New Jersey Court of Errors and Appeals

FRANK J. HIGGINS, Admr., Plaintiff-Appellant, vs. ERIE RAILROAD COMPANY, *et al.*, Defendants-Appellees.	On Appeal.

BRIEF FOR PLAINTIFF-APPELLANT

This is an appeal from a direction of nonsuit in a negligence case tried at the Hudson Circuit of the Supreme Court.

The question raised is the propriety of the granting of a nonsuit.

The suit was by an administrator for damages for the death of his intestate. The intestate was a laborer working for the Wells Fargo Express Company and as such was working at the depot of the Erie Railroad. He was pulling a baggage truck along a platform of the Erie Railroad when a locomotive proceeding rear end forward struck the end of the truck while it was being turned and threw him under the engine and killed him. There was evidence that no warning was given of the approach of the engine. The suit was commenced against the Erie Rairoad for its negligence in propelling the locomotive and against the Wells Fargo Company under the Federal Act.

It was contended by the plaintiff at the trial that the plaintiff's intestate was employed by the defendant, Wells Fargo Express Company, which is a common carrier by railroad, engaged, in interstate commerce, the direction of a nonsuit in favor of the Erie Railroad is attacked on the ground that there were jury questions as to the negligence of the defendant and the contributory negligence of the plaintiff's intestate which should have been submitted to the jury.

Ground of Appeal

The ground of appeal is that the trial judge erred in taking the case fom the jury, because there was evidence in the cases which demanded the finding of a jury as to the negligence of the defendant and the contributory negligence of the intestate of the plaintiff.

Argument

The intestate of the plaintiff, Simon Cleary, was killed on the 27th of October, 1912, under the following circumstances, or at least the jury might have found these to be the facts.

He was a laborer employed at the depot of the Erie Railroad and was pulling a baggage truck along the platform. At the same time, a locomotive approached him from behind with the rear end first. The locomotive was being operated by the fireman and no bell or signal was given of its approach to Simon Cleary. While Cleary was pulling his truck it was necessary for him to go to the side of the platform away from the engine and he started to move to the opposite side of the platform which would bring the rear of his truck

nearer to the track upon which the locomotive was proceeding. The locomotive proceeded without bell or signal and although the fireman saw the position of danger of Simon Cleary, did not stop the locomotive which was moving slowly, but continued until the breast beam of the engine struck the truck, turned the truck and threw Cleary under the wheels and he was killed. (See pp. 13, 14, 18, 19; p. 17, l. 17 to 22 and p. 34, l. 20 to 30.)

Although the fireman, who was running the engine saw the danger of the intestate of the plaintiff and saw that the accident was likely, he did not stop the locomotive but kept on going, and the jury might find, if the testimony of the first witness is true that no bell was sounded.

Upon application of the defendant, the Erie Railroad Company, the Court granted a nonsuit, upon the ground that under the case of *Dotson vs. Erie R. R. Co.*, 39 Vr., 679, the intestate of the plaintiff was clearly guilty of contributory negligence and that the defendant was guilty of no negligence. In the *Dotson* case, the appellant contends, the facts were different than those here. In that case, a passenger standing upon a platform, knowing that trains would pass, was held under the legal duty of not standing too close to the platform where she would be injured. In the case at bar, the plaintiff's intestate was pulling a truck along a platform without knowledge that there was a locomotive behind him. He was not at an intermediate station, but at a terminal. No train could come in unless he saw it. He knew that no train could approach him unless a signal was given that the train would come. He had a right to assume that nothing would approach from behind without giving him a signal. Under these circumstances, can he be held guilty of contribu-

7 See also Mowen v P.R.R. 53 N.J.L. 691

tory negligence as a matter of law, because when he moved from one side of the platform to the other, he unconsciously brought the end of his truck close to an approaching locomotive, of the approach of which he was ignorant without fault on his part? This is clearly an entirely different state of facts from that in the *Dotson* case. In that case, it is said:

> "It is the plain duty of a passenger when not getting on or off a train, but while he may be waiting at a platform or engaged in walking upon it, to keep such a distance from the edge of it, next to the rail that he would be beyond the reach of the projections of the ordinary train."

This is a different situation from that of a man walking along a platform pulling a truck, who knows that he will not be put in peril without warning and who necessarily moves with his back to the approaching locomotive and who himself keeps far enough away from the edge of the platform so that his body is not struck but who in manipulating the truck brings the end of it around so it is touched without his knowledge by a locomotive which approached rear end forward without giving him notice of the approach thereof. All this is far from a man standing so close to the edge of the platform along which he knows a moving train must pass and which train he sees, happens to be struck. This man was doing his work, pulling the truck. The jury had a right to find that the manner of propelling the trains was to give signals of their approach. In pulling the truck he necessarily had his back to the approaching locomotive and if it approached without giving him any signal he had a right to assume that the

platform was safe; and if in moving from one side of the platform to the other, he brought the edge of the truck too close to the edge of the platform, this was a perfectly harmless thing to do unless there was a locomotive approaching, and he was not charged with the knowledge that the locomotive would approach unless he had such knowledge. Therefore, to say that as a matter of law he was guilty of contributory negligence was to put upon him a greater burden than is warranted by the *Dotson* case, which deals with an entirely different condition of facts.

As to the negligence of the defendant, the Court held that negative evidence was not of any consequence (p. 72 of the Printed State of Case). But there was evidence that a man, who is in a position to hear the bell, would have heard the bell if it had been rung, and he did not hear it, and it was therefore for the jury to say whether or not the bell was rung and the Court could not direct a verdict upon weight of evidence.

See:

Uvaldes Co. v. Central Stockyard Co., 86 Atl., 425;
Dickinson v. Erie R. R. Co., 81 Atl., 104; 81 N. J. L., 464.

The Court was clearly weighing evidence when the Court said, what is the value of negative evidence as opposed to positive evidence? Negative evidence was for the jury. (See *Danskin v. Penn R. R. Co.*, 83 Atl., 1006. If the locomotive did approach without giving a signal and the man was walking in such a position he could not see and it is the custom to give a signal, that was clear negligence or at least the jury had a right to find that it was negligence.

The Court argued on page 74, because the platform was large enough and the space sufficient to enable him to move the truck, which isn't in the evidence but which could be admitted for the purpose of argument, and if he put himself where the law says he must be held to have known that there was danger, he was guilty of contributory negligence, but there is nothing in the law which says that he must have known there was danger. There was no danger unless the locomotive approached and he knew none would approach without signal, and he might have kept on the edge of the platform without danger unless the locomotive approached, of the approach of which he knew he would receive notice.

The Court of Errors and Appeals, says, in *Mumma v. Easton & Amboy,* 73 N. J. Law, 660;

> "If the case made by the plaintiff was one upon which fair-minded men might debate as to whether it spoke negligence, he was entitled to the finding of a jury. The question is not what the trial judge would infer, but whether the jury might legitimately conclude that the proofs of the plaintiff showed the defendant to have been negligent."

It is not a question of risk of the employment as he was not employed by the Erie.

Referring again the *Dotson v. Erie* case, it will be seen that this deals entirely with the use of platforms by passengers. Held that railroads using standard forms of platforms are not guilty of negligence toward a passenger who stands too near a train and is struck. But this is a far cry from a man pulling a truck along a platform at a terminal, who is entitled to believe that no loco-

motive will be propelled past him without signal, and is struck by a locomotive which comes without signal. The place is not one of danger as long as the signal of the locomotive was given. It became dangerous only because the railroad company propelled a locomotive in an unusual way along the platform so the jury might have found.

In the case of assumption of risk, which is also helpful in discussing standard of care and contributory negligence, Mr. Justice Garrison says in *Goessel vs. Central R. R.,* 78 Atl., 681;

> "A servant must use all reasonable means for his own safety while at his master's work, but if this be held to mean that he is to devote any considerable portion of his time to investigation of his master's business methods, outside of the work he is set to do, and whether he may devote a still greater portion of his time to looking out for dangers which may possibly result to him from the work that other servants are set to do, this proposition would be of no pratical use in determining the relationship of master and servant, for the simple reason that such relation would itself be terminated by the master, the moment he realized that he was paying the servant for working for him but to criticize the methods by which others were doing their work and to keep a constant lookout for possible dangers which might come to him from such outside sources."

Although this later case is a master and servant case, yet as indicating the mental condition which will or will not make for contributory negligence,

as a legal axiom; it is at least arguable if the master holds the servant to the doing of the work and not to apprehension of possible danger, a person legitimately at a railroad depot may also exclude from his mind extraordinary and possible dangers which will occur only by reason of the violation of the rules of the company, as in this case, the running of the engine by the fireman was a violation of the rules. This would be evidence of negligence. See *Goodin vs. R. R. Co.*, 33 Vr., 394.

So in the master and servant case in *Labatt* Vol. 1, page 628, section 272, note 1, it is held as to assumption of risk, that the servant is not held to have assumed extraordinary risk, such as a car repairer not held to have assumed the risk from want of proper precaution for protecting him from moving car. Citing *Felice v. Central Hudson R. R.*, 14 App. Div., 345; 43 Suppl., 922. Action held maintainable by workman in tunnel who was run over by engine, which came along on a track unexpectedly and without warning. There are other cases to the same effect collected in this note. If it would not be assumption of risk by a servant, how can it be held contributory negligence in a person who is there doing work for the benefit of the railroad company, although for an independent employer.

Of course, if it could be argued that the plaintiff's intestate knew that it was a place of danger, and knowing that the truck was in a position where it was likely to be struck, that was contributory negligence. But that is begging the question, because he did not know this. It was for the jury to say what his knowledge was under the evidence. The evidence was that he knew that no locomotive would come along without giving him a signal, because that was the rule of the

company as proved in the case. The jury also had a right to find that this locomotive did come without signal. If it was a safe place unless he got a signal that it was unsafe, he had a perfect right to pull the truck along any portion of the platform, because it only became unsafe under signal, which is an entirely different state of facts from the *Dotson* case, the meat of which seems to be that a railroad platform is a dangerous place if trains are always passing, and if a passenger stand so close that he is struck it is his own fault. In this case he was facing the incoming trains and it was only a wild locomotive which came along without signal which put him in any danger. To hold therefore, that as a matter of law, without judgment of jury, he was guilty of contributory negligence is to deprive him of his right to trial by jury, because fair-minded men might certainly differ as to whether his conduct under the circumstances was such as to betray that recklessness as to make him the architect of his own misfortune.

Respectfully submitted,

ALEX. SIMPSON,
Attorney for Appellant.

New Jersey Court of Errors and Appeals

FRANK J. HIGGINS, Administrator of the Estate of Simon Cleary, deceased,

Plaintiff-Appellant,

vs.

ERIE RAILROAD COMPANY and WELLS FARGO AND COMPANY,

Defendants-Respondents.

BRIEF IN FAVOR OF DEFENDANTS-RESPONDENTS.

Suit was brought by the plaintiff as administrator to recover damages resulting to the next of kin of one Simon Cleary, who was killed at the Jersey City Terminal of the Erie Railroad Company while in the employ of Wells Fargo and Company as a trucker. The statement of the case as given in the brief of the plaintiff is correct, except in so far as it claims that there was evidence that no warning was given of the approach of the engine by which the accident was caused. The defendants claim that there was no such evidence. As the same attorneys appear for both defendants the argument in behalf of both of them will be presented in the same brief. We will first take up the question of liability on the part of the express company.

Argument.

I.

The Express Company was not a common carrier by railroad within the meaning of the Federal Employers' Liability Act of 1908.

The action against the Express Company is based upon the theory that at the time of the accident it was a common carrier by railroad engaged in interstate commerce and that it employed Cleary to work for it in interstate commerce (p. 3, l. 30, to p. 4, l. 20). The motion for non-suit as to that company was allowed on the ground, *inter alia,* that such a company did not come within the description of the statute in question (p. 65, l. 30, to p. 66, l. 40). This conclusion is clearly correct. The statute of 1908 (unlike the original Federal Employers' Liability Act of 1906) is limited in its application to common carriers "by railroad". In this respect the language of the statute is similar to that used in the original Interstate Commerce Act of 1887, which was construed by the Commission and by the courts as not applicable to express companies.

1 Interstate Commerce Reports, 677;
U. S. v. Morsman, 42 Fed., 448;
So. Ind. Express Co. v. U. S. Express Co., 88 Fed., 659; affirmed 92 Fed., 1022;
Express Co. v. United States, 212 U. S., 522.

See also:

U. S. v. Adams Express Co., 229 U. S., 381, 57 L. Ed., 1237;
Omaha Street Ry. Co. v. Interstate Commerce Commission, 230 U. S., 824, 57 L. Ed., 1501.

It should further be observed in this connection that there is no allegation in the complaint nor any clear proof in the evidence that Cleary was employed by the Express Company in interstate commerce *at the time of the accident.* Such allegation and proof are necessary in order to justify a recovery under the Federal Employers' Liability Act.

Illinois Central R. R. v. Behrens, 233 U. S., 473, 58 L. Ed., 1051.

It is true that the Express Company is engaged generally in interstate traffic, intermingled with intrastate traffic, but that is not sufficient to justify a recovery under the statute, as the employe must be employed by the carrier in such traffic at the time of the accident.

But if we assume, for the purpose of argument, that the evidence sufficiently showed both that the Express Company was engaging and that the employe was employed in interstate commerce, nevertheless such company is not a common carrier "by railroad".

In *Missouri, etc., R. Co. v. West,* 134 Pac., 655 (Okla.), it was held that agents of express companies, whose duty requires them to ride on passenger trains, are not employes of the railroad company within the meaning of the Federal Act although part of their duty is to handle baggage of passengers. This case was affirmed by the U. S. Supreme Court in 232 U. S., 682, 58 L. Ed., 795, wherein the latter court refers, with apparent approval, to the conclusion of the State Court that under the evidence in the case the decedent was in the employ of an express company rather than of the defendant railroad company, and that therefore the defendant's liability was not controlled by the Federal statute of 1908. The action was brought under the law of the State and not under the Federal statute.

In the case of *Robinson v. Baltimore & Ohio R. R.*, 237 U. S., 84, 59 L. Ed., 849, it was held that a porter in the employ of the Pullman company was not entitled to the protection of the Federal statute and was not an employe of the railroad within the meaning of that statute, although he collected the railway tickets and fares of passengers.

To the same effect see:

Lindsay v. Chicago, etc., R. Co., 226 Fed., 23;

Fowler v. Pennsylvania R. R., 229 Fed., 373.

