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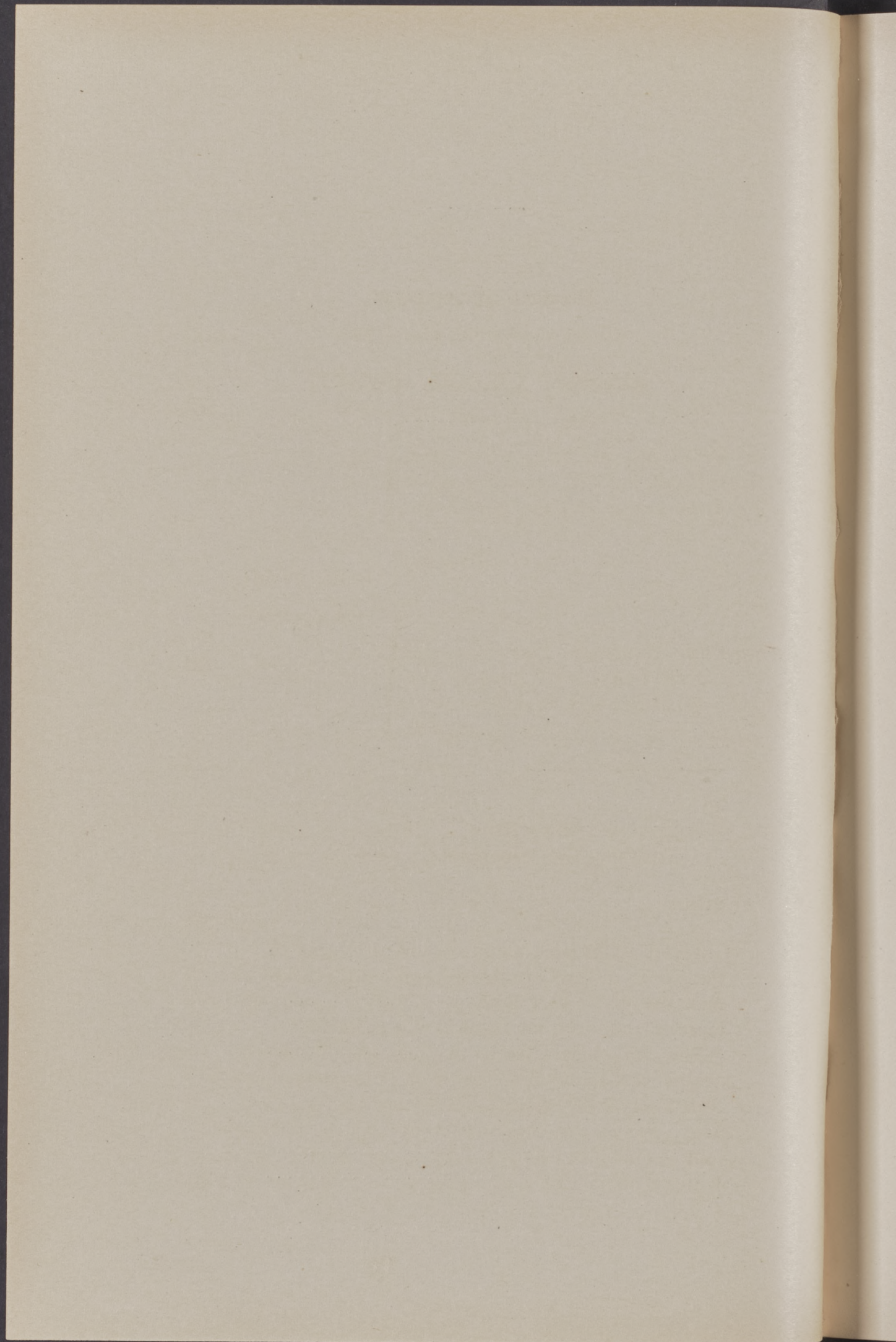
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Plaintiff's Witnesses:

Elizabeth Olsen,	Direct	9
	Cross	12
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John Kazinci,	Direct	14
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Defendant's Witnesses:

John J. McGarry,	Direct	38
	Cross	41
James A. Diman,	Direct	46



Notice of Appeal.

Filed—September 10th, 1923.

HUDSON CIRCUIT COURT.

10

ELIZABETH OLSEN, as Adminis-
tratrix ad Prosequendum upon
the Estate of Harry Olsen, de-
ceased,

Plaintiff,

vs.

ERIE RAILROAD COMPANY and
NEW YORK, SUSQUEHANNA AND
WESTERN RAILROAD COMPANY,
Defendants.

Action at Law
On Appeal.

20

To

COLLINS & CORBIN, Esqs.,
Attorneys for Defendants.

Sirs:

30

TAKE NOTICE, that the plaintiff appeals to
the Court of Errors and Appeals of the State of
New Jersey, from the whole of the judgment en-
tered in this cause on the following ground:

The trial Court directed a judgment of non-suit
against the plaintiff and in favor of the defendant,
New York, Susquehanna & Western Railroad Com-
pany, when thereunto moved by counsel for the
said defendant, whereas said Court should have
denied said motion and should have submitted to

40

Complaint.

the jury for decision the questions involved in the issues.

Dated, August 29th, 1923.

Yours respectfully,

10

KENT & KENT,
Attorneys for Appellant.

SERVICE of a copy of the within Notice of Appeal is hereby acknowledged this 6th day of September, 1923.

COLLINS & CORBIN,
Attorneys for Defendant.

Complaint.

20

Filed—August 2nd, 1922.

HUDSON CIRCUIT COURT.

ELIZABETH OLSEN, as Adminis-
tratrix ad Prosequendum upon
the Estate of Harry Olsen, de-
ceased,

Plaintiff,

30

vs.

ERIE RAILROAD COMPANY and
NEW YORK, SUSQUEHANNA AND
WESTERN RAILROAD COMPANY,
Defendants.

40 The plaintiff, who resides in the Township of Shadyside, County of Bergen and State of New Jersey, says that:

Complaint.

1. That on the 1st day of August, 1922, Letters of Administration ad Prosequendum were duly issued to plaintiff upon the estate of Harry Olsen, deceased, by the Surrogate of the County of Bergen and State of New Jersey.

2. Heretofore and at all the times hereinafter mentioned, the defendants were and still are foreign corporations and were and still are operating railroads running through the Township of Shadyside, in the County of Bergen and State of New Jersey, and that both defendants either jointly or through mutual arrangements, operated and conducted the railroad tracks and locomotives and equipment at the place aforesaid, and especially at a point therein at or near the plant of the New York Edison Company.

3. On the 4th day of March, 1922, at the place aforesaid, while Harry Olsen, plaintiff's intestate, was lawfully upon a crossing of the said railroad tracks, the defendants, or either of them, by their agent or agents, servants and employees negligently, carelessly, recklessly, unlawfully and without warning to the said Harry Olsen, drove and propelled a locomotive, so that the said Harry Olsen was run into, struck down and run over and crushed and died as the result thereof.

4. The death of the said Harry Olsen occurred without any fault on his part, but solely through the fault, carelessness, recklessness and negligence of the defendants, or either of them, their agent or agents, servants or employees.

5. The defendants were negligent in that the aforesaid locomotive was then and there being

operated at a high and dangerous rate of speed;
in that there were not sufficient lights at the head
thereof; in that the engineer or the person in con-
trol thereof gave no sound or warning of the ap-
proach of the locomotive; in that there was not a
proper lookout at the head of the locomotive and
10 in that the crossing at this point was not properly
guarded.

6. The said Harry Olsen left him surviving
Elizabeth Olsen, his widow, who has suffered pecu-
niary damage by reason of his death.

7. This action is commenced within two years
after the death of the plaintiff's intestate.

20 Plaintiff demands judgment against the defend-
ants for the sum of \$50,000, together with interest
and costs.

KENT & KENT,
Attorneys for Plaintiff,
160 Market Street,
Paterson, N. J.

Answer.

Filed—August 22nd, 1922.

HUDSON COUNTY CIRCUIT COURT.

ELIZABETH OLSEN, as Adminis-
tratrix ad pros. upon the es-
tate of Harry Olsen, deceased,
Plaintiff,

10

vs.

Action at Law

ERIE RAILROAD COMPANY and
NEW YORK, SUSQUEHANNA &
WESTERN RAILROAD COMPANY,
Defendants.

20

The defendants, Erie Railroad Company, a corporation of the State of New York, and the New York, Susquehanna & Western Railroad Company, a corporation of the State of New Jersey, having their principal place of business in New Jersey at the Foot of Pavonia Avenue, Jersey City, for answer to the within complaint, say that:

FIRST DEFENSE.

30

1. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph one.

2. They deny paragraph two.

3. They deny paragraph three.

4. They deny paragraph four.

5. They deny paragraph five.

40

6. They deny paragraph six.

7. They admit the action is commenced within two years from March 4th, 1922.

SECOND DEFENSE.

10 The alleged accident set forth in the complaint was due to contributory negligence on the part of the plaintiff's intestate.

THIRD DEFENSE.

20 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 approach of the train by which he was struck.

FOURTH DEFENSE.

1. At the time of the alleged accident set forth in the complaint, the plaintiff's intestate was a trespasser upon the tracks and property of the defendants.

30 2. As such trespasser the only duty owed to the plaintiff's intestate was to refrain from wanton or willful injury.

3. There was no wanton or willful injury to the plaintiff's intestate on the part of these defendants or on the part of any of their employees.

FIFTH DEFENSE.

40 Plaintiff's intestate was injured by an engine or car while standing, walking or being on a railroad.

Reply.

By virtue of the provisions of Section 55 of an act entitled "An Act Concerning Railroads (Revision of 1903)" approved April 14, 1903, the plaintiff is deemed to have contributed to the injury sustained by him and is not entitled to recovery therefor any damages from the company owning or operating said railroad.

10

COLLINS & CORBIN,
Attorneys of Defendants.

Reply.

Filed—September 22nd, 1922.

HUDSON COUNTY CIRCUIT COURT.

20

ELIZABETH OLSEN, as Adminis-
tratrix ad Prosequendum upon
the Estate of Harry Olsen, de-
ceased,

Plaintiff,

vs.

ERIE RAILROAD COMPANY and
NEW YORK, SUSQUEHANNA &
WESTERN RAILROAD COMPANY,
Defendants.

30

The plaintiff denies the allegations contained in the answers of the defendants herein.

KENT & KENT,
Attorneys for Plaintiff.

40

Rule for Judgment.

Filed—July 6, 1923.

HUDSON COUNTY CIRCUIT COURT.

10	ELIZABETH OLSEN, Adm'x Ad. of the estate of Harry Olsen, de- ceased, Plaintiff,	}	Action at Law
vs.			
ERIE RAILROAD COMPANY and NEW YORK, SUSQUEHANNA & WESTERN RAILROAD COMPANY, Defendants.			

20 This action was tried before Honorable Willard W. Cutler, with a jury, in the presence of the counsel of the respective parties, at the Hudson County Circuit Court, on July 3rd and 4th, 1923.

The plaintiff having submitted her evidence and the Court being of the opinion that it was not sufficient to entitle her to recover, ordered judgment of non suit to be entered against her.

30 Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that judgment final be and the same hereby is entered in favor of defendants Erie Railroad Company and New York, Susquehanna & Western Railroad Company and against the plaintiff.

Rule actually entered this
 6th day of July, 1923, on motion of
 COLLINS & CORBIN,
 Attorneys of Defendants.

HUDSON COUNTY CIRCUIT COURT.

ELIZABETH OLSEN, Admx., etc.

VS.

ERIE RAILROAD Co., et al.

10

Tried July 2, 1923, before CUTLER, J., and a jury.
KENT & KENT, for the Plaintiff.

COLLINS & CORBIN (Mr. Markley & Mr. Broad-
hurst), for the Defendants.

20

ELIZABETH OLSEN, sworn.

Direct Examination by Mr. Kent:

Q. Where do you live? A. 41 River Road,
Shadyside.

Q. On the 4th day of March, 1922, were you
married? A. Yes, sir.

Q. What was the name of your husband? A.
Harry Olsen.

30

Q. Did you see him on the 4th day of March,
1922? A. Did I see him?

Q. Yes. A. Certainly I seen him.

Q. Where were you and he on the afternoon and
evening of that day? A. We were right on the boat
in the afternoon.

Q. Where was that boat? A. It was right at
the coal docks.

Q. Where? A. Up at Edgewater where the boat
belonged. It belonged to the Company.

40

Q. To what Company? A. The Pennsylvania Coal Company.

Q. Did that Company have an office in Shadyside? A. Well, I believe they had an office but not in this City, in New York.

