a half hour to inspect this train of cars (p. 125, lines 20-30). It was at night and he had a large inspector's lantern to see (p. 126, lines 1-10). There were only a few cars containing piles of this character that had come through the yard during this time (p. 126, lines 10-30). In looking at the side of the cars, he looked to see if the stakes were broken or cracked (p. 126, lines 30-40). The mere fact that a stake was reddish in color at the bottom of it, would not indicate to him that the stake was rotting inside or that anything was wrong with the wood. There is no way that he could make an inspection of the inside of the stake (p. 127, line 10 to p. 128, line 20). If the stake was broken, or cracked, or bent, he would hold the car until a new stake was put in (p. 128, lines 20-30). Cars come through with stakes of various kinds of wood and all different colors (p. 131, lines 1-15).

Mr. Taylor, field engineer for the Snare Company, testified from records that he signed for the receipt of these cars prior to the accident (pp. 136-140).

Milanowicz was an eye-witness to the accident, seated in a passenger car looking out the window, about 50 feet away (p. 144, lines 20-40). He saw decedent and Swanson take the wires from the top of the stakes and remove the two center stakes. He observed decedent chopping the south stake and while he was doing this, the stakes gave way letting the load roll off the side of the car. He could not see which stake broke first, and they both appeared to go at the same time (p. 146, lines 1-40).

Hughes, foreman of car inspectors, having 17 years' experience as a car inspector, testified that inspector Tomecke worked under him for the past seven years. The inspection made of cars of foreign lines passing over the defendant's line, is not a minute inspection, but consists of passing along the side of the car and looking for noticeable defects. The mere discoloration of the outside of a stake would not indicate any rotting going on inside the stake (p. 156, lines 30-40).

The above is a complete resume of the defendant's testimony, and at its conclusion a motion for a direction of verdict was made on the ground that there was no evidence on the part of the defendant as alleged in the complaint, which was the proximate cause of the accident. To the Court's denial of the motion, an exception was noted.

An examination of the cases will, in our opinion, show that on the evidence adduced in this case, the Trial Court should have directed a verdict of nonsuit or in the defendant's favor, instead of submitting the issue to the jury.

In *Anderson* v. *Erie R. R. Co.*, 68 N. J. L. 647,

the plaintiff, a brakeman employed by the defendant, fell and was injured while descending from a box car in the defendant's yard at Weehawken. The cause of his fall was that the fastening of the grab-iron on top of the car gave way as he threw his weight upon it. The evidence tended to show two defects in the fastening—one, the use of a screw running less than an inch into the wooden roof, instead of a larger screw or a bolt running entirely through the roof and held by a nut underneath; the other, deterioration of the wood through which the screw ran, indicated by the fibers adhering to the thread of the screw after it was wrenched away. It was proved that the car did not belong to the defendant, but was delivered to it loaded at Marion, Ohio, and transported from there to Port Jervis, New York, over the defendant's line. It was inspected at Port Jervis by the defendant's inspectors and put in a train which carried it to Weehawken, where it arrived in the morning, and the accident happened about noon on the same day of its arrival. Justice DIXON, writing the opinion of this Court, defined the duty of the defendant in the following language (p. 649):

> "We think, however, that the weight of reason and authority is in favor of these propositions:
>
> "FIRST.—That, on receiving a car for transportation, the company is entitled to assume that the car had been properly constructed of suitable materials, for all the purposes for which the owner intended it to be used. *Ballou* v. *Chicago, &c., Railroad Co.*, 54 Wis. 257; *Gutridge* v. *Missouri Pacific Railway Co.*, 94 Mo. 468.
>
> "SECOND.—That, on receiving the car, the company is bound to make such examination as would be likely to discover conditions rendering a car, so constructed, unfit for safe

transportation on the company's line. This examination has been called a cursory examination—an examination not of a very minute character (*Richardson* v. *Great Eastern Railway Co.*, 1 C. P. Div. 342); an inspection for defects visible or discernible by ordinary examination. *Eaton* v. *New York Central and Hudson River Railroad Co.*, 163 N. Y. 391; *Gottlieb* v. *New York, Lake Erie and Western Railroad Co.*, 100 *Id.* 462; *Dooner* v. *Delaware and Hudson Conal Co.*, 164 Pa. St. 17; *Baltimore and Potomac Railroad Co.* v. *Mackey*, 157 U. S. 72.

"THIRD.—That, at convenient places during the journey, the company is bound to make the same inspection and tests of such a car as it should make of its own car, for the purposes of discovering defects likely to occur in the course of transportation.

"Under these rules we are unable to discern any evidence of fault in the defendant contributing to the plaintiff's accident.

"The defect of which he complains respecting the screw used to fasten the grab-iron was one in construction, which the defendant had a right to assume did not exist; and the same statement is probably true regarding the unsoundness of the wood. Neither of these defects was discoverable by ordinary inspection or by anything short of a very minute examination, and neither of them could occur in the course of transportation.

"We therefore conclude that the motion to direct a verdict for the defendant should have been granted, and because of its refusal the judgment of the plaintiff must be reversed, and a *venire de novo* awarded."