The Express Company is not a "carrier by railroad" but is merely a shipper over the line of the railroad company. This would seem to be a matter of common knowledge, but there can be no question about it whatever in the present case, because the interrogatories offered in evidence in behalf of the plaintiff (see p. 23, l. 30—omitted from the printed book through oversight) show the facts beyond dispute. These interrogatories and the answers thereto are as follows:

"1. State what arrangement existed on the 27th day of October, 1912, and prior thereto, between the defendant Wells Fargo & Company and the Erie Railroad Company as to transportation upon the line of the Erie Railroad Company of goods handled by Wells Fargo & Company.

"For a stipulated remuneration the Erie Railroad Company furnished to Wells Fargo & Company the necessary railroad facilities which enable Wells Fargo & Company to carry on an express business over the lines of the Erie Railroad Company.

"2. Did any employes of Wells Fargo & Company in the course of its business at any time prior to or upon the said 27th day of October, as servants of Wells Fargo & Company, travel upon trains upon the Erie Rail-

road in the course of their employment for Wells Fargo & Company, either as messengers in control of money or otherwise?

"Yes.

"3. Was there any contract or agreement existing between Wells Fargo & Company and the Erie Railroad Company on October 27th, 1912, and prior thereto, whereby Wells Fargo & Company paid the Erie Railroad Company for the use of its tracks, cars, trains, stations or property, and, if so, what was the agreement, and was this the only agreement?

"The only agreement is set forth in answer one.

"4. If the answer to the foregoing interrogatory does not contain the only agreement, or understanding, expressed or implied, between the Erie Railroad Company and Wells Fargo & Company, in reference to the business of Wells Fargo & Company, as an express company done upon the lines of the Erie Railroad Company, give any and all contracts, or agreements, relating thereto.

"See answer one."

That it was the intention of Congress to limit the application of the Federal statute of 1908 to common carriers by railroad, as distinguished from common carriers by other means of conveyance, is further shown by the use of similar expressions in other Acts passed by Congress shortly before and shortly after the Federal statute. Such other Acts use the expressions "common carrier engaged in interstate commerce by railroad" or "common carrier by railroad".

Thus, the Ash Pan Act of May 30, 1908 (35 Stat., 476; U. S. Comp. Stat. 1913, vol. 4, sec. 8624, provides in section one that after a certain date it shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic, not equipped with an ash pan which can be dumped or emptied and cleaned without the necessity of any employee going under such

locomotive. Section 2 provides that after a certain date it shall be unlawful for any "common carrier by railroad" in any territory of the United States of the District of Columbia to use any locomotive not so equipped.

The Boiler Inspection Law of February 17, 1911 (36 Stat. 913, U. S. Comp. Stat. 1913, vol. 4, sec. 8630), enacts that the provisions of the statute shall apply to any common carrier engaged in the transportation of passengers or property by railroad in the District of Columbia or any territory, etc., and that the term "employe" shall be held to mean persons actually engaged in or connected with the movement of any train.

The Sixteen Hour Law of March 4, 1907 (34 Stat. 1415; U. S. Comp. Stat. 1913, vol. 4, sec. 8677) enacts that the provisions of the statute shall apply to any common carrier engaged in the transportation of passengers or property "by railroad" in the District of Columbia or any territory, etc., and that the term employes shall be held to mean persons actually in or connected with the movement of any train.

The original Safety Appliance Act of 1893 applies by its terms to "any common carrier engaged in interstate commerce by railroad" (27 Stat. 531; U. S. Comp. Stat. 1913, vol. 4, sec. 8605).

The amendment of March 2, 1903 applies "to common carriers by railroads" (32 Stat. p. 943; U. S. Comp. Stat. 1913, vol. 4, sec. 8615).

The supplement of April 14, 1910 applies to every common carrier and every vehicle subject to the Acts of March 2, 1893 (as amended April 1, 1896), and March 2, 1903 (36 Stat. 298; U. S. Comp. Stat. 1913, vol. 4, sec. 8617).

That the expression "common carrier by railroad" means a railroad company, was also recognized by the Congressional Committee appointed in 1910 to consider the question of a Federal

Compensation Act. See Message of the President of the United States transmitting the report of the Employers' Liability and Workmen's Compensation Commission. 62nd Congress, 2nd Session, Document No. 338, Vol. 1, p. 59.

The Supreme Court of this State, in *Hammill v. Pennsylvania R. R. Co.*, 94 Atl. 313, held that the Federal Employers' Liability Act did not apply to the case of an employe who was employed in the operation of a *canal*. The Court said:

> "The Federal Act does not apply, because by its terms it affects only common carriers by railway. It is true that the employer is a railroad company, but as such employer of deceased it was operating a canal and not a railroad."

We therefore submit that the Express Company was not a common carrier by railroad within the meaning of the statute upon which the plaintiff's action is based, and that for this reason the action must fail as to that defendant.

II.

There was no evidence of negligence on the part of the express company.

The negligence charged in the complaint against the Express Company was that it did not use reasonable care to provide a system of rules for persons working in its employ; did not use reasonable care to keep and maintain persons to warn the plaintiff's intestate, and did not use reasonable care to keep and maintain the said place for him to work in (p. 3, l. 30, to p. 4, l. 20). None of these allegations was supported by proof. It did not appear that the Express Company was the owner of, or that it had any control over, the place where the accident happened. There was nothing to show that there was any duty cast upon it to provide rules for the benefit of

Cleary or to provide persons to warn him of the approach of trains. He had in fact been warned to be careful while working on the platform (p. 35, ll. 35-40). He had worked as a truckman at the Jersey City Terminal for about two weeks prior to the accident (p. 25, ll. 20-25; p. 27, l. 10). He was 38 years of age at the time of his death (p. 35, l. 10) and presumably did not need to be warned of the danger of performing his work too close to the tracks upon which trains were constantly moving back and forth. We have searched the brief served by counsel for plaintiff in vain for any argument or even suggestion therein upon which to base a charge of negligence against the Express Company. The case is apparently abandoned so far as that Company is concerned.

III.

Even if the Federal Employers' Liability statute applies to the express company and even if there was some proof of negligence on the part of that company, nevertheless Plaintiff is barred of recovery under the doctrine of assumption of risk.

In actions brought under the Federal Statute, the defence of assumption of risk remains in all cases except those where there has been a violation by the carrier of any statute enacted for the safety of employees.

Seaboard Air Line v. Horton, 233 U. S., 492; 58 L. ed. 1062;
Toledo &c. R. R. Co. v. Slavin, 236 U. S., 454; 59 L. ed. 671.

In the present case the decedent was familiar with the obvious dangers of working on a platform with a railroad track on either side, on which

trains were constantly moving back and forth. He had worked at the Jersey City Terminal for two weeks. The engine by which he was struck was moving backward on the track known as No. 12 which connected with the siding which ran into the station of the Express Company at Pier 4 (p. 28, ll. 20-30). This was the regular route for engines to move back and forth. During his two weeks of employment he had worked on the platform between tracks 11 and 12 (p. 27, ll. 20-30). During two hours of the day the engine was moving back and forth constantly on that track (p. 51, l. 25). There were 20 or 25 movements a day of trains or engines on track 12 (p. 29, ll. 20-30). The accident happened in daylight (p. 12, l. 32). The engine by which he was struck was moving very slowly, not so fast as a man could walk (p. 18, ll. 1-10). Under these circumstances, we submit that the risk of being struck was assumed, and that on this ground also the plaintiff is barred of recovery as against the Express Company.

IV.

There was no negligence on the part of the Railroad Company.

So far as the Railroad Company is concerned, the allegations in the complaint with respect to its negligence are that "it did not use reasonable care to give warning of the approach of the said locomotive; did not use reasonable care to keep and maintain control of the movement of the said locomotive so that it could be stopped before it struck the said truck which was being pulled by the said Simon Cleary; it did not use reasonable care to operate the said locomotive at the rate of speed safe to persons upon the said platform engaged in the occupation in which the said Simon Cleary was engaged" (p. 3, ll. 20-30). Of

these three allegations, the last two may be eliminated with but little discussion. The evidence was undisputed that the engine was moving very slowly. Plaintiff's witness, Kreiskother, said that he saw the engine when it was about fifty feet distant (p. 17, l. 30), that he could walk faster than the engine went, and that it kept on moving at this same rate all the time until it hit the truck (p. 18, ll. 1-15).

The fireman, Muldrew, was operating the locomotive and he said it was moving at the rate of four or five miles an hour (p. 24, ll. 20-30). Engineer Harding says it was moving "not over five miles an hour at the most" (p. 52, l. 30).

This was the only evidence on the subject of the rate of speed. It is obvious that if an engine is to be moved at all it would be difficult to operate it much more slowly than this rate. At such a rate the engine was of course under proper control.

The only ground of negligence which is seriously urged in the plaintiff's brief, is that no warning was given of the approach of the engine. Counsel asserts that there was evidence that no warning was given of its approach, and that "the jury might find, if the testimony of the first witness is true, that no bell was sounded" (p. 3 of Brief). Presumably, the reference to the "first" witness means Kreiskother. Counsel's statement that the evidence shows that no bell was sounded is not borne out by the record. The testimony of Kreiskother on this point was as follows:

> "Q. Before the engine hit the truck, did you hear this engine sound any bell or blow any whistle? A. I could not say—I didn't hear nothing.
>
> "Q. Did you hear it; that is what I want to know? A. No. (p. 14, ll. 18-22.)

On cross-examination:

"Q. You have said something about a bell on the engine; you do not know whether it rang or not, do you? A. *I could not say about that.*

"Q. You cannot tell about that? A. No.

"Q. Was there some noise around there, some noise from this train or the people walking along the platform? A. There was some noise there; there was some steam cutting off the engine, you know. You know how it is if you come from the train.

"Q. The engine of your train was letting off some steam, wasn't it? A. (No answer.)

"Q. The engine of the train you had come in on was letting off steam? A. I could not tell you exactly if it was our engine or not, you know.

"Q. But there was some steam from some engine? A. There was some steam; there was some noise.

"Q. And did the people walking up on the platform also make some noise? A. Oh, yes, because you know very well when you get out of the train what noise there is on the platform" (p. 19, ll. 1-25).

The only other witnesses called by the plaintiff as to the circumstances of the accident were the engineer and fireman who were on the engine. The fireman said "the bell was ringing all the while;" that it had been ringing and was set to ringing by him (p. 36, ll. 20-30). The engineer said that the engine bell was ringing all the time from the time they started to pull down on track 12 (p. 52, ll. 1-10).

Counsel argues that the evidence shows that the decedent knew no locomotives would come without giving him a signal "because that was the rule of the company as proved in the case" (p. 8 of Brief). We are not clear to what this refers. There was no *rule* on the subject. At the trial, counsel for plaintiff asked for production of a

book of rules but they were not produced and are not in evidence (p. 64, ll. 10-30). If by "rule of the Company" he means the custom of ringing the bell as the engine moved back and forth in the terminal, we concede that the evidence shows it was the custom to do that (p. 52, ll. 1-30); but that is exactly what was done in this case. It may be that the decedent did not hear the bell due to the escaping steam from an engine on another track (p. 19, l. 20; p. 22, ll. 20-40); or he may have confused the sound of the bell of this engine with the sound of the bell of the engine that had pulled a train into track 11, shortly before the accident (p. 47, ll. 30-40). But however that may be, the fact remains that there were two witnesses who testified that the bell of the engine by which the decedent was struck was ringing just as it always rang in such a movement, and the only other witness called on the subject testified in so many words that he "could not say" whether it rang or not. Under such evidence, the trial judge properly ruled that the signal by the engine bell actually was given and that if the decedent was confused by the ringing of the bell of the other engine on track 11 he should have either turned and looked or should have waited until the other bell had stopped ringing (p. 72, l. 1 to p. 72, l. 25). The New Jersey cases on this object are very clear and the principle is firmly established that negative evidence as to the sounding of a signal is of no importance compared with positive affirmative evidence that the signal was sounded.

Eissing v. Erie R. R. Co., 73 N. J. L., 343;
Holmes v. P. R. R. Co., 74 N. J. L., 469;
Howe v. Northern R. R. Co., 78 N. J. L., 683;
Blauvelt v. Erie R. R. Co., 81 N. J. L., 142.

But counsel for plaintiff further claims in his brief that there was evidence of negligence on the part of the fireman who was running the engine in that he saw the danger to the plaintiff's intestate and that an accident was likely to happen but did not stop the engine but kept on (p. 3 of Brief). There is no such allegation in the complaint. The only allegations of negligence, so far as refers to the Railroad Company, are found in paragraph 3 thereof (p. 3, ll. 20-30). It is, of course, too late to permit an amendment setting up such charge of negligence, as the statute of limitations has long since run—the accident having occurred October 27, 1912. But the evidence does not justify any claim of negligence in this respect, even if it had been alleged in the complaint. The fireman who was running the engine first noticed the decedent when he was about a car length away from him. He was then two feet clear of the tank of the engine (p. 34, ll. 20-30; p. 42, l. 20; p. 54, l. 20). He was standing still and then made a motion as if he were going towards the other platform (p. 35, ll. 30-40). This pulled the end of the truck towards the engine. At that moment the tank was only two or three feet from the truck. As soon as the fireman saw this movement on the part of the decedent he put on his brake and reversed the engine (p. 36, ll. 1-20; p. 42, ll. 10-20). The engine was stopped within 10 or 12 feet (p. 49, ll. 1-20). It could not have been stopped more quickly (p. 52, l. 25). What more could have been done? The engine was moving slowly, four or five miles an hour. The truck which the decedent was operating was two feet clear of the engine tank and the decedent was standing still as the engineer approached and then suddenly when the engine came within a very short distance the truck was moved and immediately the fireman applied his brake and reversed. There was nothing to suggest to the fireman that

there would be any sudden change in the position of the truck and nothing to indicate that the decedent was unaware of the fact that the engine was approaching. The truck was struck by the "brace beam" which was behind the engine tank (p. 43, l. 40). This extended a couple of inches beyond the tank but did not extend over the platform (p. 44, ll. 1-10; p. 49, l. 15).

Surely the fireman was not bound to suppose that an experienced employee who was two feet clear of the engine would suddenly move his truck when the engine was almost on top of it in such a way as to be struck—especially when the customary bell signal was being sounded as the engine was moving. There was no occasion for the decedent to change the position of the truck at that particular moment. He had plenty of room on the platform. His truck was empty (p. 15, l. 20). Counsel argues that there was no evidence to show the size of the platform. There was plenty of room on the platform for passengers who had alighted from the train that had just come in on track 11 to walk on in order to reach the station and the ferry house. (p. 13, ll. 10-15; p. 17, l. 10.) The witness Kreiskother illustrated how wide the platform was but unfortunately his illustration is not part of the record (p. 21, l. 40). However, there was no claim made that the platform was not properly constructed or that it was not large enough for the purposes for which it was used.