10 Q. But did they have an office near the docks?
A. Yes, they had a small little place there, a little shanty like; it was an office, a small little place.

Q. Did you and your husband leave the boat that afternoon? A. No, sir; I left that night before six o'clock.

Q. How did you get out from the boat to the place you were going? A. Well, I come just where he was hurt because there was no other way of getting out but that way; I had to go on them crossings.

20 Q. Do you know where the River Road is at Shadyside? A. Yes.

Q. Do you know where the Edison crossing is across the railroad? A. Yes.

30 Q. And in reference to those places how did you go? A. Well, the Edison crossing is right in front; before I had to step on those crossings of the railroad, I turned to my left, which the Edison crossing I come across it is a planking, and they go right straight in, and we had to turn to our left to go down to our boat, and we had to go on those crossings of the railroad tracks until we got further into the yard.

Q. When you turned to your left was there a path so you could walk down to the docks and office of the Pennsylvania Coal Company? A. A very small, narrow path.

Q. And that is the path you took? A. There was tracks going clean down till you get to the waterfront.

40 Q. Now, where did you go after you went across

the tracks of the railroad at that point? A. I went up to my brother's.

Q. Where did he live? A. He lived right up at 41 River Road; that is where he lived.

Q. How far was that from the Edison crossing? A. How far? Well, that is a good twenty or twenty-five minutes walk to his house from there.

10

Q. Did you see your husband at that house afterwards? A. He come after me; he come up after me to go back on the boat. It started to raining so hard I said I had better stay—

(Objected to. Objection sustained.)

A. He said, "All right; if you want to stay until"—

Q. Don't tell us that. What did you do after that, or what did he do? A. What do you mean, what did he do?

20

Q. Withdraw that. After your husband came up there for you you say it started to rain? A. Yes; it started to rain.

Q. Did he leave the house after that? A. When he came up for me?

Q. Afterwards. A. No; he left at five after eight to go back.

Q. Did you go with him? A. No; I remained there because it was raining so hard.

30

Q. And that is the last you saw of him that night? A. That is the last I saw of him.

Q. When did you next see him? A. What is that?

Q. When did you next see him after the time you saw him on Saturday night? A. I didn't see him then until I seen him dead.

Q. And where was that? A. That was at the North Hudson Hospital.

40

Q. What day was that? A. That was the very next day—Sunday.

Q. About what time, do you know? A. No—it was Monday about two o'clock, around two o'clock I guess.

10 Q. Do you know whether it was Sunday or Monday? A. Monday.

Q. And did you see him there? A. I seen him there.

Q. And what was his condition, if you know? A. His condition—well, if—

Q. Did he have any legs or arms off, or what? A. I couldn't see.

20 Q. You couldn't see. Do you know how much money he was getting from the Pennsylvania Coal Company? A. Well, they were getting ninety dollars and then they cut them down. He was getting seventy dollars.

Q. He was getting seventy dollars a month at the time of the accident? A. Yes; before they cut them. They were getting \$110, then they cut them down to ninety and then to seventy dollars.

Q. Did that also include the living quarters on the boat? A. They just gave us our two rooms on the boat; we had to feed ourselves; they just gave us the cabin.

30 Q. You and your husband lived on the boat? A. Yes; I always lived on the boat.

(Certificate of letters of administration ad
pros. offered in evidence and marked P-1.)

Cross Examination by Mr. Markley:

40 Q. Did you have any other home but the home on the boat? A. No. I had a place where we had a few things, like a storage, one room, we paid five dollars a month for that, in case anything should

happen on the boat that we always had some furniture.

Q. Where was that, in Shadyside? A. Yes. I had it closed up and never lived in it; I always lived in the boat with him.

Q. You used it as a store place? A. Just a storage.

10

Q. You say your husband left home that day around five after eight in the evening? A. Yes.

Q. Is that right? A. Yes.

Q. The last you saw of him was when he left home around five minutes after eight? A. Yes; he was at my brother's house; came where I was and left there to go back to his boat.

Q. That was the last you saw of him alive? A. Five after eight, yes.

Q. You live at your brother's house now? A. Yes.

20

Q. With your brother? A. Yes.

Q. Anybody else? A. No; just myself, his wife and son and daughter.

Q. And this seventy dollars I suppose was used to supply food and clothes for you and your husband? A. Yes, sir.

Q. Did he give you any of that each month, or did he pay the bills? A. He gave me every penny of it.

30

Q. And you bought his food? A. Yes.

Q. And the clothes for you and your husband and whatever other expenses you had? A. Yes, sir.

Q. And there were no children? A. No children.

The Court: How old was your husband?

The Witness: Thirty-five.

The Court: How old are you?

The Witness: I was two years older than him.

40

By Mr. Kent:

Q. You say he was thirty-five? A. Thirty-five.

10 JOHN KAZINCI, sworn.

Direct Examination by Mr. Kent:

Q. Where do you live? A. Cliffside.

Q. On the 4th day of March, 1922, where were you living? A. At Edgewater.

Q. Do you know the number and street of the house you were living in? A. I know the Road, but I don't know the number.

20 Q. On what Road were you living? A. River Road.

Q. In reference to the crossing at the Edison plant where was your home? A. I lived about thirty-five feet away from the crossing.

Q. Were there any houses between your house and the crossing? A. No, sir.

Q. In other words, that was the first house from the crossing? A. Yes.

Q. On the evening of that day where were you? A. In the house.

30 Q. Do you know what day of the week it was? A. I think it was on a Saturday night.

Q. Was your attention called to anything at that crossing on that evening? A. Well, I heard moaning and I went outside to see what it was.

Q. And what did you discover? A. I saw Harry Olsen laying there on the track a few feet away from the crossing.

40 Q. And what was his condition at that time? A. Well, one of his feet was off, and one of his hands.

Q. Did he continue moaning after you got to him? A. Yes, sir.

Q. Now, in reference to the crossing that you mentioned, will you please describe to us what kind of a crossing it is? A. It is planks between the tracks.

Q. About how wide is that crossing? A. About twelve or thirteen feet. 10

Q. And you say that Olsen was how many feet away from the planking or crossing as you called it? A. A few feet; I do not remember how many feet.

Q. But that is where you found him? A. Yes, sir.

Q. How near the rails was he? A. He was the third rail from the west.

Q. Do you know whether any train had crossed at that point? A. There was a train on the left side of him and it was still. 20

Q. You say there was a train on the left side of him that was still? A. Yes, sir.

Q. Had you heard any train going by shortly before you heard moaning? A. Yes, sir.

Q. Do you know whether that train that went by gave any warning of any kind? A. I didn't hear any.

Q. Did you hear any bell of any kind prior to that? A. No, sir. 30

Q. Did you observe whether there were any cars standing about that crossing or not? A. There was one car standing up towards the north from him.

Q. Was the crossing—were there any cars along parts of the track so that a view of the track would be obstructed or not? A. No, sir.

Q. How many years have you lived in that house? A. I lived there about two or three years. 40

Q. Do you know who uses that crossing at that point? A. The Edison Company.

Q. Who else? A. And people that cross the railroad; they do down that way; those I saw goes down that way.

Q. Is that used by a good many people or not?

10 A. Yes; everybody that goes down that way by the boats.

Q. From around that point is it possible to get to the docks or barges of the Pennsylvania Coal Company, except by this crossing?

Mr. Markley: I object as immaterial, irrelevant and incompetent.

A. Well, there is—

20 The Court: One minute. I think you may show how the people go there and how long they have passed there. I do not think you can go farther than that.

Q. Will you please tell the Court and jury how a person—what route a person must take in order to go to the dock of the Pennsylvania Coal Company or the office of the Pennsylvania Coal Company from the River Road?

30 (Objected to as immaterial, irrelevant and incompetent. Objection overruled. Exception.)

A. One, by the Edison; and there is another path going across the tracks about one hundred feet up from that, and there is another place on the other side of the tunnel.

Mr. Markley: On the other side of the tunnel?

The Witness: Yes.

40 Q. That is all.

Cross Examination by Mr. Markley:

Q. Do you live in a frame house? A. I did; I do not any more.

Q. Was it a two-story-and-attic frame house? A. One story and attic.

Q. I show you a picture, which just for ready reference we will call No. 19; is that the house, the frame house shown at the extreme right of the picture? A. The next one; the next house. 10

Q. The one right next to the two-story-and-attic frame house? A. Yes.

Q. On the same side of the street or on the other side? A. On the same side but on the other side of this house, this one here.

Q. The one I am pointing to is the one at the extreme right of the picture. Let's put an X there. It is not that? A. No. 20

Q. Is it to the right of that or to the left of that? A. It is to the left going down.

Q. Looking at the picture there, is it to the left of the picture or the right? A. To the left; there is the little house there.

Q. Outside that shanty? A. Yes.

Q. Right next to the big house? A. Yes.

Q. You never measured how far that is from the crossing, did you? A. No, sir.

Q. There are a number of buildings in between there and your house—small one-story buildings? A. Yes. 30

Q. Then there is a fence, isn't there, right down near the tracks? A. Yes, sir.

Q. About how far would you say your house was from the near rail of the railroad? A. From the gate, do you mean?

Q. Yes. A. About fifteen feet.

Q. Did you ever measure it? A. No, sir; but it is about that. 40

John Kazinci—Cross Examination.

Q. That crossing at that point leads right into the Edison place? A. Yes.

Q. And the Edison people have a sign up there, haven't they? A. Yes, sir.

10 (Photograph marked for identification D-1, being photograph designated as "No. 19.")

Q. I show you another one marked "22" in the right hand corner. Does that show the sign on that Edison Company railroad crossing? A. Yes, sir.

Q. And that was there on March 4? A. Yes, sir.

Q. And that fence was there leading into the Edison place? A. Yes.

20 Q. This is the path that appears in the picture? A. Yes.

Q. That pathway leads to the Edison place and stops in the Edison place? A. Yes.

(Photograph "No. 22" marked D-2 for identification.)

Q. I show you another picture, No. 24. That shows the big fence around the Edison place on the right hand side of the picture? A. Yes.

30 Q. If anyone wanted to go down toward the docks, the Hudson River, after they had crossed over this crossing for the Edison place they would have to walk along that fence and along the railroad, crossing the tracks, to get to the docks? A. Yes.

Q. And that was so on March 4? A. Yes.

Q. On this particular night you were in the house? A. Yes, sir.

Q. What were you doing? A. Waiting for the rain to stop.

40

Q. Were you going any place? A. I wanted to go out.

Q. You wanted to go out? A. Yes.

Q. Your house was a one-story affair? A. Yes, sir.

Q. What were you doing, reading or talking?
A. Playing cards. 10

Q. Playing cards with somebody? A. Yes, sir.

Q. With whom were you playing? A. My brother and one of the boarders we had; just the three of us.

Q. What were you playing, pinochle? A. Poker.

Q. So you were not paying any particular attention to the railroad, were you? A. No, sir.

Q. And you were not paying any particular attention to the engines and cars on the railroad?
A. No, sir. 20

Q. So then you do not know how many engines passed? A. No.

Q. Or how many cars passed? A. No.

Q. And the first your attention was really attracted to the railroad was when you heard someone moaning? A. Yes.

Q. Had you heard anything else that attracted your attention? A. That was all I heard, the moaning.

Q. Did you go out to the railroad then? A. Yes. 30

Q. Down on the track? A. Yes.

Q. Were there other people there at the time you got there? A. Some of the railroad men that were there before I was.

Q. They were there ahead of you? A. Yes.

Q. And you therefore did not discover Mr. Olsen; that is, he had been discovered before you got there?
A. Yes.

Q. And you just went down to the railroad? A. Yes, sir.

Q. When you got there you found Mr. Olsen on 40

the railroad, you say a few feet from the planking?

A. Yes, sir.

Q. Was it a few feet nearer the river or a few feet away from the river? A. Nearer the river.

Q. That is, he was not on the crossing but a few feet nearer the river than the crossing? A. Yes,

10 sir.

Q. What do you mean by a few feet? We would like to get some idea of that; it would be helpful to us? A. Two or three feet.

Q. Two or three feet? A. Yes, sir.

Q. How long did you stay there? A. I stood there until they took him away.

Q. About how long was that? A. About an hour.

Q. Then did you go on your way again? A.
20 Went in the house again.

Q. Played cards again? A. No, sir.

Q. Had it stopped raining when you went out?
A. After an hour's time.

Q. Did you stand in the rain a whole hour? A.
Yes, sir.

Q. Didn't have an umbrella? A. No, sir.

Q. When you went in the house it stopped raining? A. Yes, sir.

Q. Just like rain, isn't it? A. Yes.

30 The Court: What time was it you found him; what time did you go out and find him?

The Witness: About ten after eight.