In the case of *Griffin* v. *Director General of Railroads*, 95 N. J. L. 490, a recovery for the plaintiff was affirmed, but the case is clearly distinguishable from the one at bar. In the case cited, the plaintiff was engaged in opening the side door of a freight car on the Pennsylvania Railroad, in

which goods consigned to his employer had been transported. The door, owing to the decayed condition of the adjoining wood, into which its hinges were fastened, suddenly fell out upon the plaintiff, causing the injuries for which suit was brought. It appeared that the door which fell had a wooden board or cleat across it about 7 feet long, nailed to the car. The plaintiff, as this Court pointed out, might reasonably infer that this board was to afford an additional fastening to secure the lock and thus prevent the car from being opened and the goods stolen. As a matter of fact, the board had been placed there because the carrier knew that the door was in fact defective, and the purpose of the board was to hold the door in place to prevent it from falling out. This Court, in an opinion by Justice MINTURN, held as follows (p. 492):

> "In this instance it is manifest from the testimony, that the defect did not inhere in the door itself, nor in the lever or lock which was used to fasten and unfasten it; but in the decayed portion of the wood work or 'jamb,' as it is termed, upon which the door hung, or from which it was supported by means of hinges. The obvious purpose, therefore, as the jury might infer, of nailing the board or cleat across the door was not to keep it from opening in transit, but to prevent it from falling by reason of the decayed condition of its supports; and such being the purpose, the defendant, *ipso facto*, became chargeable with knowledge of the inherent danger, incident to one who in the performance of his duty of opening the door, to unload the car, would necessarily incur without some warning or notice of the latent danger, he being unconscious and ignorant of the impending danger incident to his undertaking. Such a situation imposed upon the defendant the duty of exercising due care to warn the consignees and its employees of this latent danger, by exhibiting upon the door

or at some point adjacent thereto, a sign or cautionary notice, indicative of the danger incident to such act. Upon such reasoning and inferences this verdict is supportable under the testimony, and is consistent with the fundamental legal theory upon which the doctrine of negligence is rested, *i. e.*, failure upon the part of one cognizant of the facts and charged with the duty of due care, to exercise reasonable foresight to anticipate probable harm under the circumstances. *Munroe* v. *P. R. R.*, 85 N. J. L. 688; *Soriero* v. *P. R. R.* 86 *id.* 642; *Higgins* v. *Goerke Co.*, 91 *id.* 464; *Beck* v. *Director General, ante* p. 158.

"In consonance with this legal obligation it is declared, 'Since knowledge of the parties is the test of liability, the test in any negligence action becomes one of comparative knowledge —the knowledge of the defendant opposed to the knowledge of the person injured. Liability is established when it is shown that the peril being of the defendant's creation, was known to the defendant, but not to the person injured.' 20 R. C. L. 14, and cases cited.

"It is not the case of the failure to discover a defect after reasonable inspection, but a situation presenting knowledge of a dangerous condition, an inefficient attempt to remedy it, for the purpose of transit and a failure to foresee that without some exhibition of ordinary and reasonable prudence, by notice indicating the latent danger, damage might naturally result to one lawfully engaged in unloading the freight.

"Such was the gravamen of the complaint, and there being in the case sufficient testimony to warrant that factual inference, both the refusal to nonsuit, as well as the refusal to direct a verdict, were proper.

"The judgment will therefore be affirmed."

It is to be observed that the Director General of Railroads had control of all the railroad systems over which the car in question passed, from its point of origin to its point of destination, and

therefore, was in the position of having furnished a car with a defective door. As Justice MINTURN pointed out, the responsibility was not in failing to discover the defect by inspection, but a situation presenting knowledge of a dangerous condition and an inefficient attempt to remedy it. Further, even if it should be considered that each railroad, though under Federal control, was to be considered as a separate railroad, the last carrier who delivered the car, on inspection would have observed the wooden cleat fastening the door and thus have brought to its attention the fact that there was something defective with the door, for normally this wooden cleat would not be there.

In *Cork* v. *Lehigh Valley R. R. Co.*, 98 N. J. L. 143, this Court held that the question of the defendant's negligence was for the jury, where the plaintiff, a railroad policeman, attempted to open a car door in the railroad yard and the door fell from its hanging position on to him. The Court arrived at this conclusion, however, holding that where the door was so out of repair that it fell from its normal fastenings while the plaintiff was attempting to open it, it was for the jury to infer whether a proper inspection of the condition of the door would not have disclosed its defects. In other words, the doctrine of *res ipsa loquitur* was applied, and correctly so, because the car was still in the custody and control of the defendant, whereas, in the case at bar *res ipsa loquitur* could not apply, for the car at the time of the accident had been delivered to decedent's employer and was not in the custody and control of the defendant.

A case almost identical in facts is *Anderson* v. *Southern Ry Co.*, 2 Fed. (2nd) 71 (4 C. C. A.). In the case cited, the defendant received a flat car from a connecting carrier loaded with telegraph poles. The poles were held in place on the car by

eight upright stakes, the butts of which were fastened in sockets attached to the car for that purpose. These stakes were braced by twisted wire lines running from one side of the car to the other, tied to the stakes. The stakes were green pine saplings about five inches in diameter in the center and cut in the butts so as to go in the sockets. Defendant placed the car on the consignee's side track for unloading, and two days after a gang of men, one of whom was the plaintiff, started to unload the car. They cut the wires running from the stakes and as the last wire was cut, the stakes broke on both sides of the car, rolled off and injured the plaintiff. It was claimed that the stakes were not sufficiently strong or sufficiently numerous, and that they should have been hard wood or steel. It was also proven that one of the stakes was mildewed and thereby weakened. The Court pointed out that it was undisputed that in loading poles of this character, new and different stakes had to be used with each load, as the stakes were not part of the car and the car could be used for the purpose of hauling other classes of freight with different stakes or without any stakes whatever; that under the circumstances, it could hardly be held that an insufficient number of stakes or stakes of an inferior quality could constitute a defect in the car itself. It was further pointed out in the opinion, that the car was properly loaded, because the load had been carried safely over the various lines from point of origin to point of destination, and that up to the time the plaintiff began to unload the car, nothing was wrong with the load or the stakes. It was only when the wires had been cut, thus removing an additional support to hold the stakes in position, that the load, pressing against the side of the stakes, caused them to break. The Court held that the evidence did not disclose

any fault or negligence on the part of the defendant company or its employees, and it had discharged its entire duty in connection with its transportation and delivery of the car; that the condition of the car was apparent to anyone who would look at it; that it was inspected while on this line and delivered with its load intact and secure at the point of destination.