We therefore submit that there was no proof of negligence on the part of the defendant Railroad Company or of any of its agents or servants.

V.

The evidence shows that there was contributory negligence on the part of the plaintiff's intestate.

The argument of this defendant on this point can perhaps best be expressed by quoting from the remarks of the trial judge in granting the motion for nonsuit. He said:

> "Now, in this case it seems to me that there is not any doubt in the world that a person using a station platform on which locomotive engines and cars are run which have an overhang over the platform edge, is bound to know that if he gets in the way of that overhang he is apt to be hurt, or if he gets anything that he is drawing or carrying in the way of it he is apt to receive an injury. That likelihood is clearly expressed in the Dotson case, to which both counsel have referred, and inasmuch as this portion of the case which I am going to read also refers to contributory negligence I might as well read it once and for all now." (p. 67, l. 35, to p. 68, l. 15.)

Then follows a quotation from the case of *Dotson v. Erie Railroad Co.*, 68 N. J. L., 679, and the trial judge then continued:

> "I think therefore that it is established, first of all in this case, so that there is no question for the jury upon it, that the bell or signal actually was given that would warn anybody in believing that a train was approaching on track number twelve; but even if it were not I think that the question of the negligence of the defendant, the Erie Railroad Company, is a matter of utter indifference in this case, for this reason, that by the plaintiff's own case the contributory negligence of the plaintiff is sufficiently established. I think that the section of the case of *Dotson v. Erie Railroad,* which I have just read, is clear authority for the proposition that where a man goes into a place

of known danger and puts himself there and receives an injury from the fact of his presence there, that that must be conclusively held to be contributory negligence. In other words, that it is negligence is a matter of law. That is the rule that is laid down in the Dotson case, and the differentiation of that case attempted by counsel for the plaintiff it seems to me entirely fails. The place in which Mr. Cleary was doing his work, so far as the evidence shows, was a place of entire safety. He could have done it without any necessity whatever for having either put himself or his cart in any way in jeopardy. The platform, so far as the evidence shows, was large enough, and the space sufficient to enable him to operate that truck without in any way placing himself where he would be in danger, and if he put himself where the law says he must be held to have known that there was danger, and he was injured because of the fact of the danger which he knew was there, then to say the least of it he at least contributed by his own negligence to the production of the injury of which he complains." (P. 73, l. 25, to p. 74, l. 25.)

The conclusion of the trial judge on this point is amply justified by the evidence.

The witness Krieskother said that he saw Cleary pulling an empty hand-truck on the same platform where the witness was. He was moving away from New York. The engine struck the truck "about an inch on the truck" (p. 13, l. 25). The truck was about fifty feet from the witness as he walked towards the ferry (p. 17, ll. 1-10). The decedent was walking towards witness with his back to the engine. He walked straight ahead and did not turn around to look at any time (p. 18, ll. 30-40; p. 19, ll. 30-40). He did not change his position from one side of the platform to the other (p. 20, l. 25).

Durham, agent of the Express Company, said that decedent had been working about two weeks

at the Jersey City Terminal. He told everybody to be careful the same as a passenger (p. 25, ll. 30-40). Decedent worked as a trucker during this time, pulling a hand-truck back and forth (p. 27, ll. 30-40). Ninety trains came in and out at the terminal each day, and engines were backing in and out constantly, sometimes with, sometimes without, cars, on track twelve. This connected with a siding that ran into the Express station (p. 28, ll. 1-30). Twenty or twenty-five movements a day were made over this track in and out to the Express office (p. 29, ll. 20-30).

Muldrew, the fireman who was running the locomotive, said that the decedent was a car length away when he, the fireman, first noticed him. He was then two feet clear of the tank (p. 34, ll. 20-30). He was standing still and made a move as if going towards the other platform (p. 35, ll. 30-40). The engine was then two or three feet from the track (p. 36, l. 10). The locomotive hit the end of the truck and turned it half over (p. 37, ll. 1-10).

It is apparent from this evidence that if the decedent had kept his truck in the same position in which it was when the engine came on to track twelve, he would not have been injured at all. The accident was due to the fact that just as the engine came within two or three feet of the truck the decedent suddenly, without looking, turned his truck as if to move towards the other side of the platform, and he unfortunately moved it in such a way that a part of it projected just far enough over the edge of the platform to be struck by the engine tank. He could have heard the signal given by the engine bell if he had been listening carefully, but even if he could not have heard it, the engine was in plain sight and only two or three feet from his truck when he made this unexpected change in its position. There is nothing to suggest why

he suddenly moved it at that moment. Whatever the reason for so doing, it is obvious that he was not exercising reasonable care for his own safety in making such a movement without first taking some care to assure himself that there was no engine or train in such a position as to endanger him.

VI.

The judgment in favor of both defendants should be affirmed.

COLLINS & CORBIN,
Attorneys of Defendants.

GEO. S. HOBART,
Of Counsel.

INDEX

TESTIMONY

Plaintiff's:

New Jersey Court of Errors and Appeals

E. J. Higgins, Admr. of Estate of Simon Cleary, deceased,
Plaintiff-Appellant,
vs.
Erie Railroad Company, *et al.*,
Defendants-Appellees.

Action at Law.

Notice and Ground of Appeal

To Messrs. Collins & Corbin, Attorneys of Defendants:

Please Take Notice, that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following ground:

That the Court at the trial of the cause directed a judgment of nonsuit to be entered against the plaintiff and in favor of the defendant, whereas the Court should have submitted the issues in the said cause to the jury for decision.

Dated, April 6, 1915.

Yours &c.,

ALEX. SIMPSON,
Attorney for Plaintiff.

Judgment Record

NEW JERSEY SUPREME COURT

FRANK J. HIGGINS, Admr., etc., of Simon Cleary, dec'd, vs. ERIE RAILROAD COMPANY and WELLS, FARGO & COMPANY.	Judgment for Defendant. Collins & Corbin, Attorneys.

Erie Railroad Company and Wells, Fargo & Company, the defendants in this cause, were summoned to answer unto Frank J. Higgins, Admr., etc., of Simon Cleary, dec'd, the plaintiff therein, in an action at law upon the following complaint:

The plaintiff, administrator of the estate of Simon Cleary, deceased, the said plaintiff residing at the City of Jersey City, in the County of Hudson, and State of New Jersey, says that:

1. He is the administrator of the estate of Simon Cleary, deceased, and here and now brings into Court letters of administration granted upon the estate of the said Simon Cleary by the Surrogate of the County of Hudson.

2. The said Simon Cleary, the intestate of the plaintiff, in his lifetime was employed by the defendant, Wells, Fargo & Company, a joint stock company, and while at work for said Wells, Fargo & Company, at the terminal of the Erie Railroad Company at Jersey City, in the County of Hudson, was killed on the 27th day of October, 1912, by the joint negligence of the defendant, the Erie

Railroad Company, a foreign corporation, and Wells, Fargo & Company in the following manner.

The plaintiff, while employed by said Wells, Fargo & Company, was pulling a truck along a platform at the railway station of the defendant, Erie Railroad Company, parallel to which platform were the rails upon which the defendant Erie Railroad Company propelled locomotives, and the said defendant ran against and upon the truck which the said Simon Cleary was pulling, and struck the said truck and threw the said Simon Cleary under the locomotive which was then operated by it, the said Erie Railroad Company, and killed him.

3. The negligence of the said defendant, the Erie Railroad Company consisted in this: That it did not use reasonable care to give warning of the approach of the said locomotive; did not use reasonable care to keep and maintain control of the motion of the said locomotive so that it could be stopped before it struck the said truck which was being pulled by the said Simon Cleary; it did not use reasonable care to operate the said locomotive at the rate of speed safe to persons upon the said platform engaged in the occupation in which the said Simon Cleary was engaged;

And the negligence of the said defendant, Wells, Fargo & Company, consisted in this: that although it was the master of the said Simon Cleary on said 27th day of October, 1912, and it was a common carrier by railroad, yet it did not use reasonable care to provide any system of rules for persons working in its employ as the said Simon Cleary was working, pulling trucks

along the said railway; did not use reasonable care to keep and maintain persons who would warn the said Simon Cleary of the approach of the said locomotives, although it, the said Wells, Fargo & Company, well knew that by reason of his attention being centered upon the work that he was doing, that is to say, pulling a truck, he could not protect himself from locomotives operating in the vicinity, and the said Wells, Fargo & Company, although it was, at the time aforesaid, a common carrier by railroad, engaged in interstate commerce, and employing the said Simon Cleary to work for it in interstate commerce, did not adopt the precautions aforesaid; did not use reasonable care to keep and maintain the said place for the said Simon Cleary to work in.

4. The plaintiff alleges that by reason of the joint negligence of the defendants aforesaid, the said Simon Cleary then and there was killed.

4. The intestate of the plaintiff, Simon Cleary, left him surviving as next of kin his father, James Cleary, who has suffered pecuniary loss by reason of his death.

5. The within action is commenced within 24 calendar months of the date of the death of the said Simon Cleary.

The plaintiff demands $20,000.00 damages.

ALEX. SIMPSON,
Attorney of Plaintiff.

The defendant Erie Railroad Company answered as follows:

Erie Railroad Company, a corporation of the State of New York, having its principal office in New Jersey at the foot of Pavonia Avenue, Jersey City, says that:

1. It has no knowledge of the allegations of paragraph one.

2. It has no knowledge whether Simon Cleary in his life time was employed by Wells, Fargo & Company, nor whether he was at work with said Wells Fargo & Company on October 27, 1912. It admits that on said date it had a terminal at Jersey City, Hudson County. It denies that there was any negligence on its part which was the proximate cause of the death of said Simon Cleary.

It admits that it propelled locomotives upon rails parallel to certain platforms to its said terminal, and it admits that it was operating the locomotive which struck the truck referred to in said paragraph.

3. It denies paragraph three in so far as said paragraph alleges any negligence on the part of the Erie Railroad Company, or any of its agents or servants.

4. It admits that the said Simon Cleary was killed on said date, but denies that he was killed by any negligence on the part of this defendant, or of its servants or emloyees.

It has no knowledge as to the next of kin of the said Simon Cleary, but denies that his next of kin

sustained any pecuniary loss by reason of his death.

5. It admits paragraph five.

SECOND DEFENSE:

The next of kin of the said Simon Cleary did not sustain any pecuniary loss by reason of his death.

THIRD DEFENSE:

The accident set forth in the complaint was due to contributory negligence on the part of the said Simon Cleary in failing to take reasonable care to look and listen, or otherwise inform himself of the approach of the engine by which the truck referred to in the complaint was struck.

FOURTH DEFENSE:

The said Simon Cleary at the time of the accident resulting in his death was in the employ of a certain corporation known as Wells Fargo & Company, one of the defendants herein. Said Company has paid to the next of kin of said Simon Cleary, or to his authorized agent, the full amount due said next of kin under the provisions of a certain statute of the State of New Jersey known as Chapter 95, New Jersey Laws of 1911, and said Wells, Fargo & Company has fully paid and satisfied all claims that the said next of kin has or might have against said Wells Fargo & Company; and by virtue of said payment no further claim can legally be made against this defendant for any further satisfaction of the tort charged against it.

COLLINS & CORBIN,
Attorneys of defendant.

Defendant Wells, Fargo & Company answered as follows:

Wells, Fargo & Company, a corporation of the State of Colorado, duly authorized to transact business in New Jersey and having its principal office in New Jersay at says that:

1. It has no knowledge of the allegations of paragraph one.

2. It admits that Simon Cleary was employed by this defendant, and was killed while in its employ on October 27, 1912. It denies that it is a joint stock company, and says that it is a corporation duly organized and existing under the laws of the State of Colorado, and authorized to transact business in the State of New Jersey. It denies that there was any negligence on its part which was the proximate cause of the death of the said Simon Cleary.

It admits that while in the employ of this defendant Simon Cleary was pulling a truck along the platform of a railroad station of the Erie Railroad Company; it admits that a locomotive of said railroad company struck against the truck which the said Simon Cleary was pulling and threw him under a certain locomotive.

3. It denies paragraph three, in so far as said paragraph alleges any negligence on the part of Wells Fargo & Company, or any of its agents or servants.

4. It admits that the said Simon Cleary was killed on said date, but denies that he was killed by any negligence on the part of this defendant, or of its servants or employes.

It has no knowledge as to the next of kin of the said Simon Cleary, but denies that his next of kin sustained any pecuniary loss by reason of his death.

5. It admits paragraph five.

SECOND DEFENSE:

The next of kin of the said Simon Cleary did not sustain any pecuniary loss by reason of his death.

THIRD DEFENSE:

The accident set forth in the complaint was due to contributory negligence on the part of the said Simon Cleary as failing to take reasonable care to look and listen, or otherwise inform himself of the approach of the engine which the truck referred to in the complaint was struck.

FOURTH DEFENSE:

The accident referred to in the complaint was due to one of the risks of employment assumed by the said Simon Cleary under the terms of his contract of employment.

FIFTH DEFENSE:

It denies that at the time of the accident it was a common carrier by railroad engaged in interstate commerce.

SIXTH DEFENSE:

It denies that at the time of the said accident it employed the said Simon Cleary to work for it in interstate commerce.

SEVENTH DEFENSE:

The said Simon Cleary at the time of his death was in the employ of this defendant and under the terms of the contract of employment it was agreed that the provisions of Section II of Chapter 95, New Jersey Laws 1911 should apply, and the parties agreed to be bound thereby. Said statute provided that compensation should be made in certain cases of accident resulting in death; this defendant alleges that the accident resulting in the death of said Simon Cleary arose out of and in the course of his employment, within the meaning of said statute; that the said Simon Cleary died intestate; that at the time of the death of said Simon Cleary, he left him surviving his father, one James Cleary; that the said James Cleary was the only person entitled to the personal property of said Simon Cleary according to the laws of the State of New Jersey providing for the distribution of the personal property of an intestate decedent, that the said James Cleary at the time of the death of said Simon Cleary was an alien, not resident of the United States; that after the death of said Simon Cleary this defendant paid the expenses of the burial of said Simon Cleary, and that said payment was the full amount required to be paid by it under the terms of Chapter 95, Laws of 1911; and that by virtue of said payment no further or other claim can be made against this defendant by reason of the death of said Simon Cleary while in its employ as aforesaid; and that if any such claim can be made, it must be prosecuted in the Court of Common Pleas of the County of Hudson, pursuant to the provi-

sions of said statute, and that this Court therefore has no jurisdiction of the alleged cause of action set forth in the complaint.

COLLINS & CORBIN,
Attorneys of Defendant.

The plaintiff replied as follows:

The plaintiff above named denies the truth of the matters set up by the defendants Erie Railroad Company and Wells, Fargo & Company in their answers herein filed, in which they set up separate defenses or new matters in defense of the matters contained in the complaint of the plaintiff.