JOHN RIGNEY, sworn.

Direct Examination by Mr. Kent:

Q. Where do you reside? A. Edgewater, 236
River Road.

40 Q. Are you connected with the fire department of Edgewater? A. Yes.

Q. Where is your fire engine house situated or located? A. Right across from the Edison Company, River Road.

Q. Do you recollect being called to get someone who had been struck, on the 4th day of March, 1922? A. Yes, sir.

Q. About what time of the night was it? A. Ten minutes after eight. 10

Q. Where did you go? A. I was called by a doctor to come over and give a hand and get him on a ladder and take him in the fire house.

Q. Where did you go? A. To the Erie Railroad, right opposite the Edison Company.

Q. To the crossing there? A. Yes, sir; about four feet from the crossing going into the Edison Company.

Q. Did you see a man there? A. Yes, sir. 20

Q. And what was his condition at the time? A. When I went over to pick him up I didn't look much. He was laying about four feet from the crossing, and I picked him up and fetched him to the fire house.

Q. And did you look at him? A. No, sir; I didn't.

Q. Do you know whether he had any arms or limbs missing? A. No, sir; the only thing I know, the left foot was off, that was all. 30

Q. Was he conscious or unconscious? A. I did not know. I hurried him up to the fire house; I didn't pay any attention to that.

Q. At that Edison crossing that you speak of, does that run into the River Road at Edgewater? A. It is in line with the River Road as you come to go in.

Q. At right angles? A. Yes, sir.

Mr. Markley: At right angles?

A. It goes in and out again like this (indicating).

Q. Is there anything over that crossing? A. The Edison Company.

Q. Is there anything on the crossing? A. Just plank, that is all I know, to go across and back.

Q. How wide is that crossing? A. I could not really tell how wide; I never measured it.

Q. How long has that crossing been there to your knowledge? A. I have been in town twenty years; it has been there maybe over that.

Q. Over twenty years? A. Yes, sir.

Q. How wide would you say that crossing was in reference to any object in this room? A. About nineteen or twenty feet, I guess.

Q. Eighteen to twenty? A. Nineteen to twenty. It might be a little wider. I never measured it; just a rough guess at it.

Q. Was it as wide as that street it runs into at that point—that crossing? A. I could not tell; I never bothered to measure it.

Q. It is planked the entire width? A. Yes, sir.

Q. Do you know whether that crossing is used by persons having business with or employed at the Pennsylvania Coal Company plant? A. The only ones I know, just the Edison people goes in and out for their own business.

Q. And by persons who have business at the barges? A. Some goes over the tracks in front of the fire house and some the other end of the tunnel.

Q. You have seen them using it? A. I have seen them using it that way, and down the fence, and the tunnel.

Q. That is the only way— A. There, and in front of the fire house—

Mr. Markley: I object to that as leading.

The Court: I will strike that out.

It is leading. You may find out how they get there.

Q. How do persons who want to get to the Pennsylvania Coal Company or its barges get there? A. I have seen them go over the tracks. They generally go over the tracks; and sometimes they go down there into the shanty where the railroad has their office, the time—the yard-master. 10

Q. Do you know where there is a path along the fence of the Edison Company to go down there?

A. There is a path there.

Q. That path ends at the crossing?

Mr. Markley: I object as leading.

A. Down the crossing, and down along the fence; that is where I see them go. 20

Q. Is that path used by people having business there? A. Just going in the Edison and out, that's the idea, and all employees going in and out the Edison Company.

Q. Is that used by people who have business with the Pennsylvania Coal Company?

Mr. Markley: I object as leading. 30

The Court: Objection sustained.

Mr. Kent: Withdraw that.

Q. Do you know where that path alongside of the fence of the Edison Company leads to? A. Down to the flour dock.

Q. Who would use that path, if you know? A. Boat captains generally go down there since I have been on duty. 40

Cross Examination by Mr. Markley:

Q. Where is this Edison road across the tracks?

A. Up a little from the fire house, up this way.

Q. Nearer the river? A. No; up this way, a little from the river.

10 Q. And a great many people use that road? A. There is a path before you get to the tunnel that goes downstairs, down to the yards.

Q. Right down in the yards? A. Yes.

Q. There is another pathway about one hundred feet from that crossing? A. Yes. They generally go over the tracks in front of the firehouse.

Q. There are three roads? A. They come over the tracks, and some goes along the fence to come down.

20 Q. This road where you were called to get this man leads into the Edison place? A. Edison Company, yes, sir.

Q. And it stops there? A. Yes, sir.

Q. It doesn't lead anywhere else? A. Only where it goes in the Edison Company; it goes down there; but that is for trains to the flour company; that is where they drill in to put their cars.

Q. There is not any planking except right at the Edison place? A. That is all I have any idea of; I do not know any other place.

30 Q. And the Edison Company has a sign up at their crossing with their name on it saying "New York Edison Company; Railroad Crossing"? A. Yes.

Q. And they have a fence on their property on which they have that sign? A. Yes.

Q. The planking and the improved part there merely leads to their plant and stops there? A. Yes.

Q. It does not go down along the track? A. Just the railroad.

Q. Well, the rails sticking up on their ties, that is all there is below the Edison Company? A. That is all I have an idea it is; just their company employees going in and out.

Q. And their vehicles go in and out? A. Yes. 10

Q. And their employees go in and out? A. Yes.

Q. They have a big plant there? A. Yes.

Q. A big coal place? A. Yes; a big storage place.

Q. Big piles of coal such as appear in picture 21? A. Yes.

Q. And their wagons and employees all go in and out over that plank crossing? A. Yes.

Q. There is not any plank anywhere else? A. That is the only place. 20

Q. Looking at picture 21, the planking stops at the Edison place? A. Yes.

Q. There is no planking below there? A. No, sir.

Q. Who was it that told you to go to this crossing? A. Doctor Poole from Edgewater.

Q. You got a telephone message at your fire house? A. Yes; to come over to get a ladder off the machine to fetch this man to headquarters.

Q. So you went with your partner with a ladder to the crossing? A. Yes. 30

Q. How far from your firehouse is that? A. I cannot just remember; it can't be very far.

Q. A block or half a block? A. No; about five or ten feet.

Q. Are you on the same side as this young Polish boy? A. He did live there, but not now.

Q. How much further is his place from the track than your fire house? A. About from here to you.

Q. Are you nearer the track than he? A. The track is here and I am this side of the sidewalk. 40

Q. You are further away from the track than he? A. Yes.

Q. About from where you sit to this man reading the book there? A. Yes.

Q. That is about the distance from his house to your fire house? A. Yes.

10 Q. All you did was go to the crossing with your ladder, pick him up and take him back to the fire house, where the ambulance came from the North Hudson Hospital? A. Yes.

Q. You did not examine him? A. No.

Q. When you got there you found he was about four feet from the planking of the Edison Company? A. Yes.

Q. How old are you? A. 32.

20 Q. How long have you been a fireman? A. I'll be three years on, the 15th of February.

Q. How many? A. Three years on—on the 15th of next February.

Q. You have been a fireman about three years? A. Three years the 15th of next February.

Q. What were you before that? A. Chauffeur in the barrel company.

Q. Chauffeur in what? A. In the barrel company, Shadyside, River Road.

30 Q. No other vehicle could go over this road except into the Edison place? A. No, sir.

Q. There is no room for a vehicle? A. No.

Q. There is no planking after you get to the Edison place? A. No, sir.

Q. You have to walk along the ties, along the tracks, if you want to go down to the dock? A. Yes.

JAMES CASEY, sworn.

Direct Examination by Mr. Kent:

Q. Mr. Casey, where do you live? A. Edgewater.

Q. Are you connected with the fire department of Edgewater? A. Yes, sir. 10

Q. Were you with Mr. Rigney the night he went over to get Olsen? A. Yes, sir.

Q. Will you please tell us where you found him? A. We found him a few feet from the crossing, the railroad crossing.

Q. What was his condition at the time? A. Well, he had one leg off and one arm was pretty well mangled. I don't know if it was off or what it was.

(No cross examination.) 20

Mr. Kent: I would like to offer the hospital record showing his condition at the time of his admission.

Mr. Markley: I object to the hospital record. I will admit he died in the hospital, but I will not admit anything the hospital records show without proof as to the record. 30

The Court: You admit he died the following day in the hospital?

Mr. Markley: I think he died the same day.

Mr. Kent: The hospital record shows he died at 11:02 p. m. that same night.

Mr. Markley: Yes; I will admit that.

Mr. Kent offers in evidence and reads to the jury interrogatories served on the de- 40

*Interrogatories Served on Defendant N. Y. S. &
W. R. R. and Answers Thereto.*

fendant N. Y. S. & W. R. R. Co., and answers thereto as follows:

10 1. Please state whether on or about the 4th day of March, 1922, this defendant operated locomotives and freight cars on the tracks running through the Township of Shady-side, County of Bergen and State of New Jersey?

Answer: No.

2. Please state whether this defendant so operated its locomotives and freight cars on the 4th day of March, 1922, in the vicinity of the plant of the New York Edison Company?

Answer: No.

20 3. Please state whether this defendant was the owner of the locomotive which ran down and injured the plaintiff's intestate?

Answer: Defendant does not know of any of its locomotives having caused injuries to plaintiff's intestate.

4. Please state whether the said locomotive was operated, managed and controlled by this defendant at the time of the accident?

Answer: See #3.

30 5. Please state the exact time and place where the aforesaid accident occurred?

Answer: See #3.

6. Please state on which track the accident occurred, describing Track No. 1 as the track nearest to the street?

Answer: See #3.

40 7. Please state whether the locomotive at the time of the accident was proceeding towards Jersey City or in the opposite direction?

Answer: See #3.

*Interrogatories Served on Defendant N. Y. S. &
W. R. R. and Answers Thereto.*

8. Please state the exact location of the locomotive before it started in motion at the time when it struck the plaintiff's intestate?

Answer: See #3.

9. Please state in detail the position of plaintiff's intestate at that time?

10

Answer: See #3.

10. Please state the exact position of the locomotive when it first stopped after striking and ran down the plaintiff's intestate, giving the distance in feet?

Answer: See #3.

11. Please state the exact position of the plaintiff's intestate after the accident with reference to the position of the locomotive when it first stopped after the accident?

20

Answer: See #3.

12. Please state in detail how long prior to the accident the person in charge of the locomotive saw the plaintiff's intestate?

Answer: See #3.

13. Please state whether the locomotive at the time of the accident was proceeding head-on or backing up in the direction in which it was going?

Answer: See #3.

30

14. Please state how many feet away from the front part of the locomotive in the direction in which it was going, the plaintiff's intestate was first seen by the engineer or fireman?

Answer: See #3.

15. Please state in detail whether any warning, sound or blast was given from the locomotive when it commenced to proceed before striking the plaintiff's intestate?

40

Answer: See #3.

*Interrogatories Served on Defendant N. Y. S. &
W. R. R. and Answers Thereto.*

10 16. Please state whether any such sound or warning was given at any time while it was proceeding and before it struck the plaintiff's intestate; and if so, just when it was given with reference to the time of the accident?

Answer: See #3.

17. Please state in detail the approximate speed of the locomotive when the person in charge first saw the plaintiff's intestate?

Answer: See #3.

18. Please state whether a light was burning at the front of the locomotive in the direction in which it was proceeding?

Answer: See #3.

20 19. Please state the approximate speed of the locomotive when it ran down the plaintiff's intestate?

Answer: See #3.

20. Please state when and where the said locomotive was inspected prior to the accident?

Answer: See #3.

30 21. Please state the last time the brakes and other safety appliances of the said locomotive were repaired?

Answer: See #3.

22. Please state whether the said locomotive at the time and place of the said accident had a proper bell or signal?

Answer: See #3.

23. Please state the location of the locomotive when it was not in motion just before the accident and for how long the said locomotive so remained stationary there?

40 Answer: See #3.

24. Please state where the accident happened, giving the distance in feet with ref-

*Interrogatories Served on Defendant N. Y. S. &
W. R. R. and Answers Thereto.*

erence to the north side of the entrance to the Edison plant?

Answer: See #3.

25. Please state whether any bell or signaling device is maintained at this point to give notice to pedestrians of oncoming trains? 10

Answer: See #3.

26. Please state whether this defendant maintained any person as watchman at this point?

Answer: See #3.

