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New Jersey Court of Errors and Appeals.

AUGUSTA ARMBRECHT, Admx. *Plaintiff-Respondent,* *vs.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, *Defendant-Appellant.*	Appeal from Hudson Circuit.

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APPELLANT'S BRIEF.

This action was brought under the Federal Employers' Liability act. The essential facts are not in dispute. The deceased was one of a gang of snow shovelers. He had been engaged during the morning in shoveling snow in Port Morris Yard from the tracks to gondola cars. After the cars were loaded they were drawn out on the main track and unloaded at the west end of the yard (p. 52). The snow train consisted of an engine, three coaches, a caboose and seven gondola cars, in the order named, with the engine on the west end (p. 68). When the snow was unloaded, the men stood in the empty cars (p. 51). The empty train then backed to the east end of the yard and then to Lake Hopatcong. The train was empty when the accident happened (pp. 22, 44). At the latter station the conductor of the snow train was informed that a passenger train and a freight train were coming, and he would have to take the fourth track, and go to Chester Junction (p. 22), four miles east, to cross over to the west-

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bound side of the railroad, and then to return to Port Morris for further orders. From Lake Hopatcong east to Chester Junction are four tracks, two east-bound and two west-bound, the two middle tracks being the passenger tracks and the outside tracks being the freight, or slow, tracks. The snow train pulled over on the east-bound slow track and backed four miles to Chester Junction (pp. 67, 68-69). The freight train followed the snow train on the slow track to Chester Junction, where they waited for the express train to pass east (p. 52). At Lake Hopatcong, some of the workmen had gotten off the gondolas to go into the coaches, and the foreman directed them to stay on the gondola cars (pp. 52, 59, 94). The deceased was on the car at the time (p. 97). When the train arrived at Chester Junction, about half past ten (p. 29), one of the foremen standing on the caboose platform saw some of the men jump off the empty gondolas down on the east-bound main track. He called out to them to stay on the cars, and also ran back along the gondolas three car lengths, pushing, and gesticulating to, these men not to get down on the track. While so engaged he heard the whistle of the approaching east-bound passenger train and turned to go back to the caboose, but was struck and injured himself while getting back on the work train (pp. 82, 83, 84). The rear brakeman also warned the men to stay on the cars when he saw them getting off (p. 121).

No one saw the deceased get off the train, or saw him struck (pp. 28, 38, 44), but his body was found on the track near the third gondola from the caboose (p. 103), after the passenger train passed the snow train, and it is therefore assumed that he jumped off the snow train at the time, or just before, the passenger train passed. No orders were given to the men to get off the train (pp. 85, 99, 103). On the contrary, all the

orders and warnings were to stay on the cars (pp. 52, 83, 94, 99, 107). There was no snow to be loaded at that point, but a light rain had begun to fall and it is assumed that, seeing there was no work to do, some of the men started for the coaches to get out of the rain, and the deceased must have followed by impulse (pp. 54-55). It seems that there was a conversation between some of the Italian laborers about instructions from the foreman to go into the coaches (p. 45), and doubtless they started the movement, which the foreman attempted to check as soon as he saw it. This, as developed on the cross-examination, was hearsay and was stricken out (pp. 46, 62).

The place where the snow train stopped was beyond a curve, and as soon as the engineer of the express saw the work train standing on the slow track, but before he could see any men on the track, he opened his whistle (p. 105) as a signal of his approach (p. 114). The work train engineer blew his whistle as a warning of the coming of the express (p. 119). Those who had business on the track at the time were the conductor (p. 70) who had to walk to the signal tower, and the flagmen, whose duty it was to protect their own train on the freight track. These men heard the whistle signals and were not on the express track.

The errors assigned are the refusal of the trial court to direct a verdict, as requested, on the grounds:

1. That the deceased at the time of the accident was not engaged in interstate commerce.

2. That no negligence on the part of the defendant was shown.

3. That the deceased assumed the risk of injury from trains on the main track.

And to the court's charge and refusal to charge as requested.

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I.

The deceased was not engaged in interstate commerce.

The deceased was not engaged in any work at or immediately preceding the time of the accident. The work train to which he was attached was four or five miles from the place where it had been working and to which it would return. It
10 was a matter of killing time until the road should be clear of trains. Is a man engaged in interstate commerce when he is not engaged in work at all?