ALEX. SIMPSON,
Attorney of Plaintiff.

This cause was tried before Honorable William H. Speer, Judge of the Hudson County Circuit Court to whom the same was duly referred by Honorable Francis J. Swayze, Justice of the Supreme Court holding the Hudson Circuit, with a jury at the Hudson Circuit on March third and fourth, nineteen hundred and fifteen. Evidence for the plaintiff was presented and a motion for nonsuit was made on behalf of the defendant Erie Railroad Company and the Court being of the opinion that the evidence for the plaintiff was insufficient to entitle him to recover, granted said motion in favor of the defendant Erie Railroad Company and against the plaintiff Frank J. Higgins administrator of the estate of Simon Cleary, deceased; and a like motion for a nonsuit was made on behalf of the defendant Wells, Fargo & Company and the Court being of like opinion as

to the said defendant Wells, Fargo & Company, granted said motion of nonsuit in favor of the defendant Wells, Fargo & Company and against the plaintiff Frank J. Higgins, administrator of the estate of Simon Cleary, deceased.

Dated, March eighth, 1915.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed.

Judgment entered March 9, 1915.

WM. S. GUMMERE,
C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof, I have set my hand and the seal of said Court at Trenton, this first day of May, A. D., nineteen hundred and fifteen.

(Seal)

WM. C. GEBHARDT,
Clerk.

Testimony

NEW JERSEY SUPREME COURT

E. J. Higgins, Admr. of the Estate of Simon Cleary, Deceased,
vs.
Erie Railroad Company, *et al.*

Tried Wednesday, March 3, 1915, before Speer, J., and a jury.

Alexander Simpson for the plaintiff.
Collins & Corbin (Mr. Hobart) for the defendant.

JULIUS KRIESKOTHER, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 462 Woodward Avenue, Brooklyn.

Q. On the 27th of October, 1912, where did you live? A. I come from Passaic.

Q. Where were you going? A. I came from Passaic to go to New York.

Q. What time did you get to the Erie depot in Jersey City, about? A. About 12 o'clock.

Q. And did you get off the train there and get on the platform? A. When I came from the train I saw the engine of the Erie Railroad backing up this way, backwards, and the truck, the hand truck, was away, about say fifty or sixty feet away.

Q. Now wait a minute. You saw an engine backing up and a hand truck; you saw that? A. Yes, sir.

Q. How far away were you from the engine that was backing up? A. About fifty feet, like that; fifty or sixty feet.

Q. Where were you going? A. I want to go up to reach the ferry to go to New York.

Q. And this hand truck that you describe, was it on the same platform you were on or on another platform? A. On the same platform I was on.

Q. Did you see anything happen to Simon Cleary on that day? A. That man, I suppose it was Mr. Cleary, pulled the truck on the platform.

Q. Where was he going, towards the hill or towards New York, with the truck? Which way was he going? A. No; the other way; not towards New York, towards the hill.

Q. What, if anything, did this engine do to the truck? A. The first thing I saw—or heard—that engine struck the truck about an inch on the truck.

Q. About an inch on the truck? A. Yes, sir.

Q. Which end did it strike, the end Cleary was on or the other end? A. The other end.

Q. What did it do to the truck when it struck it? A. It pull down and the man fell over and just across the track; the head was laying across the railing towards the platform.

Q. Yes? A. See? And—

Q. What did the engine do after it struck the truck and you say the truck broke down and the man fell on the rail? What did the engine do? Did it stop or keep on? A. It kept on till some man was hollering at him to stop, and then it was too late.

Q. What happened between the time it struck the truck and the time the man hollered to the engine; what happened to the man that laid on the rail? A. He was laying there; the first wheel struck him. He was laying this way (illustrating); the front wheel struck him. He turned around with the face to the ground. The second wheel got him up again so that he was laying this way (illustrating), and the third wheel—he was taken out between the third and the fourth wheel.

Q. How many wheels went over him? A. Three.

Q. How was the engine going; was it going fast or slow when it hit the truck? A. It went slow. It went about this way (illustrating).

Q. Before the engine hit the truck did you hear this engine sound any bell or blow any whistle? A. I could not say—I didn't hear nothing.

Q. Did you hear it? That is what I want to know. A. No.

Q. How long was it from the time that the engine hit the truck until the engine stopped; how long in time was it? How much time did it take? A. It was about two or three minutes.

Q. That is, it took two or three minutes for these three wheels to go over this man? A. No—before—the whole accident when I saw it from the start to the commencing took about two or three minutes, that's all.

Q. What do you mean by the start? A. When I went—when I come out of the train.

Q. How long did it take from the time you saw the locomotive hit the end of the truck until the engine stopped; how long did that take? A. About half a minute.

Q. About half a minute altogether? A. Yes, sir.

Q. That is, it took half a minute for these three wheels to go over him? A. Yes, sir.

Q. You say you heard somebody shout to the locomotive but then it was too late? A. Then it was too late.

Q. Who was it that shouted? A. It was some people on the platform; I could not tell you.

Q. Were they railroad men? A. No.

Q. What did they do with Cleary after the engine stopped? A. What I know, they took the man the opposite, the other platform; they took him away from the engine, and put him on the bar on —you know—took him—

Q. Was he dead then? A. He was dead then. They covered his face with newspaper.

Q. Was this baggage truck that he was pulling empty or did it have anything on it? A. Empty.

Q. Empty truck? A. Yes. And then I think if the engineer from the engine would do the right thing he ought to chase—

Q. You cannot tell us—the Judge won't let you say what you think about it; only what you saw. A. Yes.

CROSS-EXAMINATION by Mr. Hobart:

Q. What time of day did this happen? A. About twelve o'clock.

Q. About noon? A. Just noon what you call it.

Q. Bright, clear day? A. It was a clear day.

Q. You had come in on the train from Passaic to Jersey City? A. From Passaic, yes.

Q. That was a passenger train, of course? A. It was a passenger train.

Q. Do you remember how many cars were on that train? A. What I came with?

Q. The train you came on. A. No, I could not tell you.

Q. Which car were you riding on, the car nearer the engine or to the back of the train? A. Down near the centre.

Q. When that train came in you got off on which side, on the left hand side or the right hand side? A. I went up on the—this way (indicating) the train comes; I went out there (indicating).

Q. On the left hand side? A. Yes.

Q. That would be towards the north, wouldn't it? A. Yes—not towards New York—the other side.

Q. No; towards the north. A. Newark? I don't know is that side going to Newark.

Q. You do not know the points of the compass; all right. A. It wasn't the side to New York.

Q. At any rate it was on the left hand side of the train that you got off, wasn't it? A. Yes, sir.

Q. And this truck you saw was on the same platform where you got off? A. Yes.

Q. How far away was the truck from you when you got off? A. When I got off? I told you before, about fifty feet, like that; of course I couldn't measure so—

Q. About fifty feet? A. About that.

Q. It was towards New York, wasn't it, toward the river? A. No, sir, towards the hill.

Q. Towards where; towards the hill? A. Towards the hill, not towards New York. It went up the other way.

Q. The truck was nearer to the hill than you were where you got off? A. No; I was near to the hill; the truck was in front of me when I come from the—from the—

Q. And you were walking towards the ferry? A. Towards the ferry.

Q. And the truck about fifty feet in front of you A. Yes, sir.

Q. And on the same platform? A. On the same platform.

Q. Did a number of other people get off of the train? A. I should say about forty.

Q. Was the truck standing still or was it being moved? A. No, sir; he was moving.

Q. Which way was he moving? A. I told you, towards the hill.

Q. And he was moving towards you? A. Yes, towards me.

Q. Did he have anything on the truck at all? A. No, sir; it was empty.

Q. When you got off of the train onto the platform what was it that called your attention to the engine? A. Because when I went off the train I saw the engine moving, pull out backwards, because if you come out of the train and going towards New York you see the engine coming back.

Q. You saw the engine moving beckward? A. Oh, sure; yes, yes.

Q. And the engine was then about fifty feet from you? A. Just about that, yes, sir.

Q. And was that engine on the track right next to the platform on which you got off? A. Yes, sir; the next platform.

Q. So this platform was between your train and the track on which the engine was coming? A. Yes.

Q. And the engine was moving backward, you say? A. Yes, sir; the engine went backwards.

Q. And it was moving slowly? A. Yes, sir; as I told you before.

Q. Was it going as fast as a man could walk or slower than that? A. I could walk faster than the engine went.

Q. You could walk faster than the engine was going; is that right? A. Yes; it went about this was(illustrating), you know.

Q. And when you saw the engine moving backward slowly as you have described, did it keep on moving at the same rate all the time until it hit the truck? A. Yes, it did.

Q. It did not start up speed or anything like that? A. Not till some people were shouting for him to stop.

Q. Up to that time it was moving along a slow rate—A. A slow rate.

Q. (Continuing)—all the way? A. All the way the same thing.

Q. This man that had the truck, did you observe whether he had hold of the handle of the truck? A. He got hold of the handle of the truck, yes.

Q. And as he walked along he walked towards you, didn't he? A. He walked towards me.

Q. So that his back was to this engine, wasn't it? A. His back was to the engine.

Q. Did that man as you saw him walking along and as you saw this engine come, did he turn to look for that engine at any time or did he walk right straight ahead? A. He walked right straight ahead.

Q. Did not turn around to look at any time, did he? A. No.

Q. You have said something about a bell on the engine; you do not know whether it rang or not, do you? A. I could not say about that.

Q. You cannot tell about that? A. No.

Q. Was there some noise around there, some noise from this train or the people walking along the platform? A. There was some noise there; there was some steam cutting off the engine, you know. You know how it is if you come from the train.

Q. The engine of your train was letting off some steam, wasn't it? (No answer.)

Q. The engine of the train you had come in on was letting off steam? A. I could not tell you exactly if it was out engine or not, you know.

Q. But there was some steam from some engine? A. There was some steam; there was some noise.

Q. And did the people walking up on the platform also make some noise? A. Oh, yes, because you know very well when you get out of the train what noise there is on the platform.

Q. Was it a wooden platform or made of stone or concrete? A. No; that is the way the Erie railroad platforms are, cement or stone.

Q. About how far did you see this man walking along pulling this truck—how far did you see him walk before the engine struck the truck? A. I should say about half a car length.

Q. That would be about twenty-five or thirty feet, something like that? A. About that.

Q. And all that time he was walking towards you? A. Towards me, yes, sir.

Q. With his back to that engine? A. Back to the engine.

Q. And at no time did he look back to see this engine? A. I could not tell you.

Q. You did not see him look back, did you? A. No.

Q. How close to the edge of the platform was he walking with his truck? A. Well, I could not tell you, see? only I know that the engine struck the—the engine struck the truck about, we will say, an inch, that was all, no more. Now you know how broad and how far the trucks are, and I didn't take no measure.

Q. Of course, the truck must have been close enough to the edge of the platform to be hit by the engine as it backed up.

Mr. Simpson: I object to that as argumentative.

The Court: I guess we can all assume that if it actually hit it.

Mr. Hobart: Well, perhaps that is so.

Q. And as he walked along did he walk right straight along or did he change from one side of the platform to the other? A. No, sir.

Q. Walked straight ahead? A. Yes, sir.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. This truck that you have described had the handle in the middle of it, didn't it? He had a long wooden handle which came out, which was in the middle of the truck? A. It got a stiff handle.

Q. A stiff handle that came out from the front of this truck? A. No; like on the baby carriages, you know.

Q. Oh, it was a stiff handle? A. A stiff handle.

Q. And it was like in front of the truck (illustrating)? A. Yes; like in front of the truck.

Q. When he had hold of the handle which part of the truck was he standing in; was he standing inside the truck or the middle or the outside? How was he standing? A. He stood outside. He was pulling the truck this way (illustrating).

Q. Which part of the truck was he in? How was he, in the midde of this rail pulling it along this way (illustrating); was he on the outside, or the inside, or what part was he in? A. He was nearer the outside than the centre.

Q. That is, between the outside and the centre he stood pulling it (illustrating), is that right? A. Yes.

Q. How wide was the truck? A. I think you know it better than I. About so broad (indicating). How the baggage trucks are you know, all the railroads.

Q. About two feet or three feet? A. I think it is more than two feet.

Q. Three feet? A. I think three; three or four feet, probably. You know; you see them every day on the railroad platform there, those trucks.

Q. Now, the truck as he pulled it, was the rear of the truck nearer to the edge of the platform than the front or was he pulling it straight? A. He was pulling it straight.

Q. It was straight along then? A. Yes.

Q. How wide was the platform where you got off; how wide was the platform, about? A. That is about from the all there (indicating), I should say, to here.

Q. That is one of those platforms between the tracks? A. Yes; there is nine or ten platforms on the Erie.

Q. Which platform was this truck of his on? We can get the measurement of the platforms. Which platform was it? A. I think it was number nine.

RE-CROSS-EXAMINATION by Mr. Hobart:

Q. You are not sure about that being number nine, are you? You are not sure of the number, I mean. A. I think I am pretty sure it was number nine, because I tell you why; the next platform—where the man was pulled out, there was no more platform.

Q. So that it was the platform that is furthest to the north side of the station building? A. Yes.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. When the engine hit this truck did it make much noise? When it hit it you say it broke the truck down. Did the engine make—A. You hardly could hear the noise when the truck broke down.

Q. You could not hear it when it broke down? A. No, not very well.

Q. Did you hear it? A. I heard some—just like somebody struck a match, you know—like such noise.

Q. You say there was some noise there at the time? A. Yes, sir.

Q. What noise do you refer to? Was it the blowing off of steam or the walking of the people? A. It was more steam noise.

Q. Where was the steam coming from, do you know? A. From what engine?

Q. Yes. A. There was some steam coming from the engine where I came from—where I came with.

Q. How far away from you was that engine it came from? A. I was sitting about the middle of the train—I do not know if the train got five or four or six cars.

Q. Did you see the engineer of this locomotive that hit the truck? A. I saw him after I—after he saw what he done, when people was coming at him, paying attention to him, then when he looked there he stood like somebody had him, you knew; he couldn't talk any more.

Adjourned to March 4, 1915.

Trial resumed March 4th, 1915.

Mr. Simpson offers in evidence and reads to the jury interrogatories numbered 1, 2, 3, and 4, propounded to the defendant Wells, Fargo Express Company, together with the answers thereto.

EDWARD W. DURHAM, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. Clifton.

Q. What is your occupation? A. Agent of Wells Fargo.

Q. And where are you located? A. Jersey City.

Q. Were you in charge of the business or connected in any way with the business of the Wells Fargo Express Company down at the Erie Railroad? A. On the date—yes, I am.