27. Please state whether the tracks at this point are maintained by this defendant?

Answer: If this refers to the Township of Shadyside, answer is yes. 20

28. Please state whether the tracks at this point are used jointly or through mutual arrangement with the defendant, Erie Railroad Company?

Answer: If this refers to the Township of Shadyside, answer is no.

29. Please state whether the plaintiff's intestate was in the employ of this defendant?

Answer: No.

30

Mr. Kent: I want to read deposition of Charles F. Hurd, Jr., an employee of the Pennsylvania Coal Company.

Deposition of CHARLES F. HURD, JR., taken pursuant to notice.

APPEARANCES:

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Mr. NATHANIEL KENT, of Kent & Kent.

Mr. SELSER, representing Collins & Corbin.

Deposition of Charles F. Hurd, Jr., Direct.

Direct Examination by Mr. Nathaniel Kent:

Q. Mr. Hurd, you are connected with the Pennsylvania Coal Company? A. I am.

Q. In what capacity? A. Assistant to the president and assistant secretary.

10 Q. Did your company own the scow that Mr. month of March, one Harry Olsen?

(Objection waived.)

A. I believe that it had.

Q. Have you the records showing that? A. I have no such records.

Q. Has the company any such records showing his employ? A. Yes.

20 Q. Have you produced them? A. No.

Q. Did your company have in its employ in the Olsen was employed on? A. I have been directed by my attorney not to answer it.

Mr. Kent: I want to state here that it appears that Collins & Corbin, represented by Mr. Selser, were also, in the matter of this deposition, the attorneys for the Pennsylvania Coal Company.

30 Q. And you decline to answer that for that reason only? A. For that reason only.

Q. Did you in March, 1922, own barge No. 544? A. Yes.

Q. Was Mr. Olsen employed on that barge? A. I believe he was.

Q. Do you know where the barge was on March 4th, 1922? Where was the barge on that day?

A. At Edgewater, N. J.

40 Q. In the vicinity of the New York, Susque-

Deposition of Charles F. Hurd, Jr., Direct.

hanna & Western Railroad Company coal docks?

A. Yes.

Q. What arrangement, if any, did your company have with the owners of the docks in reference to the mooring of vessels?

(Objection waived.)

10

A. None that I know of.

Q. Did you have a contract with the Erie or Susquehanna Railroad Company in reference to the use of the docks? A. None that I know of.

Q. Who would know that? A. Why, I should say our secretary would have any such contract on file.

Q. What is his name, the name of the secretary? A. F. H. Wright.

Q. And where is he? A. Dunmore, Pennsylvania.

20

Q. Is he connected with the New York office at all? A. No.

Q. When your boats were not in service, where were they moored or docked?

(Objection waived.)

A. Why, generally in the vicinity of the Susquehanna docks at Undercliff; not always.

30

Q. You know of your own knowledge that the men with thier families lived on the boats? A. I don't believe I have ever seen any part of the family on the boats.

Q. Do your boats provide accommodation for the captain and his family? A. They provide accommodation for the captain.

Q. So he can live on it? A. Yes.

Q. When the boat is moored to the dock at Undercliff, what arrangement has your company

40

made for getting supplies to them or to the boat?
A. They make no arrangements of any kind.

Q. Then how are they to get supplies to the boat, if you know? A. I don't know.

Q. Who in your company would know that? A. I doubt if anyone would know that.

10 Q. Who is in charge of the boats and the arrangements of the boats? A. We have a foreman in charge of the boats, a Mr. Henry Wesch.

Q. And where is he? A. He is located at the docks at Undercliff.

Q. And where does he live? A. I can't give you that.

Q. Will your records show where he lives? A. I think I can find it.

20 Q. Will you produce it at the adjourned hearing? A. Yes. I will look up the address.

Q. And has he an office at Undercliff on the docks? A. Not on the ground there.

Q. Whose grounds?

(Objection waived.)

Q. Do you know whose ground?

(Objection waived.)

30 Q. Whose ground? A. I am pretty sure I knew I don't know of my own knowledge whose it is.

Q. You say he has an office at Undercliff? A. Yes.

Q. What kind of an office? A. Frame building.

Q. Who owns that building? A. Pennsylvania Coal Company.

Q. Does the Pennsylvania Coal Company own the ground? A. No.

Q. Who owns the ground, if you know?

(Objection waived.)

40 A. I don't know of my own knowledge.

Q. Have you ever gone to that office? A. Yes.

Q. How did you reach there? A. From where?

Q. From Jersey City. A. I ride to Jersey at the Edgewater ferry, either walk or take a cab south on the river road to Burns Bros. coal yards, about a mile and a half south, then I walk through the yards across the tracks.

10

Q. In other words, to reach the property, you have to go over the tracks of the Susquehanna Railroad? A. I can't tell whether I have to cross the tracks, but I do cross the tracks. Never investigated to find if there is any way of getting in without crossing the tracks.

Q. Did you ever cross at the point of the Edison Company plant? A. I am not sure. I am not sure of having come in from that end.

Q. You have come in from that end? A. Yes.

20

Q. And when you have come in from that end, you have walked across from the crossing in front of the Edison yard? A. I don't recall such crossing at all.

Q. And at that point, did you have to cross any tracks or not? A. I did cross tracks.

Q. Have you ever gone to or from any part to the shore road to that office without having to cross tracks? A. I don't believe I have.

Mr. Broadhurst: We waive the cross examination. 30

JOHN RIGNEY, recalled.

Further Cross Examination by Mr. Markley:

Q. Mr. Rigney, you testified on direct examination that this crossing had been used for probably twenty years? A. That is a rough guess. It may be over that.

40

Q. By whom? A. The Edison Company.

Q. Has it been used by anybody else for twenty years? A. I could not say that.

The Court: That was what I understood him to say before.

10

Re-direct Examination by Mr. Kent:

Q. During all this time you have known of it being used you have seen people walking down toward the water too? A. Yes, sir; but I could not tell how many times they have gone up and down the track all the time.

Q. It has been used by people to get from the docks? A. Yes; going up and down from the boats, getting to the boats.

20

Q. When you say it has been over twenty years, has such user been by people going to the boats? A. That is just a rough guess. It may be over twenty years, in and out of Edison's.

Mr. Markley: He is talking about other people.

30

Q. Going down to the boats? A. About ten years the boat captains have been coming up and down to my knowledge. Outside of that I could not tell any more on it because I never kept track of it how much they came up or down.

Q. During the entire time you can recollect, you know of boat captains going up and down that path? A. Yes; know of them going up and down.

Re-cross Examination by Mr. Markley:

40

Q. About ten years, that is about all you can remember? A. Yes.

Q. Not longer than that? A. No, sir.

Q. When you talk about twenty years or more, you mean that is how long the Edison people have been there? A. They may have been there a little longer.

Q. You do not remember other people using it during twenty years? A. No, sir; I see boat captains coming up and down all the time. 10

Q. Do you remember when the Edison people built the crossing? A. Yes.

Q. You mean you recollect the Edison people may have been using it for twenty years and no one else? A. Yes.

Q. And you think also boat captains may have been going to and from the boats for ten years? A. Yes.

Q. And they may use this crossing or some other crossing? A. I never watched them where they went. I was on duty; I would not be watching them. 20

Q. But they might use this crossing or use some other crossings? A. Yes. I had to be on my job all the time; I could not watch them.

Mr. Markley: I respectfully move for a non-suit on the following grounds:

30

FIRST.—There is no evidence of any negligence on the part of the defendants or either of them or any of their agents or servants.

SECOND.—On the ground there is no evidence of any negligence on the part of either one of the defendants or their agents or servants as alleged in the complaint.

THIRD.—No evidence of any negligence on the part of either of the defendants or any of their 40

*Motion for Non-Suit.**John J. McGarry—Direct Examination.*

agents or servants which was the proximate cause of the accident.

10 FOURTH.—No evidence that the plaintiff's intestate was lawfully at the place where he was struck, wherever he may have been.

FIFTH.—No evidence that he was struck on the alleged crossing.

SIXTH.—No evidence that the alleged crossing was a public crossing as alleged in the complaint and bill of particulars which has been filed.

20 The Court (after argument) : I will hold this case over until tomorrow morning, and if you have any case, Mr. Kent, where the courts have ever gone so far as to say that the finding of a body near a track is evidence of negligence, I would like to see it.

(Ajourned to July 3, 1923.)

July 3, 1923.

30 (Plaintiff's case re-opened.)

JOHN J. MCGARRY, sworn :

Direct Examination by Mr. Kent :

Q. Where do you live? A. Edgewater, N. J.

Q. How long have you lived in Edgewater? A.
47 years.

Q. Are you acquainted with the road or crossing
40 opposite the property of the New York Edison

Company where it crosses the Susquehanna Railroad? A. You mean leading from the River Road into the Edison Company?

Q. Yes. A. Yes.

Q. How long have you been acquainted with or gone over that property? A. Thirty years or more.

10

Q. How long has the railroad been crossing at or near that point, or in other words how long has the railroad been there? A. Well, I will say twenty-five years.

Q. Was there at that point where there is a crossing into the property of the Edison Company—was there a road prior to the railroad coming there? A. Yes.

Q. And where did that road lead to at that point? A. Into the Edison plant.

20

Q. I beg pardon? A. Before the Edison people come there it was owned by the Consolidated Gas Company, and that was the only way you could get in there.

Q. How far did that road lead to? A. Down to the end of the dock.

Q. Did you at any time prior to the coming of the railroad have occasion to use that road? A. Yes; I worked on the Consolidated Gas Company's plant there when I was a boy.

30

Q. Did you drive on that road? A. Yes, sir.

Q. Did you drive beyond the present plant of the Edison Company? A. I drove out to the end of the dock.

Q. Who else would use that road prior to the coming of the railroad? A. Anybody that wanted to get over to the Consolidated Gas Company's place; that was the only way they could get in there.

40

Q. And how about anybody wanting to get down to the docks?

Mr. Broadhurst: I object as leading.

The Court: Don't lead. He may answer that question though.

10

A. Well, that was the way they would have to go. Just let me correct myself there. What docks do you mean?

Q. The coal docks and the other docks? A. There is three different ways to get in to the coal docks. That is one; there is one coming from the north, near Burns Brothers' coal pocket; then there is a side hill entrance that comes down near the tunnel where the people come down to go to the railroad docks.

20

Q. People coming from the south side of Shady-side or Edgewater, what road would they take to go down to the coal docks? A. They would take the road that goes into Edison's and then up along the tracks.

Q. Have you recently observed the crossing over the railroad at that point? A. I pass by there possibly three or four times a week.

Q. And what is on that crossing? A. Wooden planks.

30

Q. Have you any idea how wide it is? A. Oh, say 15 or 20 feet—do you mean running north and south or east and west?

Q. Well, north and south, the width? A. Say fifteen feet.

Q. And how long has that crossing been there with reference to it being planked? A. Do you mean how long has the railroad been there?

Q. Yes. A. I would say twenty-five years.

40

Q. Are you acquainted with the train move-

John J. McGarry—Cross Examination.

ments around that yard? A. Do you mean in the yard or outside of the yard?

Q. In the yard at or near that crossing? A. Oh, yes; I see switch engines down there a couple of times a day, switching empty and loaded cars into different refineries.

Q. Do you know what direction they take on any or all tracks? A. Well, if they are delivering freight to Barrett, Corn Products, General Chemical or Spencer-Kellogg or the Bulls Ferry Chemical Company, they work from the railroad south. 10

Q. I am trying to get the way the locomotives are headed, if you know? A. Sometimes the locomotive is ahead of the train and sometimes it is behind it.

Cross Examination by Mr. Broadhurst: 20

Q. You mean sometimes the locomotive pulls the cars and other times it is behind, pushing them, is that what you mean? A. Yes.

Q. I believe you said in answer to Mr. Kent's question that there were a couple of other places that people use to get down to the coal docks? A. Yes.

Q. One you said near Burns Brothers? A. Yes; that is on the north end.

Q. How far is that from this Edison crossing? A. Possibly a mile to the north. 30

Q. And this crossing by the tunnel, how far is that from the Edison? A. I didn't say there was a crossing near the tunnel; I said the entrance to get to the railroad docks.

Q. You mean people go across? A. To get down to the railroad docks you walk down a steep incline, it is just on the north side of the tunnel, and opposite where your freight office is; you walk 40

down the incline there and across the tracks to the freight office.

Q. Is this place a mile north planked, up where you go in by Burns Brothers? A. Where you enter into Burns Brothers' they have a scale house there and on this side of the scale house there is
10 block pavement there.