In *Lewis* v. *N. Y., O. & W. Ry. Co.*, 210 N. Y. 429; 104 N. E. 944, the plaintiff was employed to unload cars of hay delivered to his employer. A box car loaded with hay was delivered over the defendant's railroad on to his employer's side switch. While the plaintiff was forcing open the door of the car with a crowbar, some bales of hay which had been piled end upon end close to the door, fell out and struck him. There was evidence that the customary method of loading a car of hay was to lay the bales flat in the space near the door. The defendant did not load the car, but merely sealed the door after it had been loaded. The Court held that the defendant was not responsible for not inspecting the condition of the load inside of the car and pointed out that if the car was improperly loaded, that was the liability of the party loading it and not the carrier.

In *Gulf West Texas & Pacific R. R. Co.* v. *Wittenbeit*, 108 S. W. 150, 14 L. R. A. (N. S.) 1227, the defendant transported a tank car full of oil from a connecting carrier to the consignee, and placed it on the consignee's siding for unloading. The method of unloading the tank was to connect a piece of hose with the end of an escape pipe beneath the bottom of the tank car. It was necessary before connecting the hose, to remove a tap from the end of the escape pipe. The plaintiff removed this tap and the oil flowed upon him, causing the injuries sued for. There should have

been a valve which, when properly closed, would prevent the oil from flowing when the tap was removed. If this valve had been working, the accident would not have happened. No one could tell whether the valve was set or not without going upon the car and removing the cap of the dome and ascertaining the position of the rod which controlled it. When the car was received by the defendant, it was inspected, but the inspector did not go upon the top of the tank nor remove the cap to ascertain whether the valve was set. The Court, in finding for the defendant, said:

> "It was the duty of the railroad company, upon receiving the tank car, to make a reasonable inspection of its condition with reference to its fitness for transportation; but we have been unable to find any authority which goes to the extent of holding that it was the duty of the railway company, under such facts, to inspect the manner of loading the car so as to ascertain whether the freight was so arranged as to be safe to persons who might be called upon to remove it from the car * * * In order to make the inspection claimed, the inspector at Victoria would have been required to go upon the top of the oil tank, unscrew the cap from the dome, and test the valve to ascertain whether it was properly set. As we have seen, no such duty of inspection rested upon the railroad company with regard to loaded cars received from another road."

From the testimony in this case, it appears that this car, with its load of piles, being loaded in Georgetown, Delaware, traveled from that point on December 17, 1925 (p. 198, lines 10-30), over various railroads and was delivered to the defendant at Marion, Jersey City, on December 20th, at 6:35 P. M. It was delivered to the plaintiff's employer on December 22nd, the date of the acci-

dent, some time in the morning. It was in the custody of the defendant, moving from Croxton to Weehawken, and from Weehawken to Monmouth Street, during this period of time. It was regularly inspected at Weehawken and no exceptions noted to its condition. It was delivered at Monmouth Street, and the plaintiff's intestate with his co-worker, Swanson, proceeded to unload it. In the course of the unloading, they climbed upon the load to cut the wires, they lifted the stakes in the center of the load and observed nothing wrong with the load or the stakes, although both decedent and Swanson are dock builders of years' experience and have an expert knowledge of wood and its condition. The decedent, when the accident happens, is chopping the south stake and Swanson is within three or four feet of him. They had both worked within three or four feet of the north stake when they took out the center stake near the north stake. These experienced men who climbed about the car and worked within a few feet of these stakes, did not observe anything from the outside of the stakes which would indicate that the stakes were in anywise defective. In fact, examination after the accident by Swanson and Anderson, disclosed that the south stake which was being chopped, had bent and let the load come down, although nothing was wrong with it. The north stake, they say, was rotten on the inside, but all agreed that there was nothing on the outside except a reddish or brownish color, which Swanson says was from the bottom of the stake up several inches, and which Anderson says extended up the stake a couple of feet. The stakes had bark upon them which was also reddish in color. They both agree, that while oak wood when it turns red on the outside is beginning to rot on the inside, you have to have an expert knowl-

edge of wood to know of this fact. They both testified that it was necessary to get right close to this stake in order to even discern the red color that they talk about. It must be borne in mind that these stakes are not part of the car itself, which it could be assumed railroad inspectors would have an expert knowledge of, and to be able to determine the exact condition. Various stakes are used of different sizes, dimensions, character of wood, color, etc. To permit a jury to determine whether a cursory inspection of the stakes would disclose this hidden defect, it seems to us, is contrary to the ruling of this Court in the case of *Anderson* v. *Erie R. R. Co.*, cited *supra*. The Trial Court, even if the stake was not discolored on the outside, could have just as well left it to the jury to say whether the inspection should not have disclosed that the stakes were not strong enough or of proper kind of wood.

We, therefore, respectfully submit that the Trial Court erred in refusing the defendant's motion for nonsuit and for a direction of verdict, and that the judgment should be reversed for that reason.

II.

There was no proper party plaintiff to prosecute the action.

This point was raised by the refusal of the Trial Judge to nonsuit the plaintiff at the close of the plaintiff's case and to direct a verdict in favor of the defendant at the close of the entire case. An exception was noted to the ruling of the Trial Court on these motions (p. 104, line 30 to p. 105, line 10; p. 159, line 10 to p. 160, line 10). The points are preserved for argument on this appeal in the grounds of appeal (p. 208, lines 20-40; p. 209, lines 1-20).