The fact that the deceased had been working previously cleaning snow from the yard tracks, which work, including unloading of the snow from the cars, he had finished so far as he, or any of the gang, had any orders, and that he might possibly be put to similar work whenever the train
20 should return to Port Morris (p. 50) does not permit a finding that, at the time of his injury, he was engaged in interstate commerce, or commerce at all.

Notwithstanding the maze of conflicting decisions on this point in the earlier efforts of the courts to construe this statute, the Supreme Court and Federal courts of appeals have recently considered a sufficiently varied line of cases to determine definitely the test of whether a given case
30 is within the statute. One of these is *Behrens v. Illinois Central R.R. Co.* 233 U. S., 473; 58 L. Ed., 1051, which was followed by *Carr v. N. Y. C. & H. R. R.R. Co.,* 238 U. S., 260, both of which involved injuries to trainmen engaged generally in handling both interstate and intrastate commerce. These were followed by *Shanks v. Delaware, Lackawanna and Western Railroad,* 239 U. S., 556, in which a shop workman was injured. In that case, the Court said:
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"Thus it is essential to a right of recovery

> under the act not only that the carrier be engaged in interstate commerce at the time of the injury, but also *that the person suffering the injury be then employed by the carrier in such commerce.* And so it is that when the carrier is engaged in intrastate commerce, *or in what is not commerce at all,* one who, while employed therein suffers injury through negligence must look for redress to the laws of the state."

The question of whether this action in maintainable under the Federal act, therefore, depends on what work the employe was doing at the time of his death, and not on the character of the train which ran over him. 10

If we assume that the tracks from which the deceased had shoveled snow when he was working that morning, were tracks on which interstate commerce was handled, then when the snow had been loaded on the cars and taken to the west end of Port Morris yard and unloaded, that service, if in aid of interstate commerce, was concluded. What next work was to be was not shown. The train backed to the east end of the yard, then to Lake Hopatcong, then still four miles further east to Chester Junction, and stopped there, waiting an opportunity to get on the west-bound tracks and return somewhere in the vicinity of Port Morris for further orders, but for what purpose was not shown and, of course, cannot be supplied by speculation. 20 30

On the principles announced in the decisions above mentioned, in the following cases it was held that the employe was not within the act:

Connell v. N. Y. C. & H. R. R.R. Co., 144 App. Div. (N. Y.), 664— a gateman who, for personal reasons, left his gate and walked down the track a few feet.

Erie R.R. Co. v. Van Buskirk, 288 Fed., 489 —a hostler regularly handling interstate engines, 40

who temporarily left his work to assist in fixing a clam-shell bucket which was not then in use.

Best v. N. Y. C. & H. R. R.R. Co., 117 App. Div. (N. Y.), 739—a brakeman on his way from his train to the rest house.

Pryor v. Bishop, 234 Fed., 9,—a trainman regularly employed on an interstate train, who was sleeping in his caboose until he should be called to take his train out.

10 *Harrington v. C. B. & Q. R.R. Co.*, 241 U. S., 177, an engineer switching coal cars to a shed from which the coal would be taken for fuel by interstate engines. In this case, the Court said:

> "It is not important whether he had been previously engaged in interstate commerce or that he would be so engaged after his immediate duty was performed."

One of the most recent cases in the Supreme 20 Court is *Erie Railroad Company v. Welsh*, No. 29 October Term, 1916, decided December 18th, in which a yard conductor, after handling an interstate car, stepped off an engine to go to the office for further orders. At that time he stepped on a switch mechanism and was injured. Justice Pitney said:

> "By the terms of the Employers' Liability act the true test is *the nature of the work being done at the time of the injury*, and the 30 mere expectation that the plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

These cases deal with situations where the employes were actually engaged in doing some work as well as those who were not so engaged, but they illustrate the final judgment of the courts as to necessity of the employes being actually engaged, not only in commerce, but interstate 40 commerce, at the time of the injury in order to come within the provisions of the act. This fact is

jurisdictional, and must appear. (*Luchetti v. P. & R. Ry.*, 233 Fed., 137).

Where the record fails to show that the deceased was actually engaged in interstate commerce at the time he received his injuries, the courts will not supply the deficiency by taking judicial notice of certain facts which, if proven, would bring the case within the act. (*Osborne, Rec., v. Gray*, 241 U. S., 16.)