Q. That is a mile north of this Edison plant? A. Yes.

Q. But down by the office near the tunnel, is there any planking there at all? A. Not that I know of.

Q. You say your first knowledge of this crossing was during a time you worked as a boy for the Consolidated Gas Company? A. Not as to the crossing; as to the road.

20 Q. As to the road, I mean. You used it then to go from the River Road, which goes parallel with the tracks? A. Yes.

Q. Some distance above the tracks? A. Yes.

Q. You used it to go down into the plant of the Consolidated Gas Company? A. Yes.

Q. Did the Consolidated Gas Company own all the territory that the Edison people now have—about the same? A. Yes; all that enclosure.

30 Q. And then the Edison people bought it from them; is that the idea? A. That is a question I can't say. I know the Consolidated Gas Company took all the refuse they got from their gas houses in New York, they brought it over in boats and a lot of us boys drove carts down there to unload the refuse and make the fill.

Q. Later, the Edison people took that property over, did they? A. The Edison people afterwards moved machinery in there and used it for coal storage.

40 Q. How long have the Edison people been there

now? A. They have been there twenty-five years.

Q. Practically since the railroad has been there?

A. I think they were there a little before the railroad; whether they were fitted up at that time I do not know.

Q. And this road, as you continue on from the River Road and go across the tracks, you come to the gate of the Edison plant, don't you? A. I believe there is a gate there. 10

Q. And then they also have their property fenced in something like this—that is photograph numbered 21, looking across the crossing toward the fence, toward the gateway of the Edison plant? A. Yes; that is a pretty good photograph there.

Q. And this is the photograph looking out of the Edison plant toward River Road—indicating photo marked No. 22 in the corner—looking out of the Edison yard near their fence, looking up toward River Road? A. Well, that is a little to the south of it. 20

Q. What does this sign say? A. New York Edison Company; Railroad Crossing; Stop, Look and Listen.

Q. Is that the same gate that appears on this picture? A. No; you don't notice your gate here.

Q. Isn't the gate here? A. I can't see this very well. 30

Q. All right; we won't argue about it. I just want to get the general appearance of it. This is 21, looking toward the Edison Company; this is a fair representation? A. Yes; that is a fair picture.

Q. And this photograph marked 24, is that a fair representation of the fence of the Edison as it runs along up the yard? A. Well, now, that I could not say because there is no point of view there where I could trace how it showed, whether it is or not. 40

Q. All right; you are not sure about that. Now, the people—that is anyone you have observed crossing the tracks at or near this place—they all use this crossing, do they, or the one up by Burns Brothers; none of them ever cross over the tracks themselves in between those points, do they? A. 10 The three routes that I give you are the routes that I know I saw people crossing over. If I was going to the coal docks myself from any direction that is the way I would go.

Q. How far is it from this place to the coal docks, about? A. Oh, less than half a mile.

Q. After you get over the tracks what do you do, walk up in what direction—north? A. Walk to the north.

Q. North, through the yards? A. No other way 20 to go.

Q. Through the yards; that is there are a number of tracks both to the north and south over which these switching movements are made; is that the situation? A. To the north and south of which point?

Q. North and south of Edison's crossing. A. Yes.

Q. And you would walk to the north through the yards about half a mile to the docks? A. Yes.

Q. When did you sever your connection with 30 the Consolidated Gas Company, before they went out of business here or not? A. I do not know whether they are out of business yet.

Q. I do not mean out of business generally; before the Edison people took over the place. A. Yes.

Q. Since the Edison people took over the place have you had occasion to go into the Edison plant? A. Yes.

Q. What? Contracting work for them? A. 40 Yes.

Q. That is all, sir.

The Court: Is there a path extending along from the Edison crossing down to the dock?

A. It is whatever you might call it, Judge; it is a cinder fill there. 10

The Court: Do they walk anywhere over the tracks they please?

A. They usually go up the tracks; they cross where this crossing is and go between the tracks and Edison's fence.

The Court: There is a fill there?

20

A. Well, if you want to call it a fill.

The Court: How many tracks are there at this crossing?

A. I never counted at this crossing. There is possibly two sets of tracks.

The Court: North and south of that crossing are there other tracks?

30

A. Yes; they do a lot of switching there.

By Mr. Broadhurst:

Q. Switch points branch out at various points?

A. Yes; as you go to the north tracks broaden out.

Q. And this fill you speak of, that is the character of fill that has been put in there for the tracks to rest upon; is that what you refer to? A.

40

Even previous to the tracks coming there there was a cinder fill.

10 Q. Is this general character of fill, etc., that you refer to—assuming that that picture is looking to the north from the Edison crossing—is that the general character of fill, etc.? A. You can't get no character of fill from that because that is only a picture; to give a character of a fill you would have to see it with your own eyes.

Q. What is the character of the fill? A. Cinders.

Q. Cinder fill? A. Yes.

Q. Like they have customarily in railroad yards? A. In some cases. Under some railroad ties they have broken stones, but I do not think there is any there.

20 Q. You mean the ballast under the ties? A. Yes, sir.

JAMES A. DIMAN, sworn.

Direct Examination by Mr. Kent:

Q. Chief, where do you reside? A. Edgewater.

30 Q. What official position do you hold in the Borough? A. Captain of Police.

Q. How long have you lived in the Borough? A. Forty-three years.

Mr. Broadhurst: Twenty-three, or forty-three?

The Witness: Forty-three.

Q. Do you know the crossing at or near the Edison plant over the Susquehanna Railroad? A. Yes.

40 Q. Do you know of a crossing of the road at

that point prior to the coming of the railroad? A. Yes.

Q. Did you have occasion to use it at that time?

A. Yes.

Q. That is about how many years ago? A. I guess about thirty years ago.

Q. Have you ever had occasion to observe the crossing over the railroad now? A. Over the railroad? 10

Q. Yes. A. Only once.

Q. Will you describe what is over that crossing? A. Why, at the crossing there there is three railroad tracks and there is planking on it.

The Court: Three tracks at this crossing?

The Witness: Yes; three or two. I won't say for sure. 20

(No cross examination.)

ELIZABETH OLSEN, recalled.

Direct Examination by Mr. Kent:

Q. Mrs. Olsen, the house of your brother where you were staying that day your husband was killed, is that north or south of the Edison crossing? A. South. 30

Q. Towards where, towards Jersey City? A. Towards Jersey City.

Q. And he would have to go towards—would he have to go toward Edgewater or Fort Lee to get to that crossing? A. Yes.

Q. And the docks are further up north? A. Yes.

Q. Go up further? A. Yes. 40

Cross Examination by Mr. Broadhurst:

Q. How much of a walk is it from your brother's house down to the Edison place? A. Twenty-five minutes anyway.

10 Re-direct Examination by Mr. Kent:

Q. You mean that is the walk for you? A. Yes.

The Court: What time did your husband leave the house that night?

A. Five after eight.

Plaintiff rests.

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Mr. Broadhurst: I renew the motion that Mr. Markley made, on the various grounds.

The Court (After argument): It appears from the evidence in this case that this deceased was employed by the Pennsylvania Coal Company on one of its boats, and that he and his wife lived on this boat while it was in service. On the day of the accident which resulted in the death of this deceased, Mr. Olsen's wife went to visit a relative, and some time in the latter part of the afternoon of that day Mr. Olsen went to the house of this relative for the purpose of bringing his wife back to the boat. It started to rain, and the wife decided to spend the night with her relatives, and the deceased started, somewhere about eight o'clock in the evening, to return to the boat, and that is the last that is known of the movements of the deceased until after the accident occurred.

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There was a planking at the railroad crossing

of the New York, Susquehanna & Western which led into the Edison plant. At this planking, or plank crossing, there were two or three tracks. It appears that boat captains and others had been in the habit of crossing this crossing, as well as persons who went to the Edison plant, and that these boat captains and others wishing to go to the dock after crossing the crossing walked down along the Edison fence on some cinders that were there, and this cinder pathway—or cinders—along the fence was parallel with the railroad tracks.

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The deceased was found between eight and nine o'clock some few feet from this crossing with his foot cut off and one of his hands nearly severed.

It may be well assumed, and I think clearly so, that the injury which this man received was due to his coming in contact with a train operated by the defendant company. There is evidence that a young man who lived in the neighborhood of this crossing was playing cards in his house, waiting for the rain to cease so that he could go out, and he says that while he was so engaged in playing cards he heard the train pass, and that he did not hear any whistle blow or bells ring, although he was not looking or listening for any such signals. After the train had passed, and a short time thereafter, he heard someone moan and went out of his house and there found the deceased near this crossing. That is the evidence, as near as I understand it in substance, presented to this jury, and the evidence on which this court is asked to allow the case to go to the jury. There is no evidence that the deceased was struck on this crossing or that the train which hit him, if he was struck, was the train that the young man heard pass that house. There is no evidence of lack of care on the part of the defendant. There is nothing to show by the position in which this man was found that he might not have been walking on the track when he

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was struck or might not have been attempting to catch a ride on a train or that he might not have fallen from some train. There is no evidence whatever by which the jury can say how this man was hurt. In order to hold this defendant liable the jury would have to assume that the deceased was struck while crossing over this crossing and that the railroad company failed to give the statutory signal, or that the deceased was walking along a track over which he and the public had some right, and was struck by a train of the defendant who failed to give him due and proper warning of the approach of that train. That is absolutely missing in this case, not only as to where the accident occurred but how it occurred. The only presumptions of fact which the law recognizes are the immediate inferences from the facts proved; and in this case I do not see how the jury could say from the facts that are proved that negligence was the cause of this accident. Negligence can never be presumed.

Under the case as presented I am forced to grant the motion for nonsuit for both the Erie and the New York, Susquehanna & Western Railroad Company.

I understand the accident occurred in 1922, and that gives you abundant opportunity, if you gather additional evidence, to base a suit on such additional evidence, because the statute of limitations has not run.

Mr. Kent: May I have an exception?

The Court: Certainly you may take your exception.

New Jersey Court of Errors and Appeals

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ELIZABETH OLSEN, as Administra-
trix ad Prosequendum upon the
Estate of Harry Olsen, de-
ceased.

Plaintiff-Appellant,

vs.

ERIE RAILROAD COMPANY and
NEW YORK, SUSQUEHANNA and
WESTERN RAILROAD COMPANY,
Defendants-Respondents.

Action at Law.

On Appeal
from Hudson
Circuit Court.

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BRIEF OF PLAINTIFF-APPELLANT.

Statement of the Case.

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Plaintiff appeals from a judgment of the Hudson Circuit Court wherein the Court directed a non-suit against the plaintiff and in favor of the defendant, New York, Susquehanna and Western Railroad Company.

The facts may be summarized as follows:

On the 4th day of March, 1922, and for sometime prior thereto, the decedent, Harry Olsen was employed by Pennsylvania Coal Company, as a barge captain. His duties consisted of loading his barge at the docks of the company at Shadyside, New

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Jersey, and taking it wherever directed. The coal company had its docks and an office at that place. The only way to get from the dock and the office of the company was across two or three well defined paths or roads. The most southerly one being across the socalled "Edison Crossing," where the decedent was killed, and the others considerably to the north. The crossing opposite the Edison plant was fully planked across the railroad tracks and a well defined gravel path led therefrom to the offices of the company and the docks. This was the crossing constantly used by him. The proof was plenary in this case that this crossing had existed long prior to the coming of the railroad and had been used by persons desiring to get to the waterfront or the docks either with wagons or on foot, and for a period of at least thirty years. On the day of the accident, the decedent's boat was moored to the dock of the company, and the decedent's wife, who lived with him on the boat, went to visit her brother, who resided on the River Road at a point south of the docks. Her husband came for her afterwards, both intending to go back to the boat. It rained considerably at that time, so he advised her to stay and that he would return to the boat alone. She fixes the time of his departure about five minutes after eight that evening. That is the last seen of him until he is found moaning at the socalled Edison crossing about ten minutes after eight of the same evening, with his limbs and other parts of his body almost severed, so that he died the same night at the hospital. It must distinctly be borne in mind that the crossing at which he was killed was the first and only crossing that he could take in order to reach his boat. The other crossings available were considerably further up the road. All of the witnesses testify that he was lying on the tracks a few feet away from the crossing with one of his feet off and one of his hands off, and

moaning. A witness, Kazinci testified that he was in the house nearest to the track and crossing, that although he heard a train pass shortly before he heard the moaning, that train or engine gave no warning of any kind, and that he heard no bell of any kind.