When the plaintiff was called to testify, her counsel offered letters of administration granted to her, in evidence, and they were objected to on the ground that they were general letters of administrations and not letters of administration *ad prosequendum* (p. 55, lines 1-20). Counsel then asked for an adjournment until the following morning (p. 62, line 30 to p. 63, line 10). At that time he called Mr. Kelly, an employee of the Hudson County Surrogate's office, who had produced all the records of their office. Mr. Kelly produced an application for letters of administration, which was offered in evidence and marked Exhibit P-1, February 3, 1929 (p. 74, lines 1-10). This exhibit will be found printed on page 177. It is an application to the Surrogate of Hudson County by Alma Michelsen, respectfully requesting that letters of administration be granted to her. It is dated January 27, 1926. Mr. Kelly also produced a petition, which was offered in evidence as Exhibit P-2, February 3, 1928 (p. 74, line 30 to p. 75, line 10). This exhibit is printed on pages 179, *et seq.*, of the state of case. It is entitled in the Hudson County Orphans' Court and addressed to Honorable DANIEL O'REGAN, Judge of that Court. It recites that she made application to the Surrogate of Hudson County on January 27, 1926, and sets out a copy of that application as disclosed in Exhibit P-1. It further recites that she filed a bond for general administration and that she was appointed a general administratrix on that date; that the Surrogate had inadvertently failed to appoint her also administratrix *ad prosequendum* and prays that an order be made by the Surrogate of Hudson County granting her administration *ad prosequendum* as of January 27, 1926. This petition was filed in the Surrogate's office on February 2, 1928.

Mr. Ryan, Deputy Surrogate for Hudson County, at the time of the trial was next called as a witness. He produced a paper which was admitted in evidence as Exhibit P-3 (p. 79, lines 1-10), which will be found printed on page 183 of the record. This exhibit purports to be a certificate, that on January 27, 1926, letters of administration *ad prosequendum* on the estate of Axel Michelsen, were granted to the plaintiff in this action. It is witnessed and sealed as of the 27th of January, 1926, and signed by Mr. Ryan, Deputy Surrogate. Mr. Ryan, on cross examination, testified that the permanent records of the Surrogate's office are kept in libers or books. He identified liber 45 as the original record of his office and at page 228 found that on January 27, 1926, letters of general administration had been granted to Alma Michelsen by his office, on the application referred to in P-1 (p. 80, line 30 to p. 81, line 40). There was no record in the liber of the granting of any other letters of administration at that time (p. 82, lines 10-30). He identified a bond of the National Surety Company on the estate of Axel Michelsen, as being the original and on file at his office, which bond was marked Exhibit D-7, February 6, 1928 (p. 83, lines 1-20), and is printed on page 192 of the record. He admitted that P-3, which purported to be the certificate of administration *ad prosequendum* given as of January 27, 1926, was prepared and signed by him at 3:30 P. M., February 2, 1928 (p. 84, lines 1-10). When asked to show the original record of said letters of administration *ad prosequendum* in the libers, he stated that P-3 was prepared by him upon an order of Judge O'Regan of the Orphans' Court (p. 84, lines 20-30). The original order of Judge O'Regan was identified by him and marked D-4 for Identification, which will be found printed on page 189 of the record. This order,

which was not admitted in evidence, orders the Surrogate to grant letters of administration *ad prosequendum* of Alma Michelsen, as of January 27, 1926. The order was made February 2, 1928 (p. 189). There was no application made by Alma Michelsen to the Surrogate of Hudson County, on which Exhibit P-3 was granted (p. 86, lines 10-20). P-3 was issued solely on the order of the Orphans' Court without any application (p. 88, lines 20-40; p. 89, lines 1-20). He was shown an application for letter of administration *ad prosequendum* which had been made on February 2, 1928, by the plaintiff and was marked Exhibit D-3 for Identification, February 2, 1928 (printed p. 187), and he testified that this was filed in his office, but no letters of administration were ever issued on it (p. 89, line 20; p. 90, line 40). The original application, P-1, was on the form used for letters of general administration (p. 92, lines 20-40), and in fact, general administration was granted on that application (p. 95, lines 20-30). P-3, which purported to be a certificate of letters of administration *ad prosequendum,* was issued solely on the authority of Judge O'Regan's order, Exhibit D-3 for Identification (p. 90, lines 1-20). It was not issued on the application, Exhibit P-1 (p. 97, lines 1-20). It was not issued as an attempt to amend or correct the records of the Surrogate (p. 98, lines 1-10). The book record is the only permanent record (p. 100, lines 30-40). Prior to February 2, 1928, no letters of administration *ad prosequendum* were granted to the plaintiff, but on that date a certificate was issued by him as of January 27, 1926, not to correct anything that had previously been done by error, but solely on the order of Judge O'Regan (p. 100, lines 1-30).