Tested by the principles adhered to in these cases, it is patent that the plaintiff's intestate was not engaged in interstate commerce when he met with his death. As I have suggested above, the fact that he was struck by an interstate passenger train does not shed any light on the character of his employment at the time of the accident. He was not at work. The gang of which he was a member could not work because they were four miles from the place where they expected to go and work whenever the opportunity arrived, and while the character of the work which would then be done is not disclosed by the record, even if it is assumed that it would be of an interstate commerce nature, that expectation has no bearing on his status at the time of the injury. This point was expressly raised and decided in *Harrington v. C. B. & Q. R.R.*, supra, and *Welsh v. Erie R.R.*, supra.

The plaintiff's intestate was admittedly on duty in the sense that he was subject to orders, but leaving the car on which he had been standing and jumping down on another track and running for the caboose or coaches, was not a part of, or incidental to his work. The distinction between being off duty but subject to call and being actually employed is pointed ont in *Pryor, Receiver, v. Bishop*, 234 Fed., 9, as the distinction between being on duty and going for orders and being actually at work is pointed out in *Erie R. R. Co. v. Welch* (U. S. Sup. Ct.) supra.

In *Minn. & St. L. R. R. v. Winters,* (United States Supreme Court, Jan. 8th, 1917) the plaintiff was injured while making repairs to a locomotive. In that case Justice Holmes said:

"It simply had finished some interstate business and had not yet begun on any other. Its next work so far as it appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of 10 commerce depended upon its employment at the time, not upon remote probabilities or upon accidental later events."

In *Hudson and Manhattan Railroad Company v. Iorio,* (U. S. C. C. A., Second Circuit, Feb. 1917; New York Law Journal, Feb. 10th 1917) Judge Hough said:

"But by the latest pronouncement of the Supreme Court (*Minn. etc., Co. v. Winters,* 20 Jan. 8th, 1917) it is in effect declared that when one claims the benefit of the act here invoked because of the character or employment of the thing upon which he was working at the time of injury, then the character of that thing 'as an instrument of commerce depended upon its employment at the time of injury, not upon remote probabilities or upon accidental later event'. It cannot be said that the rails which Iorio was engaged in storing against a use that was certainly not imminent and might here occur were at the moment en- 30 gaged in or were practically part of interstate commerce. For there commerce was going on without any present assistance either from Iorio or the rails on which he was working, or the men who were working with him. We therefore hold that the actual employment or use at the moment of injury of the thing upon which the person injured was working, is the test of applicability of the statute under circumstances such as are shown here. By that test plaintiff below was not practically engaged in or a part of interstate com- 40 merce when he was hurt, and the judgment is reversed."

In *Giovio v. N. Y. C. R. R. Co.* (N. Y. App. Div., N. Y. Law Journal Feb. 10, 1917) the deceased was injured by a switch engine which was generally used in the Weehawken yard in moving cars from one place to another, and in its work moved cars engaged in interstate as well as intrastate commerce indiscriminately. On the day of the accident, it had been used in moving cars used only in interstate commerce and was so used on the following day. At the time of the accident the engine was not engaged in moving any cars but in preparation for the next days work had taken water into the boiler, and proceeded to the coal chute to obtain coal, and then went to the turntable where the accident happened. The court considered the cases of *Shanks vs. D. L. & W. R. R.*, 239 U. S. 556; *Ill. Central vs. Behrens* 236 U. S. 473; *D. L. & W. R. R. vs. Yurkonis*, 238 U. S. 439; *C. B. Q. R. R. vs. Harrington*, 241 U. S 177, and said:

> "Applying the rule stated in the foregoing cases, it seems to be apparent that the plaintiff's decedent when he came to his death was not engaged in interstate commerce or in any work so closely related to it, as to be practically a part of it. The respondent, however urges upon us the argument that because the engine upon which the deceased was working immediately before his death, was at times engaged in hauling cars engaged in interstate commerce, it was an instrument of such commerce, and hence that deceased was engaged in interstate commerce and references are made to cases in which bridges and switches used both for interstate and intrastate commerce are held to be instrumentalities of interstate commerce and the men working upon them are held to be engaged in interstate commerce. That argument is answered by the very recent opinion of Mr. Justice Holmes, in the case of *Minn. & St. L. R. R. v. Winters*. Applying the cases from which we have quoted to the facts of the present

case we are constrained to hold that the plaintiff's intestate was not engaged, at the time of death in interstate commerce."