After hearing all this proof the Court directed a non-suit against the defendant, New York, Susquehanna and Western Railroad on the ground that there was no evidence that the deceased was struck at this crossing, or that the train which hit him, if he was struck, was the train that the young man heard pass that house, or as the Court summarized it that there was no evidence whatever by which the jury can say how this man was hurt. 10

Here follows a chronological summary of the evidence adduced at the trial, with the testimony of the witnesses indexed thereto: 20

ELIZABETH OLSEN testified at page 9: Resides at 41 River Road and the wife of Harry Olsen. Was on the boat with him on the afternoon of March 4th, which was tied up at the coal docks (page 9, lines 20 to 40). The Pennsylvania Coal Company had an office near the docks (page 10, line 10). In leaving the boat she had to go to the place where he was hurt. *There was no other way of getting out* (page 10, lines 15 to 18). There was a path that led to the dock and offices of the Pennsylvania Coal Company (page 10, lines 30 to 35). Went to her brother at 41 River Road, where they also lived. It was a twenty or twenty-five minutes walk from the house to the docks (page 11, lines 1 to 10). The decedent came up for her afterwards (page 11, lines 10 to 12). It started to rain and he left at five minutes after eight in order to go back (page 11, lines 20 to 30). That was the last time she saw him alive (page 11, line 35). That the house where they were staying is 30 40

south of the Edison crossing, and towards Jersey City (page 47, lines 30 to 35). On cross examination, page 12, she testified generally as to his earnings and the items of damage.

10 JOHN KAZINCI, testified at page 14: On the day of the accident was living on River Road in a house 35 feet away from the crossing. He was home at the time when he heard moaning and he went outside to see what it was. Saw Harry Olsen *laying on the track* a few feet away from the crossing. One of his feet was off and one of his hands (page 14, lines 10 to 40). The crossing had planks between the tracks and was about twelve or thirteen feet wide. Olsen was on the third rail from the west. There was a train on the left side of him and it was still. Heard train going by shortly before he heard the moaning. Did not hear it give any warning of any kind. Heard no bell 20 (page 15, lines 1 to 30). Had lived at that house about two or three years (page 15, line 40). That crossing is used by the people going to the Edison Company and by the people going to the boats (page 16, lines 1 to 36). On cross-examination, he testified:—His house was about fifteen feet away from the near rail of the railroad (page 17, line 35). That he was in the house waiting for the rain to stop (page 18, line 38). That he wanted 30 to go out (page 19, line 2). That he was not paying any particular attention to the engines and cars of the railroad (page 19, line 16). That he found him about ten minutes after eight (page 20, lines 30 to 35).

JOHN RIGNEY testified at page 20: Connected with the fire department at Edgewater. His engine house is located right across from the Edison Company at River Road. Called over to get someone 40 who had been struck. He was about four feet from

the crossing. The crossing at right angles to River Road (page 21, lines 1 to 40). The crossing is planked over and has been used as a crossing for over twenty years (page 22, lines 1 to 15). The width of the crossing is about nineteen or twenty feet (page 22, line 18). There is a path alongside of the fence of the Edison Company, which is used generally by boat captains (page 23, lines 35 to 40). On cross-examination he testified as to the conditions as to the road and planking in front of the Edison plant (pages 24 and 25). That the crossing had been used for probably twenty years, maybe over that (page 39, lines 30 to 40). On redirect he testified that it had been used by people to get from the docks going up and down from the boats. During all the time he recollects boat captains have been going up and down that path (pages 36 and 37).

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JAMES CASEY testified at page 27: Connected with the fire department at Edgewater. Was with Mr. Rigney when he went over to get Olsen. Found him a few feet from the crossing. He had one leg off and one arm was pretty well mangled (page 27, lines 1 to 20). There was no cross-examination.

It was admitted that Olsen died at 11:02 P. M. the same night (page 27, line 35).

CHARLES F. HURD, Jr., testified at page 31: Connected with the Pennsylvania Coal Company as an assistant to the president and assistant secretary (page 32, lines 1 to 10). The company owns the scow that Olsen was on; that it was on that day at Edgewater, New Jersey, in the vicinity of the New York, Susquehanna and Western Railroad coal docks (page 32, lines 20 to 40). That their boats provided accommodations for the captain (page 33, line 35). That the company has an office at Undercliff, New Jersey. It is a frame building.

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The building is owned by the Pennsylvania Coal Company. The said coal company however, does not own the grounds (page 34, lines 20 to 40). In order to reach the office of the company, he has to go over the tracks of the railroad company (page 35, line 15).

10 JOHN J. MCGARRY testified at page 38: Is acquainted with road crossing the Edison Company for thirty years or more (page 39, lines 1 to 10). That the railroad has been there about twenty-five years (page 39, line 15). The road was there prior to the railroad company (page 39, line 18). The road at that time led down to the end of dock (page 39, line 25). That he had at that time occasion to use the road and drive upon it (page 39, lines 30 to 35). Said that there are three different
20 ways to get into the coal docks; one coming from the north near Burns Bros. coal pocket, then there is a side hill entrance that comes down near the tunnel and the third one is the road that goes into the Edison plant and then up along the tracks (page 40, lines 1 to 25). That he is acquainted with the train movements around the yard and that he used to see switch engines down there a couple of times a day, switching, empty and loaded cars into refineries; that locomotives are sometimes
30 ahead of the train and sometimes behind it (page 41, lines 1 to 20). On cross-examination he testified that there was a path which extended along from the Edison crossing down to the dock. It is a cinder filled path (page 45, lines 1 to 20).

JAMES A. DIMAN, testified at page 46: Captain of Police at Edgewater (page 46, line 30). Had occasion to use the crossing about thirty years ago prior to the coming of the railroad (page 47, lines 1 to 10). This completed the plaintiff's case.
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The defendant then moved for a non-suit on six grounds as set out on pages 37 and 38. The Court then granted the motion for a non-suit and its opinion may be found on pages 48, 49 and 50.

The ground of this appeal is that the Court should have denied the motion for a non-suit and should have submitted to the jury for decision the questions involved in the issues.

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ARGUMENT.

POINT I.

The Court erred in granting a non-suit. The evidence adduced at the trial and the inferences to be drawn therefrom required its submission to the jury.

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The facts of the case are simple and concise. The decedent Olsen was employed by the Pennsylvania Coal Company, who had docks and an office in the railroad yards. He had a perfect right to go there. Under any interpretation of the facts he was not a trespasser. It was shown that he and his wife left the boat late in the afternoon of the day of the accident. About eight o'clock it started to rain quite heavily and he returned alone because his boat had to go out. The proof shows that the house on the River Road where they had stopped was south of the crossing, it was the first one they could come to in order to get on the tracks. That that crossing had existed for over thirty or thirty-five years and ante-dated the coming of the railroad. It was well defined, planked approximately twenty feet in width and from where the planking stopped there was a gravel or cinder path down to the docks and the office of the Pennsylvania Coal

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Company. Mrs. Olsen fixed the time when he left the house at approximately five minutes after eight, and that for her it was a twenty minute walk from the house to the docks. However it was a considerable distance from the crossing to the docks. Kazinci fixes the time when he heard the moaning at about ten minutes after eight. Allowing for
 10 whatever discrepancies there may be in the time, he had to walk very rapidly to reach the crossing and must have reached it almost or about 8:10.

Kazinci states that shortly before he heard the moaning, he heard a train pass and that train gave no signal or warning of any kind.

The Courts of this State have uniformly laid down the rule that this evidence of Kazinci was for the jury, that it became a jury question and upon that point it could not be removed from the
 20 domain of the jury. *Materka vs. Erie Railroad*, 90 N. J. L., 457 and *Danskin vs. Pennsylvania Railroad*, 83 N. J. L., 552.

It was conceded by the Court that the injury which the decedent received was due to his coming into contact with a train operated by the defendant company, and that he was found about two feet off from the planking at the crossing. In view of the short time that elapsed between the leaving of the house and the accident at the crossing, it was im-
 30 possible for him to have gone anywhere except to the point of the crossing. It eliminates from the consideration of the Court or the jury any of the factors which his Honor in granting the non-suit took into consideration such as; that there was no evidence that the deceased was struck on this crossing, or that the train which hit him, if he was struck, was the train that the young man heard pass that house, and that there was no evidence of lack of care on the part of the defendant, and that
 40 he might have been walking on the track when he was struck or attempting to catch a ride on the

train, or that he had fallen from some train. Counsel respectfully urges that these inferences drawn by the Court are not in any way warranted from the evidence submitted, and it is respectfully urged that the only fair inference to be drawn from the testimony that the decedent came to the crossing, the first one he could get to, and was struck by the train that passed around that time, which train did not give the statutory signals required. Under any consideration, a jury could have fairly reached that conclusion at least as readily as the other conclusion that was reached by the Court. 10

If from all the facts and circumstances of the case reasonable men may draw inferences which would warrant a finding that the decedent was struck at the crossing it would also warrant a finding of negligence on the part of the defendant, then there was a jury question presented and the Court should have submitted the case to the jury. 20

The great reliance of the defendant was on the recent cases decided by this Court, to wit, *McCombe vs. Public Service Railway*, 95 N. J. L. 188 and *Alvina vs. Public Service Railway*, 117 Atl. Rep., 709.

The first case occurred on the Newark Plank Road, a public highway where it crosses the Hackensack River bridge. The bridge and highway is used by the public indiscriminately. The decedent was found badly mangled. There was no proof that he was struck by a car operated by the defendant company, as the inference was just as strong that he might have been struck by a heavy truck or other vehicle. There was not the slightest proof adduced to show that the defendant was in any way negligent, or that it had violated any statutory duty. 30

In the second case, the accident occurred on a public highway in the Borough of Hasbrouck Heights. The Court again followed the rule of law 40

laid down in the McCombe case (*supra*), and that it was incumbent upon the plaintiff to prove some fact of negligence.

10 It is respectfully urged that the cases are in no way applicable to the case at bar. Persons using the highway owe certain reciprocal duties to other users and the mere happening of an accident raises no presumption of negligence. In our case we show that the train which caused the accident did not give the statutory signal and under all the decisions of this State, that is proof of negligence.

20 The cases more in point are *Drelich vs. Erie Railroad*, 91 N. J. L., 600. In that case, the plaintiff's intestate, a child of two years, was fatally injured by a car on a freight track in the City of Passaic. The evidence showed that there were one or more fairly well defined paths used as convenient short-cuts across the railroad. The trial Court directed a verdict for the defendant which was reversed and held as follows:

30 "The case does not turn on the theory of invitation, as in *Black vs. Central Railroad Co.*, 85 N. J. L., 197. If that were the criterion, there is nothing in the mere user without objection to constitute an invitation. *Dieckman vs. Delaware, Lackawanna and Western Railroad Co.*, 81 Id., 460; *Corson vs. Atlantic City Railroad Co.*, 83 Id., 517. But a railroad company may lawfully dedicate a right of way across its tracks; either by deed, as in *Central Railroad Co. vs. Bayonne*, 52 Id., 503, or by constructing a crossing evidently or apparently intended for public use, as in *New York and Long Branch Railroad Co. vs. Drummond*, 46 Id., 644; or by public user for such a period as will ripen it into a prescriptive right from which original dedication is presumed, as in *Tarlucki vs. West Jersey and*

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Seashore Railroad Co., 82 Id., 138, a Supreme Court case. Other instances of dedication arising out of public use of railroad property not used for tracks are *Riverside vs. Pennsylvania Railroad Co.*, 74 Id., 476, and *Dickinson vs. Delaware, Lackawanna and Western Railroad Co.*, 87 Id., 264.

The evidence was meagre and not very satisfactory; but there was enough to require the submission to the jury of the question whether there was at the place of the accident a path open to and adversely used by the public for such preceding period of time, not less than twenty years, as would vest in members of the public the right to use it as a public way by prescription. If so, and the child was upon that pathway, he was lawfully there and the defendant owed him some duty of care; no doubt that of giving the signal required by the statute in the case of highways generally. There was evidence that no such signal was given; and whatever may be said of its value or otherwise to a child of two years of age, it is the test of care laid down by the statute with respect to persons of all ages on the highway, and young children who are barred of recovery for injury sustained when trespassing on a railroad are, on the other hand, within the purview of the protection by signal required at highway crossings. In fact, there was a group of children at the spot, and it may well be that a signal if given would have resulted in the removal of the child out of danger. That such a young child was suffered to be in such a place unattended, does not absolve the defendant. *Bergen County Traction Co. vs. Heitman, Administrator*, 61 N. J. L., 682; *Newman vs. Phillipsburg &c., &c.*, 52 Id., 446.