To summarize the matter, it appears from the evidence produced on the plaintiff's case, that on

January 27, 1926, the plaintiff made application to the Surrogate of Hudson County for letters of administration on a form used for general letters of administration. She provided a bond of the National Surety Company in the sum of $1,000, conditioned that she would properly administer the goods of Axel Michelsen, deceased. She was granted on that date, letters of general administration on his estate. When the case came to trial, February 1, 1928, the general letters were offered in evidence and objected to. The plaintiff, on the second day of the trial, February 2, 1928, presented a petition to the Orphans' Court and prayed that the Surrogate be ordered to issue letters of administration as of January 27, 1926. The Orphans' Court made an order directing the Surrogate to so grant the letters. The Surrogate, solely on the authority of this order and without any intention to correct his records, granted a certificate that the plaintiff was appointed administratrix *ad prosequendum* as of January 27, 1926. The plaintiff offered in evidence the original application, P-1; the petition to the Orphans' Court, P-2; and the certificate of administration *ad prosequendum*, P-3. The order of Judge O'Regan was not offered in evidence by the plaintiff, and when offered in evidence by the defendant, its admission was refused (p. 141, lines 10-40). At the conclusion of the cross examination of Mr. Ryan, motion was made in behalf of the defendant to strike from the record Exhibit P-3, on the ground that the undisputed evidence showed it was prepared February 2, 1928, without any application having been made to the Surrogate but upon an order of the Orphans' Court, which order was not in evidence, and which Court had absolutely no power or authority under the statute to order the issuance of said letters. This motion was denied and an exception noted to it.

The motion was made on the theory that while the certificate, apparently regular on its face, might be admissible in evidence when originally offered, as it appeared from the testimony of the witness who produced it to have been illegally issued by the Surrogate when no jurisdiction was had by the Surrogate, that the *prima facie* regularity of the document was destroyed. The Trial Court at this juncture of the case struck from the record all the testimony that had been developed, with the exception of P-3, the certificate issued by the Surrogate. An exception was noted to this ruling (pp. 102-105). An exception was also noted to the refusal of the Trial Court to admit in evidence Defendant's Exhibit D-4 for Identification, which was the order of Judge O'Regan of the Hudson County Orphans' Court, identified by the witness Ryan as being the order on which letters of administration *ad prosequendum* were granted (p. 141, line 10 to p. 142, line 15). Ground of appeal #5 preserves the defendant's right to the exception noted to the refusal of the Trial Court to strike out Exhibit P-3, which was the certificate of letters of administration *ad prosequendum* (p. 210, lines 1-5). Ground of appeal #7 preserves the defendant's right to argue on this appeal the exception noted to the Trial Court striking from the record all the testimony adduced at the trial attacking the validity of Exhibit P-3 (p. 210, lines 15-20). Ground of appeal #8-A preserves for argument on this appeal, the Trial Judge's refusal to admit in evidence Defendant's Exhibit D-4 for Identification (p. 210, lines 20-25).

We have grouped under this point the various exceptions noted above, because, as will be disclosed by the colloquy between counsel and the Court, they all involve the one common question of law. The legal question was raised, first, by

moving to strike out of the evidence Exhibit P-3, which was the plaintiff's letters of administration *ad prosequendum,* because of what the cross examination had shown and excepting to the Trial Court's refusal to strike the same out; excepting to the Trial Court's striking out the testimony adduced on the cross examination attacking P-3; excepting to the Trial Court's refusal to admit in evidence the remainder of the records of the Surrogate's Court, which attacked the validity of P-3, and finally the moving to dismiss the action because the evidence showed the plaintiff was not the proper party plaintiff as she was never appointed by the Surrogate as administratrix *ad prosequendum* (pp. 141-144). The legal question raised by the various motions and objections, is whether or not the defendant had the right to attack collaterally the action of the Hudson County Surrogate in executing Exhibit P-3, because of lack of jurisdiction on the part of the Surrogate. To state it in another way, had the defendant the right to show that the plaintiff was never properly appointed an administratrix *ad prosequendum* because of lack of jurisdiction on the part of the Surrogate.

It must be borne in mind that at common law there was no right of recovery for wrongful death, and the plaintiff in this case derived her right of action against the defendant, solely by virtue of the Death Act (P. L. 1848, p. 151; 2 Comp. Stat. 1907). Prior to 1917, where decedent died intestate, such an action had to be instituted in the name of the personal representative of the deceased person, or by a general administrator. The Legislature in that year passed an act providing that every action brought under the Death Act should be instituted in the name of an administrator *ad prosequendum,* where deceased died in-

testate (P. L. 1917, Chapt. 180). It also provided that the Surrogate of the county in which the deceased shall be a resident at the time of his death, shall have the power and authority to grant letters of administration *ad prosequendum* (P. L. 1917, Chapt. 181). Under the Death Act, as above amended, the authority of the Surrogate was entirely statutory. In fact, between 1917 and 1922, the Surrogate could not appoint an administrator *ad prosequendum* to sue under the Death Act, where the decedent was a nonresident (*Re Post*, 104 Atl. 652). It was necessary to apply to the Prerogative Court for such appointment. In 1922, the statutory power of the Surrogate to grant letters of administration *ad prosequendum* was extended so that the Surrogate of the county where an accident occurred which caused the death of a nonresident, could grant letters of administration *ad prosequendum* to bring the action under the Act. It is our contention, first, that in granting letters *ad prosequendum* the action of the Surrogate is, therefore, that of a statutory officer and not that of a court of general jurisdiction. If this is so, then the act of the Surrogate in appointing an administrator *ad prosequendum*, can be raised collaterally.

Second, even if it should be held that the Surrogate in granting letters of administration *ad prosequendum*, acted as a court of general jurisdiction, nevertheless, the authorities clearly hold that in a collateral proceeding it may be shown the Surrogate never obtain jurisdiction of the proceeding. Although full faith and credit must be given to the judgment of the court of general jurisdiction, nevertheless, the exception is well recognized that if the Court rendering the judgment did not have jurisdiction of the subject-matter or of the parties, that fact may be shown in a sub-

sequent proceeding collaterally in order to avoid the effect of the Court's action. It will be found in examining the cases that they fall into two classes. One class holds that where a court of general jurisdiction has decided a jurisdictional fact which was in issue, its judgment on the decision of that jurisdictional fact can only be reviewed by appeal and is not the subject of a collateral attack. The other class of cases holds that where the Court has assumed jurisdiction without a proper proceeding being initiated before it, or the person of the defendant properly brought before it, that the judgment rendered may be attacked collaterally in a subsequent proceeding. We desire to refer the Court to the following cases in this State in which this distinction is evidenced.