Q. On the 27th of October, 1912, what was your connection with the business, on that date? A. Agent, to look after the movement of freight.

Q. At the Erie Railroad? A. At the Wells Fargo depot.

Q. Where was that? A. Foot of Pavonia Avenue, pier 4.

Q. What was that freight; where was it consigned on that day? A. From here to the Pacific coast.

Q. Mainly to the Pacific coast, did you say? A. No; I say from here to the Pacific coast.

Q. That is all the way? A. All the way; the entire country.

Q. And in the business did you use hand-trucks; did the men that were working for you pull hand-trucks for the purpose of distributing the freight or packing the freight? A. Miscellaneous.

Q. On that day was this dead man, Simon Cleary, working for you? A. He was hired by us.

Q. What was he; what was his business? A. Trucker.

Q. What does a trucker do? A. Sorts, pulls freight, stows cars.

Q. How would he get the freight; that is if the freight came in as you say all the way from the Pacific coast and he wanted to get it out of the cars, what would he take to get it with, a

truck? A. Well, I say it comes from the Pacific coast—I want to convey the meaning that I mean all over the country.

Q. That is what I mean. A. Yes.

Q. Any freight from anywhere west that came in, how would this sorter and packer as you call Cleary get it; would he pull a hand truck? A. It would be sorted by other men; then he would come in and help. At times—it is what we call a houseman's job; it is miscellaneous work; they load and sort and various things.

Q. Assuming that he was pulling a hand-truck towards the hill, what would he be using the hand truck for? A. I imagine to meet some inbound train.

Q. How long had he been working for you when he was killed? A. About—I don't know just—

Q. About two weeks they say; is that the fact, do you know? A. I imagine it was, because he was a junior member.

Q. At the time that he was working for you there his work was being done, as I understand, in the depot or terminal there at the foot of Pavonia Avenue. Now what direction—I will withdraw that question—did you have, or did the Wells Fargo Company have any printed rules on that day which were for the purpose of protecting the safety of employees such as Michael Cleary working in this depot? A. None that I know of.

Q. Did you have any system whereby they were protected- A. On our platform we would tell everybody to be careful, that's all—the same as any passenger.

Q. But who was entrusted by the Wells Fargo Express Company with the duty—or with the fact, not the duty—with the fact of seeing that locomotives that ran up and down a platform did not hit the men that were employed by you; or was that left to the Erie Raidroad Company? A. Well, I don't know; as a rule employees or anyone there knows that there is a track and there has got to be a certain amount of clearance to avoid accident.

Q. You are dealing now with the care a man himself would use to protect himself—A. Every man knows there is a track there—

Q. (Continuing)—but I am now asking you what on the other hand was done by the Wells Fargo with reference to protecting the men from locomotives running up and down the track of the Erie Railroad? A. Well, that I don't know, what was done.

Q. There was not anything done as far as you know, was there? A. No.

Q. Were you subpoenaed to bring any papers at all today? A. I was.

Q. Have you with you any contract, between the Erie Railroad Company and the Wells Fargo Express Company indicating in what way the Wells Fargo used the trains and tracks of the Erie Railroad Company for its business? A. I have not; I never heard of them.

Q. You never heard of them; you simply were down there using them? A. Sir?

Q. On this day you were using them; you were using cars and—A. We were using equipment.

Q. Of the Erie Railroad? A. Yes.

Q. And you were using it for the purpose of

taking freight out of New Jersey into all the states west of New Jersey to the Pacific coast? A. Yes.

CROSS-EXAMINATION by Mr. Hobart:

Q. Had this man Cleary been working as a porter, or a truckman, or whatever you call him, all of this period of two weeks? A. Trucker, yes; that is what we call them.

Q. Same sort of work? A. Yes.

Q. And at the same place, the Jersey City station of the Erie Railroad? A. Same station.

Q. There are about a dozen tracks there where passenger trains come in, are there not? A. Twelve tracks.

Q. There were at that time at least; with platforms between them? A. Yes.

Q. Do you know which is track eleven and which is track twelve? A. The last platform on the north side.

Q. Do you know whether during the two weeks that Cleary worked there he had occasion to work at different times on the platform between those two tracks? A. No doubt of it.

Q. How long were his hours? A. Various.

Q. Well, upon the average. A. Why, from the morning—he might work from six o'clock in the morning until ten, and then again in the afternoon from four to nine at night.

Q. And during that time he was engaged as what you call a trucker? A. Trucker.

Q. That is to say pulling a hand-truck back and forth, either empty or with express matter? A. Yes; or sorting.

Q. Or what? A. Or assorting.

Q. Do you know whether or not during this two weeks trains were passing back and forth over all of those tracks where he worked? A. Every day.

Q. Have you any idea how many trains a day? A. That passed over that particular track?

Q. Well, over any of the tracks from one to twelve in the station. A. Well, I am not familiar all I know is there is about ninety in and ninety out; somewhere around that figure.

Q. Engines backing in and out also? A. Oh, yes, constantly on track twelve.

Q. Engines without any cars passing back and forth on track twelve constantly? A. With and without.

Q. Track twelve is the last track over on the north side? A. Yes.

Q. And there were switches or sidings connected with that? A. Yes, sir.

Q. Does one of these sidings run to this place where you say the Wells Fargo Express Company had a station at pier 4? A. It does; it is the main lead.

Q. And were express cars backed in on track twelve in order to get to your Wells Fargo pier? A. There were cars in track—we call it 15. It is our house.

Q. In order to reach the pier that you call pier 4, where the Wells Fargo has its own particular business, did engines pass back and forth over track twelve in order to go to that pier? A. Yes, sir.

Q. That was the regular way followed? A. The regular direct way.

Q. Sometimes with cars and sometimes without? A. Some without. It is used exclusively to make up our trains.

Q. And the engines that passed over track 12 would sometimes go one direction and other times another direction? A. Naturally.

Q. And was that true during the two weeks Cleary worked there? A. Same situation exactly.

Q. Have you any idea how many engines passed back and forth there, with or without cars, on that track twelve, on an average, during the two weeks he worked there? You have given us ninety in and ninety out for the entire—A. That is from one to twelve.

Q. About how many movements, according to your observation, would have been made on track twelve, according to your best judgment; how many a day? A. Twenty-four hours, or just a day?

Q. Well, twenty-four hours. A. I would say about twenty, or twenty-five; perhaps I may be a little bit over, maybe under.

Q. Sometimes with cars and sometimes without? A. With or without.

Q. And going in either direction? A. M-m-m.

Mr. Hobart: He nodded his head "yes."

(Answer repeated by stenographer,)

Q. Do you mean "Yes"? A. I say yes.

Q. You knew Mr. Cleary, did you? A. I did not knew him personally; I just knew them—I recall him there.

Q. You had seen him around? A. Yes.

Q. How old a man was he, about? A. I should judge about—

Mr. Simpson: Thirty-eight years old.

Q. Now, you spoke of the express matter coming from various points as far west as the Pacific coast. A. M-m-m. M-m-m.

Q. Is it a fact that some express matter also comes from points in the State of New Jersey? A. As I said, I meant to convey the meaning from the Pacific coast entirely through the country, right to New York City that would mean; that would include the State of New Jersey also.

Q. Then do I understand that there was express matter which came from points in New Jersey—starting in New Jesey—to Jersey City? A. Oh yes, certainly.

Q. And that express matter went to this same pier, I suppose? A. Pier 4, oh, yes—transfer point.

Q. And express matter also went from points in Jersey City to other points in Jersey City at that time? A. Oh, yes; intrastate and interstate.

Q. Both within and without the state? A. Yes, sir.

Q. You did not see this accident, I understand. A. No, I was not there at the time.

Q. Have you any personal knowledge of what purpose Cleary had in going to the platform between tracks 11 and 12 when he was killed? A. Why, my only knowledge was that he was about to meet some inbound train; unload it.

Q. How do you know that; did you tell him to go out? A. No; I had not told him, but from ordinary practice; they go out with a load to a certain train and rather than bring back an empty truck they will pull up and meet another inbound train.

Q. But you have no knowledge on that subject, other than the general course of business? A. Other than the general course of business.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. Was there a train due at this time he was killed? You know the time he was killed, don't you? A. Around twelve o'clock, I believe.

Q. Was there a train due in about that time? A. Yes.

Q. What train was due in about the time that he was killed; what is the train, do you know? A. I don't know just the train number.

Q. I do not mean that. Where does it come from, from outside New Jersey? A. There is a main line train due.

Q. That comes from where, Chicago or where? A. No; from Suffern, I believe, New York.

Q. And presumably that would be the train he was going to meet at about this time? A. Yes; I would say so.

Q. Now that train carries express matter from Suffern, New York? A. It is due to.

Q. Did it carry express matter from Suffern? A. M-m-m.

Q. Who was the man immediately in charge of Cleary? You were the general superintendent, or manager, weren't you? A. I am the agent, yes—the general supervisor.

Q. Who would be the man immediately in charge of Cleary that day? A. He is not here.

Q. Who is he; do you know his name? A. A man named Crystal; he would be the one who took charge of that work.

Q. He is not here today? A. No.

Q. Is he down at Wells Fargo?

Mr. Hobart: Do you want him?

Mr. Simpson: I don't know; I might.

Mr. Hobart: I will telephone for him if you want him.

Mr. Simpson: Yes; I wish you would telephone for him.

Q. You said that naturally this dead man would have been on platform 11 and 12 many times—Mr. Hobart asked you that. A. Yes.

Q. Your place was inside, wasn't it, in the office? A. Oh, yes.

Q. Did you ever see him on platforms 11 and 12 yourself, or do you simply say that because of the general custom? A. I say that because his duties ought to bring him there.

Q. On those platforms? A. Yes, sir.

Q. But you do not mean to give the jury the impression that you saw him on platforms 11 and 12 at any time? A. I would not convey that impression that I saw him on the platform.

Q. And you say there are about twenty movements on track 12 in twenty-four hours of locomotives with or without trains? A. Yes; I think that is small.

Q. That would be about a little less than one an hour. A. I think that is small.

By the Court: Q. Would a regular movement on that track let the locomotive unfasten itself from the train and let the train drift in and the locomotive come in on another track and then back out? A. No; they do not kick any cars in.

Q. How did this locomotive get in on the track it backed out from? A. It came in with the cars

and placed some cars and was backing out, I presume, to make a switch to another track.

By Mr. Hobart: Q. And in order to get out he would have to back out? A. He would have to back out to the crossover switch.

Q. That was the regular way of doing it? A. Yes, sir.

By a Juror: Q. Isn't there a switch there where they come out of the express house; there is a switch comes out at that platform? A. There is a switch, but the engine would have to back up alongside of that platform to make the switch.

By Mr. Hobart: Q. When you say "alongside the platform," you mean right next to— A. Track 12.

Q. Right next to the platform that is between track 11 and 12? A. Yes, sir.

Q. In other words, it would have to back out on track 12? A. It would.

FELIX MULDREW, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 292 4th Street.

Q. Jersey City? A. Yes, sir; Jersey City.

Q. And you work for the Erie Railroad? A. Erie Railroad.

Q. Were you the fireman on this locomotive that struck this man Cleary? A. Yes, sir.

Q. Which side of the locomotive were you on? A. I was on the right side.

Q. Was that on the same side that struck him? A. Yes, sir.

Q. And the engineer was on the other side? A. Yes, sir.

Q. Where did you come from with that locomotive? A. Just a couple—we came over with two cars; we cut off and was going to run around the cars down 12 track.

Q. What were you on 12 track for; where were you going? A. We were going to run around them two cars.

Q. Did you have two cars behind the locomotive? A. No; just an engine. We cut off from the cars and was going to run down 12 track and get to the head end of the cars to shove them into the dock.

Q. Was there another train on track 11? A. Yes, sir.

Q. As you came along did you see this man? A. Yes, sir.

Q. How far ahead of you? A. I was about a car length away from him when I noticed him.

Q. And how were you going, fast or slow? A. I was going about four or five miles an hour.

Q. Did you see when your engine hit the end of truck? A. Yes; when I first came down he was about two feet in the clear of the tank, and when I came down shortly I supposed he would stay there.

Mr. Simpson: I ask that that be stricken out.

The Court: That will be stricken out.

Q. You were running the engine? You say "I came down;" the engineer was not running the engine? A. No, sir.

Q. You were running it? A. Yes, sir.

Q. What was the engineer doing? A. He was on the left side.

Q. Wasn't he doing anything at all? Was he letting you run the engine? A. Yes, sir.

Q. That was not the ordinary custom? A. That is what we do down there in the yard, to change off.

Q. Isn't there a rule in the company against the firemen running the engine? A. Not if you have had any experience.

Q. Don't you know that there is a written rule of the Erie Railroad Company when the engineer is on the locomotive he runs the engine and the fireman don't? A. As a rule they let you run the engine.

Q. The engineer does, but that does not answer the question. Don't you know there is a written rule?

The Court: He does not say the engineer did. He says as a rule they let you run the engine.

Q. Who do you mean by "they;" the engineer or the superintendent of motive power or who do you mean by "they"? A. The engineer lets me run it.

Q. There are written rules, aren't there; you get a copy of the written rules and you study them and work under them? A. Yes, sir.

Q. Isn't there a written rule of the company forbidding you to run that engine? A. Yes, sir.

Q. There is; that is what I thought. Now as you came along you saw this man, you say, on the platform, pulling the truck, was he, or pushing it? A. He was standing still; he stood still.

Q. Did he start to move away from you before the locomotive hit the truck? A. He made some move like that as if he was going towards the other platform.

Q. As if he was going away toward the other platform? A. Towards the other track.

Q. And that would pull the end of his truck further around towards your engine, wouldn't it? A. Yes.

Q. As you came up to the end of the truck, how far were you away from the end of the truck when he started to go over towards the other platform? A. I was about maybe two or three feet.

Q. And what did you do then? A. I put the brake on.

Q. You put the brake on? A. Yes, sir.

Q. Now up to that time when you were within two or three feet of the truck, you had not put the brake on? (No answer.)

Q. And did you do anything else when you put the brake on? A. Only threw the engine over—reversed it—reversed the engine.

Q. And did you do anything else? A. The bell was ringing all the while.

Q. The bell was ringing before you got up there? A. Yes, sir.

Q. Had you set the bell ringing? A. Yes, sir.

Q. But there was a lot of steam and noise around there, wasn't there, that drowned the bell? A. No.

Q. There was not any noise at all? A. Not that I know of.

Q. You were on the engine, weren't you? A. There was not any steam escaping.

Q. Well, there was not any noise to drown that bell, was there? A. No.

Q. Did you see when the locomotive hit the end of the truck? A. Yes, sir.

Q. What did it do to the end of the truck when it hit it? A. Just about half turned over.

Q. Did it push it along any distance along that platform? A. I did not notice; I only just noticed it turned the truck half over.