On the authorities mentioned, the Court erred in refusing the motions to non-suit and direct a verdict on the ground that, at the time of the accident, the deceased was not engaged in interstate commerce.

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II.

There was no negligence on the part of the defendant.

The federal act does not prescribe any duties to be performed by the employe, nor does it define assumption of risk, and the questions of negligence and assumption of risk are to be determined according to the principles of the common law. *Horton vs. Seaboard Air Line*, 233 U. S. 492, 58

20 L. Ed. 1062. *Sou. Ry. Co. vs. Gray*, 241, U. S. 333. The act allows a recovery only in case of negligence, and excludes responsibility for insufficiencies not due to negligence. *Horton vs. Seaboard Air Line* (supra).

Negligence is never presumed. It must be proven. In cases of master and servant the doctrine of res ipsa loquitur does not apply. *Bahr vs. Lombard*, 53 N. J. L. 233; *Looney vs. Met. Co.*, 200 U. S. 480.

30 Negligence being the omission of a legal duty the burden is on the plaintiff to show the existence of the duty and its violation as the proximate cause of the injury. *Patten vs. T. & P. Ry.*, 179 U. S. 658. In other words the employer is not an insurer of the servant's safety. *U. P. R. R. vs. O'Brien*, 161 U. S. 351, 457; *Choctaw etc. R. R. vs. McDade*, 191 U. S. 64, *Myers vs. P. C. Co.*, 233 U. S. 191; *Reese vs. P. & R. Ry.*, 239 U. S. 463.

40 The plaintiff's intestate did not get off the cars and on the track through any negligence of the

defendant in failing to provide a safe place or appliances for his work, as deceased was not at work or at a place he was required to be (pp. 24-44-51-71-82-94-99-107). The only contention of negligence is that he was not warned of the approach of the passenger train on the main track, and this contention must necessarily rest on the theory that his presence on the track was in the line of his duties, for the relation of master and servant, and the duties, arising out of that relation are essentially different from others involving children or persons *non sui juris* or *non compos mentis,* from whom ill-considered and unwise actions are to be anticipated and guarded against with a high degree of vigilance. The deceased was a man 45 years of age, and had been working on the railroad for six months. A master is entitled to assume that an adult employe in possession of all of his natural faculties, will follow instructions and conduct himself with some regard for his obvious environment, and it is not negligence to act on this assumption. *Hogan vs. N. Y. C. & H. R. R. R. Co.,* 223 Fed., 890.

The complainant alleges that the plaintiff's intestate was engaged in work and that defendant did not employ a system of warning the men working on the tracks. Admittedly he was not at work, and no attempt was made to prove these allegations. There was no proof whatever that there was a custom, system or practice of warning the men while at work or while walking the track, so that the allegation as well as the evidence negatives any inference that there was a departure from an established custom on which the men relied.

Further, it is alleged that the defendant did not give a warning of the approach of the passenger train on this particular occasion. This must be taken with reference to the time when the deceased jumped to the track, which must have been

only a few seconds before the express passed. As to this charge it is proved and not contradicted that four separate and independent efforts were made to prevent injury to these men as soon as their peril was discovered. These efforts were first by the foreman Simcox, who as soon as he saw the men jump from the cars to the track, shouted to them, which he followed up by running along the track next to the work train, shouting, and pushing the men back on the cars and off the track; also by foreman Kelley (pp. 83-99-100); secondly, by the trainman, Eckerson, who while not being in authority over the employes, nevertheless shouted to them to stay on the cars as soon as he saw the movement (p. 107); third, the engineer of the work train, as soon as he saw the passenger train approaching in the distance, began to "toot" his whistle and continued to do so a dozen or twenty times (p. 119); and fourth, the engineer of the passenger train, who opened his whistle (p. 99) as soon as he saw the work train on the passing track (p. 57), and before he knew there was or saw anybody on the track (pp. 105-114). It therefore appears that every effort was made, not only to stop the men when they made the break from the cars, but to apprise them of the approach of the train as soon as its approach, which was simultaneous with the act of the men jumping to the track, was discovered. And as there is no proof and can be no contention that everything was not done that could have been done at that time, the plaintiff must rely upon her allegation of a failure to have a system which would have warned the men *at some earlier time* that the passenger train was approaching.