In *Administrator of Catherine Young* v. *Rathbone,* 16 N. J. Eq. 224, a bill was filed to enforce the specific performance of a contract for the sale of certain real estate made by the complainant as administrator to the defendant. The defendant declined to accept the deed and resisted the decree for specific performance on the ground of defective title. The complainant claimed title under a deed made by commissioners appointed by the Court of Common Pleas upon a partition proceeding under the Act of 1789. Three of the tenants in common held shares in fee. Two were tenants for life with remainder over to their children. The partition proceeding was in the names of those only having estates in possession. The tenants in remainder were not, and could not be made parties. The Supreme Court in *Steven* v. *Enders,* 1 Green 271, had held that under these circumstances the Court of Common Pleas had no authority under the Act of 1789 to make an order for sale or to approve and confirm it. It was contended

by complainant that even though the sale to complainant was unauthorized and illegal, yet the order confirming the sale, having been made by a court of general jurisdiction upon a subject-matter within its jurisdiction, is final and conclusive and can never be questioned in a collateral suit. Chancellor GREEN in disposing of this contention said (p. 227):

> "But the fallacy of the argument consists in this, that, although the court had jurisdiction over the partition, they had none over the sale. If they had power to direct a partition, they had no power to order a sale, or to affect the interests of the persons having estates in remainder. The order of sale *was not an error of judgment, but an usurpation of power.* The order of the court was therefore not conclusive upon the validity of the sale, which may be drawn in question in a collateral proceeding."
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> *Moulin* v. *Insurance Company,* 24 N. J. L. 222.

Action was brought upon a foreign judgment obtained in New York. The defense was lack of jurisdiction by the New York Court. The plaintiff filed a general demurrer to this defense. The Supreme Court held that while the judgment of a superior court of one of the States, when an action was brought upon it in another State, would have to receive in all respects the same effect as a judgment of a court in the State where the action was brought, nevertheless, lack of jurisdiction of the defendant could be shown to defeat the action on the judgment.

Munday v. *Vail,* 34 N. J. L. 418.

The action was in ejectment. The plaintiff claimed title to the premises by virtue of a certain deed of trust from one Asa Munday. The defend-

ant claimed title by virtue of a sheriff's deed under a decree for costs against Asa Munday in a suit to set aside the deed of trust. The defense claimed that the deed of trust and all rights under it were destroyed and annulled by the decree in the Court of Chancery. Chief Justice BEASLEY, writing the opinion for the Supreme Court, said (p. 421):

> "The counsel for the defense did not attempt to maintain the propriety of such a decree, but argued that if erroneous, it could not be called in question in this collateral suit. Cases were cited to sustain this position. But these decisions are all to the effect that the judgment or decree of a *court having jurisdiction over the controversy and the parties cannot be impeached for error,* except in a direct proceeding for that purpose. The proposition has long since taken its place among the settled maxims of law. The only question is whether it applies to the present case. If the Court of Chancery, in the case under review, had the power to make the decree in question, the legal title thus invoked must prevail; *but if the court had no such power, the rule is not applicable.* The inquiry is, had the court jurisdiction to the extent claimed?
>
> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this, there are three essentials: First. The court must have cognizance of the class of cases to which the one to be adjudicated belongs. Second. The proper parties must be present. Third. The point decided must be, in substance and effect, within the issue."

It was held that the decree was void and subject to collateral attack.

Plume, Administrator v. *Howard Savings Institution,* 46 N. J. L. 211.

Philip McMahon deposited money with defendant in a savings account. Twenty years later the Orphans' Court granted letters of administration to the plaintiff. The plaintiff sued for the balance in McMahon's account. The defendant's answer pleaded as a defense that McMahon was not a resident of Essex County at the time of his death nor did he die intestate a nonresident of the State and, therefore, the Orphans' Court of Essex County improperly appointed plaintiff administrator. Chief Justice BEASLEY, writing the opinion of the Supreme Court, said (p. 225):

> "This is a suit by an administrator, and the only question for solution is whether, in this proceeding, it can be shown as a defense that the letters of administration held by the plaintiff, and which were in due form granted to him by the Orphans' Court of the County of Essex are invalid. There are two reasons assigned on the argument in favor of the affirmation of this proposition, namely, first, 'that the Orphans' Court acted in the premises without due proof of the fact of the death of plaintiff's intestate' and second, 'that at the time of such judicial action it affirmatively appeared that the decedent was not a resident of the County of Essex, but, to the contrary, had his residence at the time of his alleged death in the County of Sussex.'"

After reciting the evidence which the Orphans' Court had before it on these questions, the Chief Justice continued (p. 228):

> "In the present case there was plainly *some proof of the death* of the supposed intestate, and likewise of the fact that he was not, at the time of his decease, a resident of this state, and therefore even if the court fell into error, which I do not intend to indicate, such error might have led, in a proper course of law, to a reversal of the judgment, but it can have

> no bearing against the right of the court to adjudicate upon the facts before it. Upon this assumption, that this power of judicature existed, it is apparent that the defendant in this instance must stand on the proposition that he has a right to show that the Orphans' Court *decided incorrectly with respect to the evidence relating to jurisdictional facts.* But such a contention is opposed to fundamental rules of law. * * * (p. 229). Consequently, when the Orphans' Court of the County of Essex, *having the matter by the requisite proceedings before it,* awarded letters of administration in the present case, it will be intended, by force of the rule of law just stated, that it decided all the facts requisite to validate its action."