Q. Didn't it push it about twenty feet along the platform before this man was thrown down? A. I did not notice.

Q. What you noticed was it turned the truck half over? A. Yes, sir.

Q. And after it turned the truck half over, did you see anything happen to the man? A. I did not see where he went. As soon as I stopped I found there was three wheels passed over him; he was in between the tracks.

Q. And you did not see him after you hit the end of the truck? A. No; I did not see where he was.

Q. And when you stopped the engine you say three wheels had gone over him? A. Yes, sir.

Q. Was he dead when you got down? A. I don't know; I just—

Q. You did not take him out from under the engine? A. No, sir.

Q. How far did your engine go after you put on the brake? A. About ten feet.

Q. Now at this time that you were moving the engine along—I will withdraw that—how many tracks were there in this terminal on the day of the accident? A. There was twelve tracks in it.

Q. And at the time you came along there were other engines in the terminal weren't there? A. On that 11 track there was; that was the only one I noticed; there was a train come in there.

Q. There was a train coming in there, you say? A. Yes; coming in there when I got down.

Q. Outside of 11 track there were other locomotives, weren't there, on other tracks? A. I didn't notice that.

Q. Didn't you hear locomotive bells on other tracks? A. I did not notice that.

Q. You heard the bell on 11 track ringing at the same time your bell was ringing? A. Why should I hear that bell ring? I didn't hear a bell to ring on 11 track.

Q. You just said so. What did you mean by saying that if you did not mean it? A. I didn't say that.

Q. But there was a locomotive on the train which had just come in, and you do not know whether there were any other locomotives— A. No.

Q. (Continuing.)— in the terminal or not? A. I did not notice.

Q. You did not see any? (No answer.)

CROSS-EXAMINATION by Mr. Hobart:

Q. How long have you been a fireman? A. I I am firing ten years and three months now.

Q. How long have you run an engine? A. Ever since I have been firing a year or so, they let me handle engines.

Q. At the time of this accident how long had you been running engines? A. About—you mean that morning?

Q. Yes? A. About two hours.

Q. About two hours that same morning? A. That same morning.

Q. How long before that day of the accident had you been running engines? A. I don't know—every day.

Q. You used to run then every day? A. Yes.

Q. For how long a time? A. A couple of hours a day.

Q. But for how long a period of time had you been running engines a couple of hours a day; had you run them a week or a month or a year or a number of years or what? A. Since I was firing for a year and a half.

Q. So you had been running engines for about a year and a half before the day of the accident; is that right? A. Yes, sir.

Q. And all of that time you had been running engines in the Jersey City yard? A. Yes; pretty near all the time.

Q. Do you remember the number of this engine? A. 634.

Q. How long had you been running that engine? A. I was on that—running that yard job about a year.

Q. With the same engine? A. I would not say with that engine.

Q. I ask you, how long you had been running that particular engine, 634? A. I don't—I could not say about that; I did not have that engine on the run all of the time. Oftentimes the engine would go in the shop and we would have another engine.

Q. Was this your regular engine for yard purposes? A. The regular engine.

Q. And when it was laid up in the shop for any purpose you would take some other engine? A. Yes, sir.

Q. So most of the time during this year and a half you had used engine 634? A. Yes.

Q. And you would run it sometimes and the engineer would run it sometimes? A. Yes, sir.

Q. And was that the usual custom at that time? Is that so or not? A. As a rule the company's rules is the firemen are not to run the engine in the passenger yard.

Q. I do not get that. A. I say the company's rule is the firemen are not to run the engine in the passenger yard.

Q. But in a yard outside the passenger yard the fireman was permitted to run the engine; is that right? A. As long as the engineer was on the engine, yes.

Q. Now this engine 634 was headed towards the river, wasn't it? A. Yes, sir.

Q. What track had you been on with that engine just before you came in onto track 12? A. I was on track 13.

Q. Is that the track that leads into the Wells Fargo? A. Yes, sir.

Q. And that is the track used by the Wells Fargo Company to run their cars back and forth on, isn't it? A. Yes, sir.

Q. And track 12, as I understand it, is the last track there— A. Last track.

Q. (Continuing.)—for passenger trains? A. Passenger trains.

Q. It is just outside the passenger shed, isn't it? A. Yes, sir.

Q. Had you taken any cars in to pier 4 on track 13? A. There was two cars we were going to run around.

Q. Where were they standing? A. They were down below the crossing on track 13.

Q. These two cars that you were going to run around, were they express cars? A. I do not remember just now.

Q. But at any rate you had to get around those cars in order to get behind them; was that the idea? A. Yes, sir.

Q. And in order to do that you would have to switch over onto track 12? A. Yes, sir.

Q. There is a switch or lead, is there not, running from track 13 to track 12? A. Yes, sir.

Q. When you got onto track 12 and were backing up as you have told us, how fast was your engine moving? A. Four or five miles an hour.

Q. And was your bell ringing? A. Yes, sir.

Q. How long had it been ringing? A. From the time we cut off the cars.

Q. And was that they way you usually do— A. Yes, sir.

Q. (Continuing.) in making a movement of that kind? A. Always kept the bell ringing around the depot.

Q. Just as you were doing on this occasion, is that right? A. Yes, sir.

Q. Now, as you were sitting in the engine, on the right hand side, which direction were you facing? A. Facing towards the back of the tank and towards the hill.

Q. In other words, you were facing in the same direction that the engine was moving? A. Yes, sir.

Q. And when you saw this express truck did Mr. Cleary have hold of it in any way—have hold of the handle or any part of it? A. Had hold of the handle.

Q. And when you first saw him was he standing or moving? A. Standing.

Q. Which way was he facing? A. His back was towards me.

Q. Was his back towards you all of the time up to the time of the accident? A. From the time I first seen him.

Q. That is what I mean; from the time you first saw him up to the time of the accident? A. Yes, sir.

Q. In other words, did he at any time turn around to look at your engine? A. I did not see him.

Q. You were looking at him all that time, weren't you? A. Yes, sir.

Q. How close was your engine, that is to say the back of the tank, to the truck when Cleary started to move it? A. About two or three feet.

Q. And up to that time how close was the truck to the side of the platform? A. About a couple of feet away from it.

Q. There was enough away to clear it? A. Clearance.

Q. When he started to move his truck what did you do? A. I put the brake on and reversed the engine.

Q. When you speak of putting on the brake do you mean the air-brake? A. The air-brake.

Q. Is that what you sometimes call the emergency brake? A. The emergency brake.

Q. Was it in working order that day? A. Yes, sir.

Q. Was there anything sticking out from the tank or the engine? A. No, sir.

Q. What was it that struck the truck? A. Just the breastbeam of the tank.

Q. Was your bell ringing at that time? A. Yes, sir.

Q. Is that what is called an air-bell; that is to

say it rings automatically? A. Automatically yes, sir.

Q. Could you have stopped any quicker? A. I do not think I could, no.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. Are you still a fireman? A. Yes, sir.

Q. Not an engineer yet? A. I am fireman.

Q. You said that the man did not turn, although the bell was ringing, and you were coming on towards him, that he did not turn to look at your engine? A. Yes, sir.

Q. Did he give any indication that he heard the bell at all? A. Not that I know of.

Q. Well, he did not give any to you, did he? A. No, sir.

Q. And although you saw that the truck was only two feet away from the edge of the platform, and although you saw that your engine projected over the side of the platform, and although the man never gave you any indication that he heard your bell you still kept on going, didn't you? A. I supposed he was clear of the tank, and I supposed I would get past him.

Mr. Simpson: I ask that that be stricken out as not responsive.

The Court: It will be stricken out.

Q. You still kept on going, didn't you? A. Yes, sir.

Q. How much of your engine projected over that platform? (No answer.)

Q. What do you say hit the truck, the wrist-pin? A. The brace beam back of the tank.

Q. Does that extend out over the tank on each

side of the tank? A. I guess about a couple of inches.

Q. And how far over the platform did it extend? A. I don't think it went over the platform at all, sir.

Q. You said to Mr. Hobart, as I understand you, that it was a rule of that company that a fireman could run an engine as long as the engineer was on the locomotive, but that he could not run it in passenger yards; is that right? A. Yes, sir.

Q. You had never run one before in the passenger yard had you? A. Yes, sir.

Q. You had violated the rule before? A. The engineer let me run the engine—

Q. Well, you had done it before? A. Yes, sir.

Q. Did you hear anybody holler at you? A. No, sir.

Q. At any time? A. No, sir.

Q. That was not what made you stop the engine, that somebody hollered at you? A. No, sir; no, sir.

RE-CROSS-EXAMINATION by Mr. Hobart:

Q. Had you run this engine or other engines on track 12 before? A. Yes, sir.

Q. How many times a day did you have occasion to move in and out on track 12? A. I think quite a few times; we went down there on the docks about half past nine and worked there pretty near all day long.

Q. You worked there practically all day long? A. Yes, sir.

Q. Moving in and out on that express company dock? A. Yes, sir.

Q. And in order to get to the express company

dock and make these movements of the cars and so on, you would move in and out on track 12? A. Yes, sir.

Q. Beginning at about 9:30 in the morning? A. Yes, sir.

Q. And keeping that up until how late? A. Well, five or six o'clock.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. How long had you been doing it; how long had that engine been doing that work? Just that day you mean? A. No; we do it every day.

Q. How long had you been doing it? A. We started at half past nine that morning.

Q. For a month or a year or one hundred and ten years; for how long? A. As long as I was on the job, a year and a half.

Q. That was the work you did? A. Yes, sir.

Q. The engineer ran the engine on track 12 as a rule, didn't he; it was his work? A. His work.

EDWARD S. HARDING, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. 264 9th Street, Jersey City.

Q. What is your occupation? A. Engineer.

Q. Erie Railroad? A. Yes, sir.

Q. How long have you been an engineer? A. About 28 years.

Q. Were you the engineer on this locomotive that struck and killed Simon Cleary on October 27th, 1912? A. I was.

Q. What did you see of the accident? A. I did not see any of it.

Q. But you were the engineer on the train? A. I was on the left side of the engine.

Q. What were you doing on the inside of the engine? A. The left side?

Q. Yes. A. I stood there right between the doors.

Q. You were not doing anything at all then? A. Only just watching for signals, that's all.

Q. On the other side? A. Yes, sir.

Q. Well, the fireman usually watches for signals, doesn't he? A. He does when he is there.

Q. When he is on the fireman's side? A. They are on both sides. Whichever side they are on they give the signal.

Q. You did not do anything about running this engine? A. No, sir; not at that time.

Q. You did not try to put the brakes on? A. No, sir.

Q. Did not try to stop it? A. No, sir; I did not know anything of it; didn't know that Cleary was anywhere near the locomotive.

Q. You did not know any man was pulling the truck so near the locomotive that it was apt to hit him and knock him down and kill him? A. No.

Q. Was it customary of that company that the locomotive engineer is in charge of the engine? A. We are in charge of it, but the instruction-book gives the fireman the right to handle the engine under the instruction of the engineer.

Q. But not in passenger yards? A. It doesn't say in the yards.

Q. Have you got the book? A. No; I haven't got one.

Q. You carry one usually, don't you? A. Yes; but I have not got it with me.

Q. What rule is that that you say gives the fireman the right to run an engine as long as the engineer is on the engine? A. I cannot tell you the number of the rule.

Q. How long ago did you read it? A. Oh, a couple of days.

Q. How long had you been working on track 12 with this engine? A. Oh, I hadn't been working there very long.

Q. How long? A. Oh, about twenty minutes, I should judge.

Q. No, but I mean altogether on this track. The fireman says, as I understand him, that that was your usual day's work, you worked on that track 12 every day. A. We worked every day in the year.

Q. On that track? A. Up and down.

Q. And anywhere else? A. All up and down the yard.

Q. How much time would you spend on track 12? A. Some days we would spend two hours, some days not so much; some days twenty minutes, half an hour.

Q. And what was the work on track 12? A. Handle Fargo cars.

Q. At the time this man was killed did you see the train on track 11? A. I seen it come in.

Q. Did you hear it ringing its bell as it came in? A. Yes, sir.

Q. Was that train on track 11 still in motion when your engine hit and killed this man? A. I could not tell you that, whether it got stopped or not.

Q. You don't know that? The best of your recollection is that she still was in motion or that she had stopped, which? A. I think she was stopped.

Q. How long? A. Oh, probably a couple of minutes. The passengers were getting off.

Q. Was the bell ringing on 11 as she came in? A. Yes, sir.

Q. And was the bell ringing on 11 as she stood there with this air valve going? A. I could not say that.

Q. But you do know it was ringing as she came in? A. Yes, sir.

Q. Were there any other engines in the terminal? A. Only that and ours; only that one and our engine.

Q. But there were ten other tracks, weren't there? A. Oh, yes.

Q. Weren't there engines on the other track? A. I could not say.

Q. You do not know that; well at that time of day—what time was it this accident happened? A. It was about three minutes after twelve, I should judge.

Q. Well, at that time of day there are other trains due besides this one that just came in? A. No; they do not come in just at that time.

Q. They go out just at that time? A. No; they do not come in or go out.

Q. Was there any steam escaping— A. No, sir.

Q. (Continuing)—or noise at all to drown your bell? A. No, sir.

Q. You did not hear any at all? A. Not a bit.

Q. You really did not know anything about this accident then until this man— A. No.

Q. (Continuing)—was killed, did you? A. No.

Q. What was the first you knew anything was wrong? A. He stopped; he stopped quick.

Q. Put the brakes on? A. Put the brakes on.

Q. Did it stop soon after he put the brakes on? A. Yes; I don't think she went half the length of the tank.

Q. How far would that be, about? A. Half the length of the tank would be from ten to twelve feet. They are short tanks.

Q. Do you know how far this tank projected over the platform? A. Not at all; not any.

Q. It must have projected over to hit the truck, mustn't it? A. He shoved the truck back.

Q. But the truck was not on the rail in front of your engine; the truck was on the platform, and in some way that truck was— A. It was on the platform, and just when we stopped it was up against the wheel of the tank; the wheel of the truck.

Q. The wheel of the truck was up against the wheel of the tank—of the engine? A. Of the tank.

Q. Had you shoved it along at all; did it look as if it had been shoved? A. No; we did not shove it no distance.

Q. Do you mean exactly that? Or do you mean only a little distance? A. Well, I don't suppose he shoved it two feet.

Q. Where was the man lying? A. In between the rails.

Q. How many wheels had gone over him? A. Two; two wheels.

Q. Aren't you wrong about that? Weren't there three wheels went over him? A. Yes, one

wheel on the first truck—two wheels of the back truck and one of the front; three wheels.