In the case of men actually working on railroad tracks on which regular trains are operated, our courts have always recognized that such places are not and cannot be made inherently safe for obvious reasons, *Connelly v. P. R. R. Co.*,

228 Fed. 322, *N. & W. R. R. v. Gesswine,* 144 Fed. 56, *Aerkfetz vs. Humphries,* 145 U. S. 418, and it has been shown that comparative safety to those who work on tracks may be secured either by the personal vigilance of the worker or by the vigilance of watchman employed by the master to make observation and give warning of the approach of trains; and from these practices two general rules have been evolved; first, that the employe who has no one told off to look out for him assumes the risk of injury from trains which he fails to observe (*Precodnick vs. Lehigh Valley R. R. Co.,* 74 N. J. L. 566) secondly, he who is assured that while he is at work he may rely on the watchman for a warning does not assume the risk of danger resulting from the failure to warn, and the failure to give such warning is negligence. *D'Agostino vs. P. R. R.,* 73 N. J. L., 259; *Germanus vs. Lehigh Valley R. R.,* 74 N. J. L. 662, and this rule has for its basis the fact that employes cannot give their attention to their work if they must continually be on the lookout for trains. But as we have pointed out, the deceased was not at work, his mind was not engrossed with his employment, and there was no occasion for establishing a system of warning those who for their own purpose went on the tracks; obviously in such a situation the rules in the track laborers' cases have no application. Does such absence of a system of warning the men *in the gondola cars* that a train was approaching on the main track, constitute negligence? *It will be perceived at once that this suggestion is not of a warning to men working in a dangerous position to leave it; but of warning to employes in a safe place to refraim from leaving it and going where it is inherently dangerous; and where neither duty demands or permission invites.* It must be remembered that the crew who were operating this work train expected to make a crossover at the east end of Port Morris Yard, but that the tracks there were so

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engaged that that movement was not permitted and the train therefore went to this point four miles away to another cross over and switch tower, to make the movement (p. 69). The conductor then got off and went to the tower to notify the towerman of his wishes (p. 70), when the men took advantage of the stopping of this train to run to cover from the rain which had commenced to fall. A system of warning under such circumstances
10 presupposes that the men had a perfect right to jump off the train every time the train stopped, which might be occasioned by signals, obstructions or accidents. To have an effective system of warning of the approach of other trains under such circumstances would necessitate the sending out of guards every time the train came or intended to come to a stop, wherever it should stop, and before it came to a full stop. A little reflection will disclose the impracticability of any such sys-
20 tem. As we have before pointed out, it is not the failure to physically restrain the men from leaving a safe place, but the failure to have a system of warning them after they got on the tracks, which is charged as negligence, which is another way of saying that wherever the train happened to stop, was a place of work, whether the workmen had any work to do or not. We have found no authority based upon a recognition of the legal principles involved which so holds, and certainly
30 there is none in this jurisdiction. The converse is firmly established, that is, that such a duty does not prevail, but that in such a case the employe assumes the risk of danger to which he thus needlessly exposes himself.

As an illustration of plaintiff's conception of the defendant's duty, on the trial it was contended that the defendant should have had some system of notifying the engineer of the express train of the places where he might meet work trains
40 laying in on a siding, so that he might have sig-

naled his approach before reaching the curve (p. 115), but no authority for any such rule is suggested, nor in view of the fact that work trains have no fixed schedule, could any such rule be made practicable. This court in *Zebrowski vs. Warner Sugar Company,* 83 N. J. L. 558, adopted the opinion of the Supreme Court in *Voss vs. Delaware, Lackawanna and Western Railroad,* 62 N. J. L. 59, as follows:

> "A general averment in the declaration of the failure to exercise reasonable care to make and establish or enforce rules and regulations furnishes no basis of liability against the master. No authorities have been cited to sustain such a proposition and it cannot be founded upon any sound reasoning."