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We conclude that on this phase of the case there was error requiring a *venire de novo*, and to that end the judgment is reversed."

10 In the case of *Hannon vs. Delaware, Lackawanna & Western Railroad Co.*, 119 Atl. Rep., 86, the facts were: The decedent was employed by the defendant on a certain barge; that while seated
 20 on the rail of the barge, he was found dead on the deck; that another barge with an overhanging stern sufficient to overlap the rail was being towed into a slip nearby. The claim was that this overhanging stern struck and crushed the deceased against the bit and killed him. No one saw the actual collision; no other cause for the accident was apparent. This court held that there was sufficient proof to justify the inference that the decedent was struck by a stern of the barge and that such
 20 collision could not have happened if it had been properly managed and therefore a jury question was presented.

It is respectfully submitted that the evidence adduced at the trial and the fair inference to be drawn therefrom required the submission of the case to the jury.

POINT II.

30 **The appellant therefore argues that a jury question was presented and that the case should have been submitted to the jury.**

Respectfully submitted,

KENT & KENT,
Attorneys for Plaintiff-Appellant.

40 NATHANIEL KENT,
of Counsel.

#77

New Jersey Court of Errors and Appeals

ELIZABETH OLSEN, Administratrix
ad prosequendum of the Es-
tate of Harry Olsen, deceased,
Plaintiff-Appellant,

vs.

ERIE RAILROAD COMPANY and NEW
YORK SUSQUEHANNA & WESTERN
RAILROAD COMPANY,
Defendants-Respondents.

Action
at Law.
On Appeal
from
Hudson
County
Circuit
Court.

BRIEF IN BEHALF OF DEFEND- ANTS-RESPONDENTS.

1.

Statement of the Case.

The appeal in this case brings before this court a judgment of non-suit entered in favor of respondent, New York, Susquehanna & Western Railroad Company (hereinafter referred to as defendant). Judgments of non-suit were entered in favor of both defendants. The notice and grounds of appeal only appeal from the judgment in favor of defendant, New York, Susquehanna & Western Railroad Company (p. 1). The action was brought to recover damages under the New Jersey Death Act, for the death of plaintiff's intestate. At the conclusion of plaintiff's case, counsel for the defendants moved for a judgment of non-suit on

various grounds (p. 37 et seq). The motion was granted (p. 50, l. 25), and thereafter judgment was entered (p. 8). It is from that judgment that the present appeal is taken.

2.

Grounds of Appeal.

There is but one ground of appeal urged by the plaintiff, and that is as follows: "The trial court directed a judgment of non-suit against the plaintiff and in favor of the defendant, New York, Susquehanna & Western Railroad Company, when thereunto moved by counsel for the said defendant, whereas said court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

3.

BRIEF OF THE ARGUMENT.**I.**

The trial court did not err in nonsuiting plaintiff because there was no evidence of any negligence on the part of the defendant which was the proximate cause of the accident.

There was no eye witness to the accident. No one saw how it happened. No one knows, in point of fact, what caused the death of Harry Olsen, the plaintiff's intestate.

The plaintiff, widow of the deceased, testified that her husband was captain of a barge belong-

ing to the Pennsylvania Coal Company. The accident happened on March 4, 1922. Before six o'clock on that day the plaintiff left the barge, which was moored at a dock at Edgewater, to visit her brother. The dock, according to the plaintiff, belonged to the coal company, and it had a little shanty on the dock, which it used as an office (p. 9, l. 30; p. 10, l. 10). It was undisputed that the Pennsylvania Coal Company and its employees had *no agreement* or arrangement with the defendant New York Susquehanna and Western Railroad Company to use the dock or the railroad yard as a public highway (p. 33, ll. 1-10). After leaving the dock there was "a very small narrow path" which lead along the tracks through the railroad yard to the private crossing of the Edison Company (p. 10, ll. 11, 30-40). In order to reach her brother's house at 41 River Road it required "a good 20 to 25 minutes" from the Edison crossing (p. 11, ll. 1-10). After she arrived at her brother's house, her husband called for her; it started to rain and she decided to stay at her brother's house. Her husband left at five minutes after eight o'clock at night to return to the barge, and she remained with her brother, because it was raining so hard. That was the last time she saw her husband alive (p. 11, ll. 20-30).

The next witness, Kazinci, lived 35 feet from the private crossing of the Edison plant. He was in his home playing cards with his brother and a boarder; and he was paying no attention to the railroad or to the engines and cars on the railroad; and he did not know how many engines or how many cars had passed on the railroad while he was thus playing cards in his home (p. 18, l. 35; p. 19, l. 20). His attention was first attracted when he heard someone moaning. He then left his home and proceeded to the railroad (p. 14, ll. 30-40; p. 19, ll. 20-30). When he reached the

railroad there were other people on the railroad, some of whom were railroad men, who had already found Olsen, so that he, Kazinci, was not the first one to discover that Olsen had been hurt (p. 19, ll. 30-40). After he had reached the railroad he found that Olsen was lying about 2 or 3 feet from the private crossing of the Edison Company (p. 20, ll. 10-15). There was a train on the adjoining track to the left, standing still, and Kazinci, sometime before he heard the moaning, had heard a train go by, although he said that he didn't remember hearing any warning; there was also a railroad car standing somewhat to the North from Olsen. The view of the tracks was not obstructed (p. 15, ll. 20-40). The private crossing of the Edison Company, according to Kazinci, was about 12 or 13 feet wide, and there was planking between the rails. There were at least 3 rails (p. 15; ll. 1-20). The crossing lead right into the Edison plant, and the Edison Company had a sign up (p. 18, ll. 1-30).

The next witness, Rigney, a fireman of Edgewater, was connected with a fire house located right across from the Edison Company. He received a telephone call to come over and help an injured man on the railroad. When he reached the railroad he found Olsen lying about 4 feet from the crossing. He picked him up and "fetched" him into the fire house (p. 21, ll. 1-30). He said the crossing was planked, and he said it was about 19 or 20 feet wide (p. 22, ll. 1-20). Asked "Do you know whether that crossing is used by persons having business with or employed at the Pennsylvania Coal Company's plant?" he answered "The only ones I know just the Edison people goes in and out for their own business" (p. 27, ll. 20-30). There is another pathway across the tracks about 100 feet from the Edison crossing. There were three distinct pathways across the tracks. The crossing at the Edison plant stops

at the plant, and the Edison Company has a sign up at their crossing with their name on it, saying, "New York Edison Company. Railroad Crossing" (p. 24, ll. 20-35). The planking merely leads into the plant, and the crossing is used by the employees of the Edison Company and by its vehicles; the Edison Company maintains a large supply of coal at this particular plant, using it as a storage place, and the wagons of the Edison Company used the crossing in question (p. 25, ll. 1-10). He also stated that the crossing had been used at times by boat captains going to the docks, but that that practise had only continued for about 10 years (p. 36, ll. 1-30).

The next witness, McGarry, was merely called for the purpose of proving usage. He stated that he had known of the crossing for 30 years or more (p. 39, ll. 1-10). The railroad has only been going over the crossing for about 25 years (p. 39, ll. 10-15). The Edison Company was there prior to the railroad. The crossing always lead into the Edison plant and nowhere else (p. 39, ll. 20-30). He said there were three different ways of getting to the coal docks, one of which was over the Edison crossing (p. 40, ll. 10-20). The coal dock is about half a mile from the crossing (p. 44, ll. 10-15). There are a number of tracks, both North and South of the crossing, over which switching movements are continually being made (p. 44, ll. 20-30). Switching engines are daily at the crossing switching empty and loaded cars into the different refineries (p. 40, ll. 1-10). Sometimes the locomotive is ahead of the train; sometimes it is behind it (p. 41, ll. 1-20). The path extending from the Edison crossing down to the dock is made of a cinder fill. He said that there were two sets of tracks at the crossing, and that they do a lot of switching at that point, because the

tracks branch out into various switch tracks. He said the cinder fill was the kind usually found in railroad yards (p. 46, ll, 1-20).

The foregoing is all of the evidence with respect to how the accident happened. It is undisputed that it took 25 minutes to walk from the home of the plaintiff's brother to the Edison crossing, and that it was about half a mile from the crossing to the dock. No one saw the deceased after he left the home of the plaintiff's brother until after the accident had happened, and his body was found 3 or 4 feet from the private crossing of the Edison Company. How he reached that point, no one knows. Whether he walked to the Edison crossing; whether he walked to one of the other two crossings; for how long a time he walked along the tracks in the yard; whether he fell from a moving train upon which he was riding in order to shorten his walk; whether he was struck by a truck or wagon of the Edison Company at the crossing, or by a train; does not appear. He may have fallen from a moving train; he may have been struck by a truck or vehicle of the Edison Company. It does not appear that he was on the crossing at any time. Shortly prior to the accident, a train had passed over the crossing and had proceeded on its way; another was standing near the crossing; and still another train, consisting of one car, was also in the immediate vicinity of the crossing. Whether any one of these three trains caused the accident does not appear. It may have been some other train; or it may have been a truck. There was no eye witness to the accident. No one saw how it happened, or what caused it.

It is well settled, that under such circumstances the court was bound to non-suit the plaintiff, because the evidence was insufficient to submit the question of the defendants' negligence to the jury.

Alviana v. P. S. Ry. Co., 117 Atl. (N. J. C. of E. & A.) 109;

McCombe v. P. S. Ry. Co., 95 N. J. L. 187;

Price v. N. Y. C. R. R. Co., 92 N. J. L. 429;

Patton v. P. S. Ry. Co., 227 Fed. (C. C. A. 3d Cir.) 810.

In *McCombe v. Public Service Ry. Co.*, 95 N. J. L. 187, *supra*, the facts of the case as stated in the opinion are as follows:

“There was no eye witness to the accident. No one saw how it happened.

No one knows in point of fact what caused the death of Jeremiah L. Saunders, the plaintiff's intestate. The defendant company operates an electric street railway along a public highway known as Newark Plank Road in Jersey City, where it crosses the Hackensack River Bridge. There are two tracks, one on either side of the bridge. Automobiles use the centre of the bridge between the tracks. On the night of November 7th, 1917, at or near midnight, the motorman of a car, as it approached the bridge some seventy or eighty feet from where the body of Saunders lay, saw a dark object on the track. The motorman stopped the car about half a car's length from the dark object; getting off the car, he then discovered the object to be a man, Saunders, badly injured. The man lay on the South rail of the westbound track some two or three feet east of the draw. The bridge was lighted. The deceased had one of his arms below the elbow and one of his legs cut off sharply. The body was otherwise badly mangled. The next morning blood was discovered on the tracks at that point. There are sidewalks on both the north and south sides of the bridge. The cars at that point

were run on a fifteen-minute headway. The motorman of the car which immediately preceded the car, the motorman of which discovered the body on the track, was a witness, but he could not throw any light on the accident; he testified that he stopped his car some fifteen or twenty feet before reaching the draw; he was looking in front of him and there was nobody on the track, when he started the car. The only jar he felt was when the car went from the main part of the bridge onto the draw."

This Court, by Black, J. in an opinion affirming the judgment of non-suit, said:

"But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price v. New York Central R. R. Co.* 92 Id. 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. 29 Cyc. 589; *Bien v. Unger*, 64 N. J. L. 596.

For the plaintiff to succeed it was incumbent upon him, in the absence of direct evidence, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that Saunder's death was caused by the wrongful act of the defendant, and which would exclude the idea that it was a cause with which the defendant was unconnected. *Suburban Electric Co. v. Nugent*, 58 N. J. L. 658; *Austin v. Penna. R. R. Co.*, 82 Id. 416.

The complaint charged the defendant that it propelled against the decedent an electric car at great speed, without giving any signal of the approach thereof, without using rea-

sonable care to keep a lookout for the decedent, without using reasonable care to illuminate the car and the road in front of the car.

We think the plaintiff failed to prove these facts, or any facts, from which the jury could infer negligence of the defendant. It would serve no useful purpose to multiply illustrations of these elementary principles. The reports are full of cases showing striking and apt illustrations."

In *Alvina v. Public Service Ry. Co.*, 117 Atl. (N. J. C. of E. & A.) 709, *supra*, it appeared that the plaintiff's intestate was killed as the result of a collision between a motorcycle and the defendant's trolley car. No one testified to having seen or heard the collision. This court speaking through Black, J. held:

"Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. *McCombe v. Public Service Ry. Co.* 95 N. J. Law, 189; 112 Atl. 255.