In *Lawson* v. *Action,* 57 N. J. Eq. 107, bill was filed to set aside a sale and conveyance of land by an administrator under an order of the Orphans' Court. The bill charged fraud practiced upon the Orphans' Court and want of jurisdiction in the Court to make the sale. The Court concluded that the proceeding in the Orphans' Court was founded upon a fraud practiced upon the Court. It was contended that the Orphans' Court had complete and unlimited jurisdiction over the subject-matter before it, and that having acted, its decree cannot be questioned collaterally. Vice-Chancellor PITNEY in discussing this question said (p. 115):

> "But to say that the court has general jurisdiction of the sale of lands of decedent to pay debts of the decedent, is no more than to say that it has power *to acquire such jurisdiction in particular instances by certain proceedings,* and the jurisdiction to proceed at all against the particular land depends, by the statute upon an application by the executor or administrator to sell the lands for the payment of the debts. In my judgment, there must be a

> *written application by the executor* or administrator to the Orphans' Court, and it must appear to have been actually presented. I apprehend that a mere order of the Orphans' Court directing a sale of lands of a decedent by a personal representative, in the absence of any application for that purpose, would be void, precisely as would a mere entry of judgment *in personam* by a common law court without any service of process on the defendant or appearance by him, or the entry of a decree in this court not based upon a bill filed and process served thereon, or an appearance by the defendant. And, in my judgment, a party claiming title through a sale by an order of the Orphans' Court to pay the debts of the decedent, is chargeable with notice of whether or not, in fact, such written application was made."

Elmendorf v. *Elmendorf,* 58 N. J. Eq. 113. Complainant and defendant were married in New Jersey and defendant left the state permanently. Complainant filed a bill for divorce and obtained it on ground of desertion with an allowance of alimony. No personal service was made on defendant and he did not appear in proceeding. Complainant learning defendant had temporarily come into state had him arrested on a *ne exeat.* Motion was made on his behalf for a discharge on ground that judgment for alimony was void for lack of jurisdiction over him. The Court examined the facts relative to the service on the defendant and deciding that it, the decree, was illegal because of the Court's lack of jurisdiction discharged the defendant and dismissed the order allowing the *ne exeat.*

Assets Development Co. v. *Wall,* 97 N. J. L. 468, (C. of E. & A.). Chief Justice GUMMERE held that a final decree, made by the Surrogate after the time limited by the rule to bar creditors has expired, when pleaded, of itself establishes all the

facts essential to the protection of the executor and it cannot be attached collaterally. He pointed out however, after discussing the cases of *Quidort's Admr.* v. *Pergeaux,* 18 N. J. Eq. 472, 477, and *Ryno's Exec.* v. *Ryno's Admr.,* 27 *Id.* 522, 524, that where the question involved was the right to attack the action of the Surrogate in appointing a representative of the decedent's estate for the purpose of its administration and settlement, upon the ground that he was without jurisdiction to make the appointment, a question essentially different was involved which could be raised by attack in a collateral proceeding.

The ground of attack on the jurisdiction of the Surrogate in the case *sub judice* was based on the fact that the evidence showed no application was ever made to the Surrogate for administration *ad prosequendum,* but, on the other hand, the letters of administration, Exhibit P-3, were granted without application or proceeding initiated in the Surrogate's Court upon order made by the Orphans' Court, which concededly the Orphans' Court had no jurisdiction to make. It has been held in this State repeatedly, that a decree or any judgment which is entirely outside of the cause of action specified in the pleadings in the suit in which it is pronounced, is invalid, and will be treated even in a collateral proceeding as a nullity. Such a judicial sentence is absolutely void and will be held to be a nullity everywhere.

Dickinson v. *City of Trenton,* 33 N. J. Eq. 63, 65;

Reynolds v. *Stockton,* 43 N. J. Eq. 211, 214 (C. of E. & A.);

Jones v. *Davenport,* 45 N. J. Eq. 77, 81;

Consolidated Electric Storage Co. v. *Atlantic Trust Co.,* 50 N. J. Eq. 93, 97.

If a judgment or decree outside the cause of action specified in the pleadings in the suit in which it is pronounced, is invalid and will be treated even in a collateral proceeding as a nullity, *a fortiori,* a judgment or decree rendered without any pleading or application to invoke the jurisdiction and action of the Court, is invalid and a nullity, and subject to attack in a collateral proceeding.

Under the ruling of the Trial Judge, the mere production of a certificate from the Surrogate showing administration granted to the plaintiff, was held to be conclusive and the evidence which the defendant adduced on cross examination clearly showing that the Surrogate never had jurisdiction to grant the letters, was clearly struck out of the record erroneously. Under the Trial Court's ruling the production of a judgment or decree would be absolutely binding so far as collateral attack was concerned, even though the Court rendering it was never applied to by any of the parties for the rendition of the judgment or decree. We contend that while the Surrogate's Court has jurisdiction of the subject-matter of granting letters of administration *ad prosequendum* and may acquire jurisdiction of the parties in that proceeding, that, nevertheless, until the jurisdiction is invoked by an application, the subject-matter is not within its power to adjudicate upon. The record clearly shows that on the original application for administration, the Surrogate granted general letters of administration and a bond was filed by the administrator. The execution of the certificate, P-3, was clearly not an attempt to amend or correct its proceedings on this original petition. The letters, P-3, were issued as clearly appears from the testimony, on an order of the Orphans' Court, which Court has appellate jurisdiction only of the

Surrogate's Court. There was no evidence of any appeal from the Surrogate's Court to the Orphans' Court. The application was made on a petition which finds no justification in the statutes or decision of the State. In fact, under the act permitting the appointment of administrators *ad prosequendum,* the Orphans' Court does not even have appellate jurisdiction.