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In the case at bar we have a work train standing on a passing track with no work under way. Alongside is a main track for passenger trains. The workmen on the snow train are in a safe place, have nothing to do on that track or at that place, and are confronted with no emergency. In an analogous situation in the Zebrowski case supra, this Court said:

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> "There was no proof in this case that the business was of the complicated character which the law obligates the employes to guard by a scheme of laws. The only evidence on the point was that 150 to 200 men were employed and that an elevator was a dangerous agency. It is not perceived how * * an inference of a dangerous and complicated business is raised * * *. Under such circumstances a master will not be chargeable with negligence in failing to make rules, *nor can the question of necessity of rules be left to the jury.*"

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In the Zebrowski case Justice Voorhees quoted from other authorities as follows:

In *Abel v. D. & H. Canal Co.,* 128 Id., 662, an exception was taken to a charge which proceeded as follows:

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"I think rules might have been suggested not adopted by any company. You have a right to consider whether some rule which occurs to you even though no company has adopted it, would have been a better rule and given better protection and such a one as ought to have been adopted and maintained."

Upon review, the Court of Appeals said:

"If the charge is to be construed as leaving it to the jury to determine, irrespective
10 of evidence, what rules ought to have been adopted for the safety of the repairmen and to find the one way or the other on the question of the defendant's negligence in conformity with a conclusion so reached, the charge was undoubtedly erroneous."

So, in *Atchison, T. & S. F. R. Co. v. Carruthers,* 56 Kan., 309, the court held that in the absence of any testimony as to possibility or usefulness of a code of rules a jury is not justifiable
20 in finding the company negligent in failing to promulgate such system.

In *Berrigan v. New York, Lake Erie and Western Railroad,* 131 N. Y., 582, the rule is thus stated:

"There is no proof in the case that rules for such a case had ever been promulgated by any other railroad company, or that it was reasonable or practicable to provide against the occurrence of such an accident by
30 a rule. The learned trial judge submitted to the jury the question whether the defendant was at fault in omitting to make and publish such a rule. This opened to the jury a wide field for speculation and conjecture. In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads, or of persons possessing peculiar skill and experience in the management and operation of railroads to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and
40 propriety of making and promulgating such

a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury."

See, also, *Morgan v. Hudson River Ore Iron Co.*, 133 Id., 666, where the court said:

"The recovery was based entirely on the absence of rules. It was not suggested at the trial nor is it on this appeal, what particular rule the defendant could have adopted that would have been likely to prevent the accident. No evidence was given that any rule is in use in business of a similar character by other corporations of the same class carrying on like operations, nor was there any evidence by experts or other witnesses to show that any rule was necessary or practicable in such cases. It was left to the jury to say whether or not it was a case for rules, and if, so, what particular rule should have been adopted. We know nothing with respect to the views entertained by the jury on these questions, except so far as they are indicated by their verdict for the plaintiff. *It is not probable that they concluded that any definite rule should have been promulgated, but were content to hold that, as the plaintiff was injured, the defendant ought in some way to have prevented it, or in case it did not respond to him in damages. Almost every conceivable injury that a servant received in the course of his employment may in this way be submitted to a jury, and with the same result.* * * * Even if it could be shown, after the accident occurred, that it might have been prevented by adopting and enforcing some suitable rule, that would constitute no proper test of liability. The failure to adopt rules is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precautions."

We therefore repeat that the railroad company was not bound to anticipate that the plaintiff's

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intestate would leave his safe place on the train, and for purposes purely of his own convenience jump down on the express track, so as to found a charge of negligence in failing to adopt means to prevent such action on his part.

There is difficulty in aligning these cases where employes are injured while engaged in work, where accomplishment of a duty may be uppermost in their minds, with a case where the em-
10 ploye is not engrossed with a present task, but it seems clear that if he is free to observe and think is certainly under as much duty to do so as he who has actual work on his mind and especially if for his own convenience he voluntarily places himself in a place of danger. It was so held in *Phillips vs. C. R. R. N. J.*, 68 N. J. L. 605, where a brakeman left the car on which he was stationed and was injured on an adjoining track, and in *Hobbs vs. Great Northern R. R.* (Wash.), 56 L. R.
20 A. N. S. 503, 510 where the court said:

> "The federal statute does not cover the servant when he is not within the scope of his employment, or doing some act which is not incidental to his employment. This rule is sustained by all the authorities and the federal act in nowise attempts to change it. Unless the evidence in this case shows that the deceased was on the pilot of this engine in the discharge of some duty required by the railroad company, then the railroad company
> 30 owed him no duty except to avoid injuring him after it discovered his perilous position. Such is so clearly the law that it will not be doubted and no authorities need be cited to sustain it. There is no evidence in this record that the deceased was required to do any act which would place him upon the pilot of the engine. All of the evidence in this subject is to the contrary. So far as we can find, whatever it was that caused him to step upon the pilot, it was his own purpose not in any way connected with his duties."