The only presumptions of fact which the law recognizes are immediate inferences from the facts proven. *Price v. New York Central R. R. Co.* 92 N. J. Law, 429; 105 Atl. 187; *McCombe v. Public Service Ry. Co.*, 95 N. J. Law, 189; 112 Atl. 225; *Adriance v. Schenck Bros.* 95 N. J. Law, 187; 112 Atl. 408.

Proof of a collision or facts from which a collision could be inferred by a jury does not make a *prima facie* case of negligence. The doctrine or maxim *res ipsa loquitur* is not applicable. *Conover v. Delaware, etc. R. R. Co.* 92 N. J. Law, 602; 106 Atl. 384.

To establish a case of negligence and fix the liability of the defendant, it is incumbent upon the plaintiff to prove some fact which is more consistent with negligence of

the defendant than with the absence of it. *Toomey v. London etc. Ry. Co.* 3 C. B. N. S. 150.

When the plaintiff's evidence is equally inconsistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail (*Cotton v. Wood*, 8 C. B. N. S. 568) because there is always a presumption against negligence and in favor of innocence (*Philadelphia, etc. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457). A probability is not sufficient. *Searles v. Manhattan Ry. Co.* 101 N. Y. 661, 5 N. E. 66."

The Court further said:

"It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car, but if so, how it happened or who was responsible for the collision is left entirely to conjecture."

In *Price v. New York Central R. R. Co.*, 92 N. J. L. 429, this Court held (syllabus) :

"Plaintiff was employed as a fireman on one of defendant's locomotive engines; he was found in the engine cab in a standing position, about to collapse, with an abrasion on his head; was taken to a hospital and shortly became permanently insane. There was no proof of what caused the injury. A suit was brought on his behalf, and on the trial proof was made, in addition to the foregoing, that another engine passed that on which plaintiff was employed, which carried an iron poker extending four inches at one end, into the clearance space between the two engines, which was two feet eight inches, and that there were no other projections within the clearance space which could have come in contact with plaintiff. With these circum-

stances proven a motion by defendant for a favorable direction was refused. On appeal the plaintiff urged that the jury might presume that the poker had so changed its location as to come into position to strike plaintiff, because unless plaintiff was struck by the poker there would have been no accident. Held, that there being no proof that the poker had changed its position, or of the fact that plaintiff came in contact with it, the jury could not presume that a change in position of the poker had occurred, and upon that presumption, presume plaintiff came in contact with it."

In *Patton v. Public Service Ry. Co.*, 227 Fed. (C. C. A. 3d. Cir.) 810, the U. S. Circuit Court of Appeals for this Circuit reiterates the rule enunciated by this Court in the cases referred to. The facts as stated in the opinion in the *Patton* are as follows:

"Palisade Junction is a station of the street railway system operated by the defendant corporation, at which two lines of double tracks intersect, one line extending north and south and the other east and west. The waiting room of the station is south of the point of intersection. The platform in front of the waiting room serves the southbound track of the first-named line. From this platform to the platform serving the northbound track on the opposite side, the space is planked and is the way provided for passengers to pass from one side to the other to board cars going north or south. South of the wooden platform serving the northbound tracks and in part divided from it by an iron fence, is a level earthen space used for embarking and disembarking passengers in northbound traffic. From this space leads a well worn path along the defendant's right of way used by passengers

to shorten the distance going to and from Marion Avenue and the station. Except where the tracks are planked, the girder rails are exposed in the ordinary manner of steam railroad tracks.

The plaintiff's husband was found dead under the rear truck of a car on the north-bound track. The car had backed from a position north of the station toward a switch south of the station. The body was found at a point forty-three feet from the southernmost edge of the planking connecting the two platforms. The head lay in the direction of the front of the car. Wounds upon the body and the disarrangement of clothing suggested that the body had been dragged or pushed, but did not indicate the distance. The night was cold and the tracks were filled with snow and ice to the level of the rails.

A few minutes before the accident, a man stopped at the news stand in the station waiting room and inquired the distance to Marion Avenue. Being informed and having purchased a small bag of candy, he left. A moment later, the conductor of a car standing upon the northbound track gave the signal by bell to move the car back to the switch. The conductor remained upon the rear platform and according to the testimony, was able to see a certain distance down the track, but saw no one. The car was righted within and carried the customary forward and rear lights. The conductor felt a jolt, ordered the car stopped, and discovered the body of the plaintiff's husband beneath it. Impact with the body had thrown the truck off the track. In the decedent's pocket was found a small bag of candy. This is the only evidence tending to identify the man as the one who had made the inquiry at the station. There was also found in his pocket a letter written by his wife, requesting him to visit her, and indicating how he could reach her.

He was instructed by the letter to take the line of the defendant running east and west, to alight at Palisade Junction, and there after to 'walk along the track two blocks' to Marion Avenue."

The court affirming judgment of nonsuit said:

"No one saw the accident and no one knows, as a matter of fact, how it happened. The plaintiff contends that from the circumstances of the accident, negligence of the defendant must be inferred, that is, had the defendant not been neglected, the accident would not have occurred. When or how the plaintiff's husband got upon the track between the two rails is not disclosed. Whether he heard the bell ordering the car to back or whether he saw the lighted car in time to avoid his peril, is not shown. Whether the car knocked him down, or whether he fell down and while in the forward position in which his body was found, was run over by the car, is a mystery. Whether the conductor upon the rear platform of the car could have seen the decedent or by the exercise of care should have seen him, is not proved, nor is it proven that in backing the car, under the circumstances, the conductor was engaged otherwise than in directing the car's movements and in the proper exercise of care for the safety of those upon the track. In fact it is not shown how the accident occurred. While it is certain that the plaintiff's husband was killed by the car, there is no evidence that his death was caused by negligence, or that the proximate cause of his death was the negligence of the defendant. The learned trial judge was entirely without error in withdrawing from the jury a case in which a verdict for the plaintiff could not have been sustained by the evidence."

The plaintiff may rely on the cases of *Austin v. Pennsylvania R. R. Co.*, 82 N. J. L. 416, and

Hannon v. D. L. & W. R. R. Co., 119 Atl. 86, which were the authorities upon which she relied at the trial. The first of these cases deals with an action against a railroad company for fire caused by sparks escaping from its locomotive. The facts are not recited in the opinion, but the court held that they were sufficiently strong to take the case to the jury. There is nothing contained in the opinion which is authority for the submission of the case *sub judice* to the jury or that is contradictory of the decisions referred to *supra*.

In the case of *Hannon v. D. L. & W. R. R. Co. supra*, plaintiff's intestate was employed to check a cargo of freight being unloaded from a barge of the defendant. The cargo consisting of iron plates was being moved from the barge to a car by a crane. While this operation was in progress, decedent sat down on the rail of the barge against a small upright and within a few seconds afterward was found dead on the deck. Another barge of the defendant, with an overhanging stern was being towed into the slip nearby and it was claimed that the overhanging stern crushed decedent against the upright. Although no one saw the actual collision, the stern of the barge was observed very near and moving toward the place where decedent was sitting and in a position where it might overlay and inflict injury, *if it was not skillfully managed*. No other cause for the accident was apparent. The Court of Errors and Appeals, Bergen, J. (p. 87), in discussing the question of whether there was sufficient evidence of negligence to go to the jury said, "We think that there was sufficient proof to justify the inference that the decedent was struck by the stern

of the barge, *and that such collision would not have happened if it had been properly managed* and therefore a jury question was presented."

It will be observed that the above case is distinguishable from the case *sub judice*, in that it appeared that the *only* probable cause of death was the result of unskillful handling or managing the barge so that its overhanging side struck the decedent while in a place where he had a lawful right to be, whereas, in the case *sub judice*, as pointed out by the trial judge, in his conclusions for granting the non-suit (p. 49, l. 30; p. 50, l. 20):

"There is no evidence that the deceased was struck on this crossing or that the train which hit him, if he was struck, was the train that the young man heard pass that house. There is no evidence of lack of care on the part of the defendant. There is nothing to show by the position in which this man was found that he might not have been walking on the track when he was struck or might not have been attempting to catch a ride on a train or that he might not have fallen from some train. There is no evidence whatever by which the jury can say how this man was hurt. In order to hold this defendant liable the jury would have to assume that the deceased was struck while crossing over this crossing and that the railroad company failed to give the statutory signal, or that the deceased was walking along a track over which he and the public had some right and was struck by a train of the defendant who failed to give him due and proper warning of the approach of that train. That is absolutely missing in this case, not only as to where the accident occurred but how it occurred. The only presumptions of fact which the law recognizes are the immediate inferences from

the facts proved; and in this case I do not see how the jury could say from the facts that are proved that negligence was the cause of this accident."

We therefore respectfully submit that the trial court did not err in non-suiting the plaintiff when thereunto moved.

II.

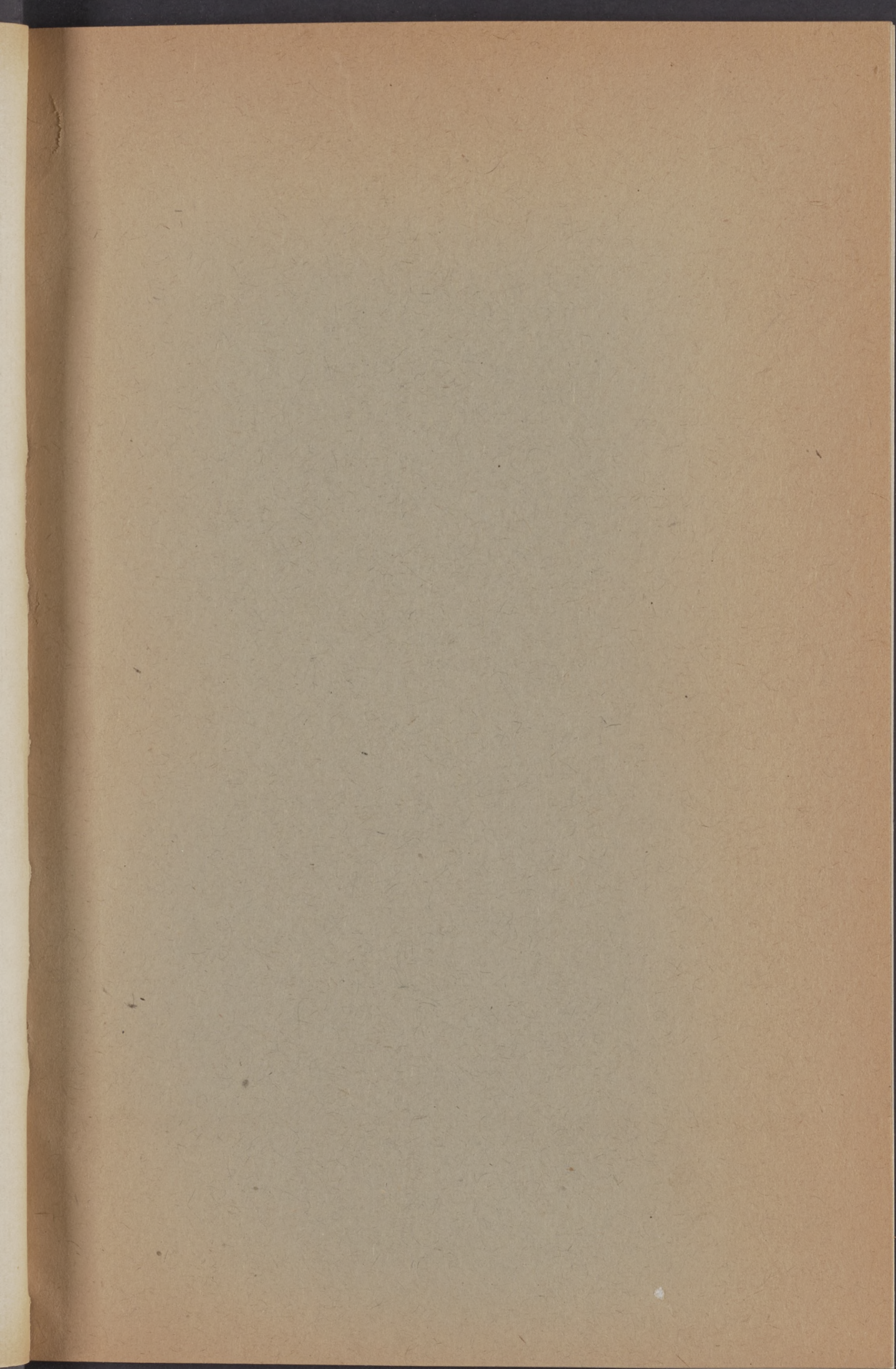
For these reasons we submit that the judgment below should be affirmed.

November Term, 1923.

Respectfully submitted:

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