Q. What kind of a truck was this on the platform? A. Oh, it was one of them things they shove along.

Q. About how long was it? A. Oh, probably the truck is fifteen feet long.

Q. Then it had an iron handle in front of it? A. Yes, sir.

Q. What kind of a handle was it, like the pole of a wagon where you have a team? A. Yes, sir.

Q. It was that kind of a handle? A. Yes; then it had two ends on it, two pieces where you could put your hands in.

Q. Where you could put your hands in? A. Yes, sir.

Q. How long were you a fireman before you got to be an engineer? A. Ten years.

CROSS-EXAMINATION by Mr. Hobart:

Q. Did you run engines while you were a fireman? A. H'm?

Q. Did you run engines while you were a fireman? A. Yes, sir.

Q. Now, Mr. Muldrew has been fireman with you how long, or had been up to the time of this accident? A. Over a year.

Q. In the Jersey City yard? A. Yes, sir.

Q. Did he run the engine from time to time? A. Yes, sir.

Q. You had this same engine usually, didn't you? A. Well, without she broke down or something.

Q. This was your regular engine, number 634? A. Yes; regular engine.

Q. And he had run it from time to time in and around the yard? A. Yes, sir.

Q. Under your instructions, I suppose? A. Yes.

Q. Did you give him instructions about running it on the day of the accident? A. I did not.

Q. How did he happen to be running it? A. Oh, I got down to look at the back of the main rod, the key; something was pounding; and I got down and said, "Take her, Felix;" and I got down, and I just got back on the left side when the accident happened.

Q. You mean you got down from the engine while it was moving? A. No; it was standing still; it was before we started to back up.

Q. And it was then on track 13? A. Between 12 and 13, just about to come over.

Q. And you got down to look at something on the engine? A. Yes, sir.

Q. And then you told him to run it? A. Yes.

Q. And had he run it before on that track? A. Yes; he run on all the tracks.

Q. And about how many movements, on the average, were made by your engine in and out on that track; how many movements a day? A. Oh, I could not tell you; I could not count them if I wanted to.

Q. Well, you were going back and forth there, working, all day long? A. All the while, we would go back and forward, steady, from half-past-seven to half-past nine, just as fast as we could go backwards and forwards.

Q. And when you backed out you usually came out on track 12? A. Always came on track 12; we had to get on track 12 to get over on 13.

Q. Just the same as you were doing on this day? A. Yes, sir.

Q. Do you recollect about the engine-bell of your engine; you have spoken of it as ringing; where did it begin to ring? A. It was ringing all the time, when we started, when we started to pull down on track 12.

Q. Is that the usual custom in the yard, to ring the bell? A. Yes, always had to keep it ringing. There is so many Polacks and things working around there you would not dare leave it stand still a second.

Q. So the custom was to ring the bell all the time? A. Yes, sir.

Q. You have told us that the engine ran about half the length of the tank, about ten or twelve feet. A. I should judge about that.

Q. Did you notice the emergency brake go on? A. Yes, sir; that is what drawed my attention, the brake went on so quick.

Q. Could you have stopped the engine any quicker? A. No, sir; I could not handle her any better than he did.

Q. Have you told us about how fast your engine was moving? I do not think you have. How fast was it moving? A. Well, not over five miles an hour at the most.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. You say you would not dare stop the bell because there were so many Polacks and things working around there? A. Yes.

Q. You mean it is a place of danger? A. It is a place of danger.

Q. Danger; all right. Now then, how long were you fireman before you started to run a locomotive through a place of danger? A. Ten years.

Q. And this man had only been a fireman one year with you? A. Oh, I had run the engine from the first day I ever went firing.

Q. But you have said in answer to a question of mine, how long were you a fireman before you ran an engine through a place of danger?—you said ten years. Did you mean that? A. No.

Q. How long were you a fireman before you ran an engine through a place of danger? A. Well, I always worked in a place of danger.

Q. From the first day; from the first day you were a fireman you drove a locomotive through a place of danger; is that right? A. If you call it danger; I run right in the yard.

Q. From the first day you got on an engine as a fireman you drove a locomotive through a place of danger? A. No; I won't say that, the first day.

Q. How long were you a fireman before you drove a locomotive through a place of danger? A. Well, I got the engine out from the first day I went firing; took them in the yard.

Q. Did you drive an engine in among people where you say there was danger? A. No; there was no people where I was; I was working on a freight division.

Q. You were not running an engine in a passenger yard where there were men working on a platform, were you? A. No; I had been working for three years before I went to work down there.

Q. You also said to Mr. Hobart—and I did not

object to it—that the man ran the engine as well as you could have. A. Yes, sir.

Q. Now if you were running this engine and you saw a man dragging a baggage truck so near the locomotive that he was going to be struck, and he did not pay any attention to your bell, and as far as you could see he did not hear your bell, would you have kept running right on with that engine in danger of hitting his truck and knocking him under and killing him? A. I do not think I would.

RE-CROSS-EXAMINATION by Mr. Hobart:

Q. But if you saw that the truck was clear of the engine you would keep right on going, wouldn't you? A. I would have kept right on going until we stopped, the same as he did. It was clear.

RE-DIRECT-EXAMINATION by Mr. Simpson.

Q. But you would have been sure it was clear when your locomotive passed? A. I am sure it was.

Q. But you would have been; if you were running the locomotive; you would have been sure that it was clear when you passed, no matter what he did? A. I think I would.

Q. You would not leave it to the man on the platform? A. No.

DELIA CLEARY, sworn:

Direct-examination by Mr. Simpson:

Q. Where do you live? A. Jersey City, sir.

Q. And Simon Cleary was your brother, wasn't he? A. Yes, sir.

Q. How old was he when he died? A. Thirty-eight years old.

Q. And is your father living? A. Yes, sir.

Q. Where is he? A. County Clare, Ireland.

Q. How old is he? A. About sixty years old.

Q. You saw your brother in Jersey City before he died, didn't you; you were friendly with him? A. Yes, sir.

Q. Did he send any money to your father? A. Yes, sir; he always sent money to my father.

Mr. Hobart: I object, unless she knows of her own knowledge.

Mr. Simpson: I do not think that is a good objection. I asked her if he sent money to her father, and she said yes. If it is not to her own knowledge he may bring it out on cross-examination.

Mr. Hobart: I object to it.

The Court: When you come to cross-examine, if you show that what she says about having sent money to his father is based purely upon hearsay or what he told her, I will strike it out for you.

Mr. Hobart: Well, if that is the understanding, all right.

Q. How much money would he send every month? A. He would send ten dollars a month, and any time my mother wanted money he would always send it.

Q. Whenever they wanted it? A. Yes, sir.

Q. And about how much do you say he sent, about ten dollars a month? A. Yes, sir.

CROSS-EXAMINATION by Mr. Hobart:

Q. Did you live with your brother? A. I lived with my brother in Ireland, but not out here.

Q. What is your name? A. Delia Cleary.

Q. Where did your brother Simon live; before his death, I mean? A. He lived with my sister, Mrs. Marna, 222 Erie Street at the time.

Q. Is she here? A. No, sir.

Q. Mrs. Mariner? A. Marna.

Q. That is your married sister? A. Yes, sir.

Q. Where did you live before your brother's death? A. I lived at 74 Brinkerhoff Street.

Q. You worked there? A. Yes, sir.

Q. How often did you see your brother before his death? A. I always seen my brother every other Sunday on my days off.

Q. Whenever you had a day off from your work you would see him? A. I would see my brother, yes, sir.

Q. That would usually be on a Sunday? A. Yes, sir.

Q. Did you ever see him draw checks or draw money orders or anything of that kind to send money to your father? A. Yes; I seen the money home in Ireland, I seen it when I was home in Ireland.

Q. When you were home? A. Home in Ireland, yes, sir.

Q. When you were home in Ireland? A. Eight years—I am out in this country eight years next August.

Q. You have been in this country eight years? A. Yes.

Q. Next August? A. Yes, sir.

Q. So you must have come over in the year 1907. A. Yes, sir.

Q. And while you were in Ireland— A. Yes, sir.

Q. (Continuing)—and before you came to this country— A. Yes, sir.

Q. (Continuing)—then you saw money come from your brother from time to time? A. Yes, sir; always. My brother had a habit—used to send money since, but I could not say how much he sends.

Q. I thought not. Now let us find out what you know about what he sent before you came to this country; that would be back in 1907 and before that. A. Yes, sir.

Q. Did he send it by money order or real estate order I think they sometimes call it, or what? A. He used to send it by money order.

Q. And you saw it? A. Yes.

Q. How much was that? A. He would send ten dollars at a time, or fifteen dollars at a time, and whenever my mother would always want for money he would always send it.

Q. And it would be about ten dollars a month I think you said? A. Yes, sir.

Q. And that was back in 1907? A. Yes, sir.

Q. And is that what you meant when you said your brother used to send about ten dollars a month? A. Yes, sir.

Q. Now, after you came to this country in 1907 of course you did not see very much of your brother except on these Sundays that you have mentioned? A. Yes, sir.

Q. Did you ever see him send money while you were in this country? A. Yes, sir; he sent for my brother Jim; he and myself and my sister.

Q. Money that came from your brother? A. That we sent to take out my brother Jim to this country.

Q. Oh, to bring your brother Jim over here? A. Yes, sir.

Q. When was that sent? A. About four years ago.

Q. How much was that? A. About thirty dollars.

Q. That was to pay his fare from Ireland to this country? A. Yes, sir.

Q. It was not for your father or your mother in Ireland? A. Yes, sir.

Q. Was it? A. Well, it was for their benefit and to bring my brother over.

Q. To bring your brother over? A. Yes, sir.

Q. You saw him send that? A. Yes, sir.

Q. How did you see him; were you present when he made out the order? A. Yes, sir.

Q. Post office order? A. He just gave me the money to put with my money to send for my brother.

Q. And you all put together money enough to bring your other brother over; is that right? A. Yes, sir.

Q. That was about four years ago, you say? A. Yes, sir.

Q. Did you see him send any other money there to Ireland from 1907 down to date? A. No, sir.

Mr. Hobart: I move to strike out the testimony about the contribution of ten dollars a month, if your Honor please.

Mr. Simpson: I would like to re-directly examine a little.

The Court: You may.

RE-DIRECT-EXAMINATION by Mr. Simpson:

Q. You told me he sent ten dollars a month home—about ten dollars a month—and you told Mr. Hobart you did not see him send the ten dollars a month. Now why did you say he sent ten dollars a month; how did you know that? A. When I was in Ireland, sir.

Q. After you came out here; what do you know about his sending money after you got here? A. He always used to say he sent it.

Q. He told you he sent it? A. Yes, sir.

Q. But you did not see him send the money? A. No, sir.

Q. Did he ever give you any money while you were here to put with your money and send to your father? A. Yes, sir.

Q. I mean besides the thirty dollars. A. Yes; he gave me some money.

Q. How often did he give you money to put with your money and send to your father? A. Any time I would ask him for money he would always give it to me.

Q. And you would put it with your money and send to your father? A. Yes, sir.

Q. How much do you send over a month? A. I am sending five, ten or fifteen dollars a month.

Q. One other question. I show you a letter; whose handwriting is that in? A. My brother Simon's handwriting.

Q. Do you know where this letter came from;

have you seen it before today? This letter, have you seen it before today? A. No, sir.

Q. You do not know whether it came from your father or not? A. Yes, sir; that came from my father.

Q. How do you know that? A. Because that is Simon's handwriting.

Q. How do you know this letter ever got to your father; where did you see it after the "22nd, 1910;" how do you know this letter ever reached your father? A. That is from my parents.

Q. But you never saw it in Ireland? A. No, sir.

Q. But you know this is the handwriting of your brother? A. Yes, sir.

Mr. Simpson: I will offer this letter.

Mr. Hobart: I object to it.

The Court: How could it be admissible, no matter what its contents are, in the light of the lack of knowledge that she has of where it came from? You see that would be a self-serving declaration.

Q. Can you tell us how often your brother has given you money before he died, since you have been in this country, to put with your money and send to your father; how often has he done that? A. Well, he has done that about—I would generally ask him about four or five times.

Q. Altogether, in the eight years, you mean, that you have been here; you have been here eight years, haven't you? A. Yes, sir.

Q. In that eight years how many times has your brother given you money and told you to put it

with your money and send it to the old country? A. I do not know really how many times.

Q. Well, ten times? A. About ten times.

Q. In eight years? A. Yes, sir.

RE-CROSS-EXAMINATION By Mr. Hobart:

Q. About once a year then he would give you some money to send to your parents in the old country? A. He would not give it to me unless I would ask him, sir; but he generally sent it of his own accord other times.

Q. What we want to find out is how many times did he give you money to put with your money to send to the old country? A. About ten times.

Q. A little over once a year? A. Yes, sir.

Q. Sometimes around Christmas time? A. Yes; Christmas and Easter.

Q. And how much would he put with you, or how much did he put with you on those ten times during those eight years? A. He would give me fifteen or twenty dollars.

Q. About fifteen or twenty dollars each time? A. Yes, sir.

Q. And then you would send it with your own money? A. With my own money, yes, sir.

Q. And to whom would you send it? A. To my father and mother, sir.

Mr. Hobart: I move to strike out the evidence about sending ten dollars a month.

Mr. Simpson: I have no objection to that.

The Court: I will strike it out.

Mr. Simpson: I would like to recall Mr. Durham, unless we can agree as to how much this man earned. You have got the

figures. * * * It is agreed that this man earned from twelve to fifteen dollars a week at the time he was killed.

Mr. Hobart: All right.

Mr. Simpson: I want to offer in evidence the agreement between the Erie Railroad and Wells Fargo Company; and then I would like to ask you if you have the book of rules to produce your book of rules.

FELIX MULDREW, re-called:

By Mr. Simpson: Q. Have you got a book of rules of the Erie Railroad in your pocket? A. No, sir.

FREDERICK CHRYSTAL, sworn:

Direct-examination by Mr. Simpson:

Q. Mr. Chrystal, you work for the Wells Fargo? A. Yes, sir.

Q. And you did on the 27th of October, 1912? A. Yes, sir.

Q. And Mr. Durham is your superior officer, the agent? A. Yes, sir.

Q. Did you know Simon Cleary, the man that was killed? A. Yes, sir.

Q. Were you his foreman, or what position? A. Foreman.

Q. Were you actually in the terminal yards at the time; was that your place to be in among

those platforms? A. At the time this gentleman got killed I was to dinner.

Q. When you were at work where would you be? A. Right in the yard on the platform; I would be on the platform, inside and outside both.

Q. When you say platform you and I may be using the same word for different meanings. I mean by platform the railway platforms that run up and down between the tracks; you may mean the platform down at the Wells Fargo? A. I mean both.