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A Federal Court of appeals has held that:

"If a servant step aside from the business of his master for even so short a time to do an act that is not a part of that business, * * * * his acts during that interval are not the master's but his own."

St. L. S. W. Ry. v. Harvey, 144 Fed. 806 (C. C. A.).

So where a railroad company established a custom of sending a man to warn car repairers to get off the track whenever it was intended to move the cars, it was not negligence to fail to send a man with such a warning at a time when the car repairmen were not required or expected to be on the repair track. *Hardy vs. Lehigh Valley R. R. Co.*, 240 Pa. St. 454; 87 Atl. 781. And when an employe is in a safe place and unnecessarily goes to a place which is dangerous on account of the failure of the master to guard it, the master is not guilty of negligence as to him. In such a case this Court said:

"The only ground upon which the case was permitted to go to the jury was the alleged failure of the defendant company to use reasonable care in providing Harris a safe place to work, and the particular failure which the case was considered to have disclosed was the neglect to have a light over the coal hole while it was open, or to warn Harris that the cover had been taken off.

"A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for this occupance while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. *Morrison vs. Burgess Sulphite-Fibre Co.*, 70 N. H. 406.

"It is not disputed that the defendant company had provided Harris with a safe place to perform his work as a member of the freight gang. It had provided a safe method of fur-

nishing him with a shovel when needed, and, when he asked for it, was in the act of supplying it, of which he was informed. When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant owed no duty except to abstain from willful injury, * * * * *Collyer v. Pennsylvania Railroad Co.,* 20 Vroom 59; *Gugenheim Smelting Co. v. Flanigan,* 33 Id. 354; *Haber v. Jenkins Rubber Co.,* 43 Id. 171."

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Harris vs. U. S. S. Co., 75 N. J. L. 861.

In the following cases it has been held that a servant in leaving his post and going to a dangerous place on the master's premises, lost the right to expect protection or warning from the master.

Going to lunch.

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Brice v. Lloyd, 2 K. B., 804; 101 L. T. N. S., 472;

Chicago Smelting Co. v. Collins, 43 Ill. App., 478;

Allen v. Chehalis Lbr. Co., 112 Pac., 338.

Looking for water.

Shadean v. R. R. Co., 82 S. W., 567;

McCann v. Atl. Mills, 40 Atl., 500.

Nature call.

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Rose v. Morrison, 80 L. J. K. B., 1103; 105 L. T. N. S., 2;

L. & N. R. R. v. Hocker, 96 S. W., 526;

Lenk v. Kan. Coal Co., 80 Mo. App., 374.

Other objects.

Sou. Ry. Co. v. Bentley, 56 Sou., 249;

Smith v. Lancaster Ry., 1 Q. B. (1899), 141;

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Lynch v. Texas R. R., 133 S. W., 522;

Ellsworth v. Metheny, 104 Fed., 119; 51 L. R. A., 389;
Schmonske v. Asphalt Co., 129 App. Div., 500;
Williamson v. Berlin Mills, 190 Fed., 1;
Russell v. O. S. L. Ry., 155 Fed., 22.

As appears from the Court's charge, the case was not submitted to the jury on the assumption that the plaintiff got off the car and on the track in the line if his duty (p. 134), but on the theory that he had right to do so at that place and at that time, and from which they might find that there was a duty on the defendant to have a system of warning, or to warn him at this particular time and place, which duty was not performed. 10