We respectfully submit therefore, that the Trial Court erred in admitting in evidence Exhibit P-3, in striking out the evidence attacking the Exhibit P-3, and in refusing to nonsuit the plaintiff on the ground that it clearly appeared she was never lawfully appointed administratrix *ad prosequendum* and no proper party plaintiff was before the Court.

III.

The Trial Judge erred in refusing to charge the defendant's requests to charge numbers seven and eight.

The complaint filed in this cause charged negligence against the defendant in the following language (p. 2, lines 20-30):

> "6. The negligence of the defendant consisted in this:
>
> "That while the intestate of plaintiff was aiding in the unloading of certain piles from a flat car of the defendant, by reason of the failure of the defendant to use reasonable care in the loading, handling, shipping and fastening of the said piles the said piles were caused to roll and fall from said flat car, against and upon the intestate of the plaintiff, killing him."

It will be observed that the specific acts of negligence were four in number, namely, failing to

use reasonable care in (1) loading; (2) handling; (3) shipping; (4) fastening; of the said poles. The defendant conceiving that there was no evidence of negligence on its part in shipping the said poles or in fastening the said poles, requested the Trial Judge to charge the following requests to charge (p. 174, line 35 to p. 175, line 10):

> "7. I charge you as a matter of law, that there is no evidence in the case of any negligence on the part of the defendant in shipping the said poles, and the plaintiff, therefore, cannot recover on that ground.
>
> "8. I charge you as a matter of law, that there is no evidence in the case that the defendant fastened the said poles, or was negligent in fastening said poles, and there cannot be any recovery on that ground."

The Trial Judge refused to charge requests numbers 7 and 8 (p. 171, line 40 to p. 172, line 20), and an exception was noted to such refusal (p. 172, lines 20-25). The grounds of appeal numbers 10 and 11 preserve those exceptions for argument on this appeal (p. 210, line 30 to p. 211, line 10).

We have summarized the evidence adduced at the trial under Point I and shall not here reiterate it. It is absolutely clear from the reading of the evidence that there was no proof this defendant was in anywise negligent in the shipping of the said poles or in the fastening of the said poles. In fact, it definitely appeared the car of poles was received some 48 hours before the accident and transported in regular course from the place where it was received to the destination. The defendant, was, therefore, entitled to have the jury specifically instructed that there was no evidence of any negligence on the part of the defendant in loading the poles, and specifically instructed that there was no evidence of negligence on the part

of the defendant in shipping the poles. After reading to the jury as part of his charge, the allegations in the complaint charging the defendant with negligence in loading, handling, shipping and fastening of the said poles, the defendant was entitled to have the jury specifically instructed that no liability could be predicated on any one of the four charges of negligence which the plaintiff had failed to substantiate by proof. The verdict in the case is a general one and it is impossible to say on which of the four allegations of negligence charged against the defendant, they predicated their verdict. If the evidence, therefore, failed to prove negligence as to one or more of the charges made in the complaint, the verdict must be set aside as it may have been on that ground that the jury based its verdict.

Maryland v. *Baldwin,* 112 U. S. 490; 28 L. Ed. 822;

N. Y. Cen. & H. R. R. Co. v. *Banker,* 224 Fed. 351 (Second C. C. A.);

N. Y. Central R. R. Co. v. *Lloyd,* 258 Fed. 111 (Second C. C. A.).

The U. S. Supreme Court in the case of *Maryland* v. *Baldwin,* cited *supra,* in reversing a judgment stated the rule as follows (p. 823):

> "Upon these pleas, issues were joined and tried by the court with a jury, which found a general verdict for the defendants. Judgment having been entered, the case was brought here on writ of error.
>
> "On the trial, evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue, error was committed, either in the

admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."

In the case of *New York Central & H. R. R. Co.* v. *Banker,* cited *supra,* action was brought to recover damages for the death of plaintiff's intestate who was a railroad engineer. The complaint alleged that he was killed as the result of a derailment and charged negligence first, in improperly operating the signals so as to mislead the deceased, and secondly, in using a type of derail which it was negligent for the defendant to maintain at the place in question. The case being submitted to the jury by the Trial Court on both theories the jury rendered a general verdict and on writ of error in reversing the judgment the Circuit Court of Appeals held that there was sufficient evidence of negligence to go to the jury on the first charge of negligence but there was no evidence of negligence to go to the jury on the second charge. The Court held that because it could not be determined from the verdict on which charge of negligence submitted the jury found against the defendant, there must be a new trial and judgment was reversed.

In *New York Central R. Co.* v. *Lloyd,* cited *supra,* action was brought to recover for the death of a passenger and the complaint charged four distinct negligent acts. The Trial Judge submitted the four questions to the jury in its charge upon which they were instructed if they found the defendant negligent a verdict could be rendered. The jury returned a general verdict in favor of the plaintiff and the Circuit Court of Appeals in reversing the judgment held that there was no evidence of any negligence on one of the grounds submitted by the Trial Court to the jury and as the verdict

was a general one it was impossible to determine whether the jury found the defendant negligent on that particular claim so that a reversal of the entire judgment was necessary.

We respectfully submit that the Trial Judge erred in refusing to charge the defendant's requests to charge numbers 7 and 8, withdrawing from the jury's consideration the alleged negligence of shipping and fastening the said poles.

(4)

CONCLUSION.

We respectfully submit that the judgment of the Supreme Court should be reversed and that a *venire de novo* be awarded.

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