Q. You would be all around? A. Yes, sir.

Q. Mr. Durham has said that at the time of his death he supposes that Cleary was going with a truck to meet a train coming in from Suffern; do you know what train that was? A. No; I don't know what train it was.

Q. You do not know what time it was due? A. No.

Q. You were in immediate charge of the men, were you, for the Wells Fargo? A. Yes, sir.

Q. What did you do about seeing that the men were not struck by locomotives going up and down the track; did you order the Erie Railroad Company to give them any signals or do anything of that kind to protect them, or was that left to the Erie Railroad? A. I did not give them any orders at all.

Q. That was left to the Erie Railroad, to protect the men? A. Left to the Erie, yes, sir.

CROSS-EXAMINATION by Mr. Hobart:

Q. You had nothing to do with running the trains of the Erie Railroad, I suppose? A. No, sir.

Q. You knew this man Cleary? A. Yes, sir.

Q. How long had he been working there at the time of this accident? A. Oh, about—I could not give you the exact time.

Q. Do you know where track 11 and track 12 are located? A. Yes, sir.

Q. How often had he been out on those tracks? A. Well, that is hard to tell, too; I suppose he—

Q. He would go out whenever a train would come in with express on it? A. Whenever a train would come in he would have to meet the train. He would have to be on the platform, yes, sir.

Mr. Simpson: Now I have asked Mr. Hobart to produce the book of rules and he hasn't got one. I would like to have the privilege of putting that in after, if I get the book of rules of the Erie Railroad Company. I think it is evidence, under Goodwin v. Thompson, on the theory that if they provide a rule and that rule is violated, that is evidence of negligence.

Mr. Hobart: Do you think that is the proximate cause?

Mr. Simpson: Yes. And on that theory I would like to put in the rules.

That is my case, with that exception.

Plaintiff rests.

Mr. Hobart: If your Honor please, I appear for both defendants, and I ask for a nonsuit for both defendants on the grounds:

First, that there is no evidence of negligence on the part of either defendant.

Secondly, on the ground that contributory negligence on the part of the plaintiff's intestate clearly appears; and of course that he was would be applicable only to the Erie Railroad Company, provided your Honor should conclude that the express company comes under the federal employers' liability act, because under that act the question of contributory negligence is not an absolute bar.

Thirdly, for both defendants on the ground of assumption of an obvious risk.

Fourthly, for both defendants on the ground that there is not sufficient proof to bring the case within the federal statute.

Fifthly, as to the Wells Fargo Company, that that company cannot be held liable under the federal employers' liability act, because it is not a common carrier by railroad; and as to the Erie Railroad Company that that company cannot be held liable under this act. In fact I do not think there is any claim in the complaint that it can be.

Mr. Simpson: Well, he was not a servant of the Erie.

Mr. Hobart: No, so that act would not apply anyway to that company.

Those are the grounds of my motion.

The Court (After argument): Well, I have no doubt what I ought to do in this case. The case is brought by a plaintiff against two defendants, the Wells Fargo Express Company and the Erie Railroad Company. The Wells Fargo Company is sought to be charged on the ground that it was a common carrier by railroad engaged in interstate commerce; that the plaintiff was its employee and received his injury while he and it were

coincidentally engaged in the prosecution of interstate commerce. I have no doubt whatever that this is not a case that comes within the federal act. The cases that have been submitted to me, and which also have been seen by counsel for the plaintiff, are clear authority for the proposition that while an express company is a common carrier it is not within the descriptive language of the statute a common carrier by railroad. Some analogy was sought to be established between the condition of an express company and that of the New York, Susquehanna & Western Railroad Company, and the argument was made that the New York, Susquehanna & Western Railroad Company did not own the railroad because it ran over the tracks, part of the way at least, and used the terminal, of the Erie Railroad Company; but that argument does not go far enough, because it does not prove that it does not own a railroad; it may prove that it does not own the ground upon which the tracks are laid, but the railroad is not ground; a railroad is something more than the mere ground upon which the tracks are laid; and I have no doubt in the world that the New York, Susquehanna & Western Railroad Company owns a railroad, even though it leases the tracks and may lease the terminal upon which and into which it runs its trains. But an express company has been held under the interstate commerce cases and has been distinctly held in common law cases that I know of that have been decided on the question, to be a company that is not a common carrier by railroad. True, it uses a railroad; it also uses wagons, and it probably uses messengers; and it is not therefore within

the descripitive language of the act. But even if it were within the descriptive language of this act, I have no doubt that the Wells Fargo Company is entitled to a nonsuit in this case, because there is not any evidence of negligence on its part, and there is conclusive evidence of the assumption of risk by the deceased and of contributory negligence. I agree with counsel for the plaintiff that there is a distinction very clear and distinct between assumption of risk and contributory negligence, and that distinction arises out of their origin. The doctrine of assumption of risk arises out of a contract, the contract of hiring. The doctrine of contributory negligence rests upon the conduct of the party in the employment itself. The risk is supposed to be assumed as a part of the consideration which the employee gives to the employer for the wages which he receives, and therefore the doctrine of assumption of risk is applicable against the Wells Fargo Company, but it is not applicable against the Erie Railroad Company in this case. Now choosing the doctrine of assumption of risk in consideration of the liability of the Wells Fargo Company, the risks which an employee is supposed to assume under his contract of employment are those which are ordinarily incident to the employment, those which he actually knows of, those which he comes to know of even after the employment has been entered upon, and those which he ought to know in the exercise of reasonable care on his part.

Now, in this case it seems to me that there is not any doubt in the world that a person using a station platform on which locomotive engines and cars are run which have an overhang over

the platform edge, is bound to know that if he gets in the way of that overhang he is apt to be hurt, or if he gets anything that he is drawing or carrying in the way of it he is apt to receive an injury. That likelihood is clearly expressed in the Dotson case, to which both counsel have referred, and inasmuch as this portion of the case which I am going to read also refers to contributory negligence I might as well read it once and for all now. The Court says:

> "And it is a matter of common knowledge that in performing this duty (that is of making their platforms reasonably safe) the platforms along the best-regulated railroads are built so near the rails that a projection from the engines and cars will overlap to some extent the edge of the platform. While the extreme edge of the platform is perfectly safe for passengers when occupying it for the purpose for which it is manifestly adapted, it is a matter of common knowledge that it is a place of danger when occupied while trains are passing or are likely to pass. It is the plain duty of a passenger when not getting on or off a train but while he may be waiting upon the platform or engaged in walking upon it, to keep such a distance from the edge of it next to the rail that he would be beyond the reach of the projections of ordinary trains. And the company is not liable for injury to a passenger who suffers himself to go beyond such a limit and is injured by a passing train."

In citing some of the cases that bear upon this sort of case the Court said:

> "It was held in C. B. & Q. R. R. vs. Mahara that where a platform is wide enough to give room for safety, the fact that it is so built that the edge nearest the track cannot be safely occupied as a standing place while trains are passing is not negligence. In Matthews vs. Pennsylvania R. R. Co., 148 Pa. St. 491, it was held that where a passenger waiting for a train at a station, the platform of which is properly constructed, stands so near the track as to be struck and killed by the bumper of a passing locomotive, the railroad company is not liable."

It must be assumed therefore that the platform where the overhang is must be a place of danger as a matter of common knowledge, and if anybody works along the railroad any length of time, a day if you please, or if he does not work there at all, the common knowledge affects him that that is a place of danger and if he gets in the way of it he is going to be injured. Now if his duty required him to put his truck in that neighborhood he must be deemed, so far as the Wells Fargo Express Company is concerned, to have assumed the risk of that from the fact that he worked there for two weeks, knew there was not anybody except the railroad company to warn him of the approach of trains, and had been told, so the evidence indicates, that he must use care, or take care for his own safety. There is nothing in the case to show that there was anything that

he was entitled to depend upon except his own observation for his own safety. Therefore that was one of the risks that he assumed, not the risk of injury by reason of the negligence of the Wells Fargo Company but the risk of injury from passing trains of the Erie Railroad Company; whether they were carefully or negligently operated he might be injured by them. So that so far as the Wells Fargo Company is concerned he assumed the risk of the particular kind of injury that actually occurred to him and resulted in his death, and under the Dotson case it cannot possibly escape, in my mind, being held that the action of the decedent in placing himself, or something that was so near to him that if it were struck he would suffer the consequences of the blow, in that position, was contributory negligence. The distinction that was endeavored to be drawn between the case of Dotson against the Erie Railroad Company and the Daum case is a distinction that is infirm and unsatisfactory, for this reason, that in the Daum case the employees were working on the tracks; that was a part of their duty. The case now on trial is a case where the duty of the workman did not require him to pull his truck near the track at all, so far as the evidence shows. He had a platform along which he could go safely, and when he got out of the safe place and pulled his truck into a place of unsafety he was doing an act which by common knowledge he knew would jeopard him, and if he received the injury it must be held, as the Dotson case asserts, to have been contributory negligence on his part. Manifestly, a man who is put to work on a track is not supposed to be looking up

every two or three minutes from the track to see if something is going to strike him, but this man was not put to work on the track; this man was not required in the exercise of his employment to go near the track; he was just as safe on that platform as passengers were. That it seems to me disposes of the question of the liability of the Wells Fargo Company. First of all, it is not a company that comes within the descriptive language of the interstate commerce act, and secondly, if it did, there was no negligence on its part, and there was both assumption of a risk by the decedent and also contributory negligence on his part, which it seems to me conclusively disposes of that phase of the case.

That brings us then to the consideration of the case against the Erie Railroad Company. Now, that case is not rested and could not be rested upon the federal statute for two very obvious reasons. The first one is that the federal statute is not pleaded with respect to the Erie Railroad Company, and secondly, the plaintiff would not come within it because the plaintiff was not an employee of the Erie Railroad Company, and the statute is only a statute to give a remedy to a servant as against a master who carries on the business of a carrier by railroad. That then brings us to the question as to whether or not the Erie Railroad Company is liable on the ground of common law negligence, and whether that liability will be held not to attach because of the contributory negligence of the plaintiff himself, because in this case, as I stated before, the doctrine of assumption of risk is not applicable, there being no relation of master and servant.

Defendants' Motion for Non-suit

Now first of all with respect to the evidence as to the ringing of this bell for the purpose of giving a warning of the backing down of this locomotive: the case of Eissing vs. Erie Railroad Company and other cases in this State are authority for the proposition that negative evidence with respect to hearing a bell rung, that is that parties did not hear it ring, is not of much consequence where there is not something in the case to show that there was some reason for the party to pay attention to the fact of the ringing of the bell, and that if there be on one side positive evidence of the fact that the bell was rung and on the other side the mere statement by a party that he did not hear it ring, and nothing further in the case to show that there was any reason why he should have paid any particular attention to the fact of its ringing, the negative evidence will be disregarded. That is the law as I understand it in this state, established by the Eissing case and by other cases which follow that rule. Now if it be true, as is asserted that in all likelihood the jury would have a right to conclude that the train that came in on track No. 11 was ringing its bell at the time that the bell on the engine on track 12, which caused the injury, was ringing its bell, and that therefore plaintiff's decedent might not have heard it, that brings it within another line of cases, which is that if obstacles temporarily intervene to prevent the effective use of the senses to ascertain the approach of danger from a direction from which danger may be expected, that prudence requires that the person shall wait until the obstacle shall have been removed and the

effectiveness of the use of the sense may be re-established. Now if this decedent was unable to determine by his auditory sense whether a locomotive was coming on another track because a bell was ringing on the track on the other side, then prudence would require either one of two things; that he should either turn and look or else that he should wait until the bell on the other track had stopped ringing to ascertain whether danger menaced him from another source from a bell ringing there. In other words, he cannot shut up one sense because the other one is obliterated by noise that may come from several sources; he must use prudence, he must use caution, such caution as a reasonably prudent and cautious man would use under like circumstances, and if he simply says, or is to be held to have said, "Why, I did not hear it because other bells were ringing," why, that is all the more reason why he should have used his eyesight if his hearing could not have apprised him sufficiently of the approach of trains.

I think therefore that it is established, first of all in this case, so that there is no question for the jury upon it, that the bell or signal actually was given that would warn anybody in believing that a train was approaching on track number twelve; but even if it were not I think that the question of the negligence of the defendant, the Erie Railroad Company, is a matter of utter indifference in this case, for this reason, that by the plaintiff's own case the contributory negligence of the plaintiff is sufficiently established. I think that the section of the case of Dotson vs. Erie Railroad which I have just read is clear authority for

the proposition that where a man goes into a place of known danger and puts himself there and receives an injury from the fact of his presence there, that that must be conclusively held to be contributory negligence. In other words, that it is negligence as a matter of law. That is the rule that is laid down in the Dotson case, and the differentiation of that case attempted by counsel for the plaintiff it seems to me entirely fails. The place in which Mr. Cleary was doing his work, so far as the evidence shows was a place of entire safety. He could have done it without any necessity what ever for having either put himself or his cart in any way in jeopardy. The platform, so far as the evidence shows, was larrge enough, and the space sufficient to enable him to operate that truck without in any way placing himself where he would be in danger, and if he put himself where the law says he must be held to have known that there was danger, and he was injured because of the fact of the danger which he knew was there, then to say the least of it he at least contributed by his own negligence to the production of the injury of which he complains. Now there were only two witnesses who testified as to where this truck was at the time of the happening of the injury. The first witness says it was right near the track, a very, very short distance away from it; and that witness gives the further evidence—if my recollection from last night is correct, and I am quite sure that it is—that he drew the truck in a straight line from the time that he first came in the vision of the witness until he was struck. In other words, that he kept it an inch or so away from the edge of the platform all the way up the track,

with no apparent necessity for it, no reason for it in the world; he just simply put himself there and kept himself there without reason and with the common knowledge in his own mind that by being there a train was likely to come out—and it must be presumed that he knew it was, because he had worked there for two weeks, and there were ninety movements of the train in and ninety movements out every day during all the while that he had been there—it must therefore be presumed that he knew when he placed himself there that he was placing himself in a position of jeopardy and was likely to receive the injury which actually did result to him and eventuated in his death. The other witness says that he was about two feet from the track and standing still, and that when the engine got two or three feet from him he then started to go across the track and pulled his truck around so as to just point the end of it out toward the locomotive, or in toward the locomotive, and that by so doing he placed the truck in a place where it was struck; which of course simply indicates, if that testimony were believed, that there was no negligence on the part of the defendant company and that in the second place by doing what he did, without making any observation apparently for his safety, he did precisely the thing that resulted in his injury and that he must have known would have caused it.

So is seems to me that for these reasons I must grant the motion of nonsuit asked for, and I do that, and you may have an objection entered on the record.

Mr. Simpson: Yes.