In *C. & O. R. R. Co. v. Barnes,* 132 Ky., 728; 117 S. W., 261, a wrecking train was held on the side track to wait for the passage of the train on the main track. When the wrecking train was ready to leave Barnes, who was not a trainman, but a member of the wrecking crew, walked in front of the engine of the wrecking train without being seen by the engineer. It was contended that the railroad company was negligent in failing to blow a whistle which was customarily given upon the starting of train, but the Court held, that the duty, if any, to blow a whistle did not apply to such employees as Barnes, and that as he was not performing, at the time of the accident, any duty which he owed to his employer, and did not take the position in front of the engine in obedience to any request of any person, and as his employment did not require him to go in front of the engine of the wrecking train, there was no breach of duty owed to him for which the railroad company could be liable. 20 30

If the verdict cannot be supported on this theory, it cannot be supported on any other theory, 40

Marshall v. Burt & Mitchell Co., 75 N. J. L., 626. To hold that any inference of negligence is permissible from the evidence in this case, even if the foreman had not warned the men to stay on the cars, is to justify the employee in saying:

> "Although I was in a safe place and did not have any occasion to get on the track in the line of my duty, and although I was not invited to get down on the main track which was obviously used for the running of trains, and although I did not communicate or indicate my intention to leave my safe place and get on the track to any one in authority, and although it was not my custom to jump off the cars and down on the track when there was no work to do on the track, nevertheless the law gives me the right to demand that when I jumped off the car somebody should have known what I intended to do and told me that a train was coming on the track, a fact I was not expected to know."

We submit that no such doctrine is recognizable under the law, and there being no evidence that the defendant failed to do everything possible to avert the accident, when the deceased jumped down on the track, we respectfully submit that there was no issue of negligence to be submitted to the jury, *Southern Ry. Co. v. Gray,* 241 U. S., 333, and a verdict should have been directed for the defendant.

III.

The deceased assumed the risk of injury from jumping down on the passenger tracks.

The testimony shows that the deceased had been employed by the railroad company for six months (p. 60), that the accident happened on the main line of the railroad, that on the day of the accident as well as the day before, freight and passenger train were frequently passing in both directions on the main tracks on this part of the railroad (pp. 26-27-36-37). No sane adult needs to be told the functions and purpose of railroad tracks, especially the men who are working on or about the railroad. We submit, therefore, that as a matter of law the deceased was chargeable with the knowledge that the main track, next to the snow train, was used for the operation of trains, that a train might come along any time and that it was dangerous to walk on the track, and this obvious risk he assumed (*Precodnick vs. Lehigh Valley R. R. Co.,* 74 N. J. L., 566). In *Lauter vs. Headen Construction Co.,* 83 N. J. L., 617, a painter had been working in an elevator shaft at a time when the elevators were being operated, and was injured at a time when, as he testified, the elevator was not working, or when he did not observe it to be in operation, and that he had not been warned that it would be operated. In that case this Court said:

> "The case is wholly lacking, therefore, in the element of a system of warnings having been established and upon which consequently the party injured had a right to reply, as in *Belleville Stone Co. v. Mooney,* 32 Vroom, 253, and in *Harmer v. Reed Apartment Co.,* 39 Id., 332, which, although not a master and servant case, is illustrative of this principle; and it is also equally lacking in the element

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of an 'exceptional' or 'extraordinary' condition requiring the establishment of a system of warnings, as in *Ondis v. Great Atlantic and Pacific Tea Co.,* 53 Id., 511. It does fall clearly, however, not only within, but far within, the doctrine laid down on *Caffrey v. Hedden,* 50 Id., 556, in which this Court said: 'Where the risk is one ordinarily attending the service, or where the risk known, or *by the reasonable exercise of ordinary observation and care would have been known and* 10 *appreciated,* the legal presumption is that the workman undertakes the employment on the terms of encountering the danger, though he may have no actual knowledge of it."

In *Horton vs. S. A. L. Ry.,* supra, Justice Pitney said:

"Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years 20 is taken to assume risks of this sort whether he is actually aware of them or not."

This Court in recent cases has held it error to charge that an employee assumes only such risks of danger which he notices, instead of all the risks of danger *which he ought to notice in the exercise of reasonable care on his part.*

Hardy vs. Sulphur Mining Co., 75 N. J. L., 237;
30 *Goodrich vs. Cort,* 80 N. J. L., 653.

As this Court said in *McConnell vs. Alpha Portland Cement Company,* 74 N. J. L., 727:

"An employee may not take chances and in case ill results following the risks thereby assumed, charge them to the master. Such conduct resulting in injury constitutes the assumption of risk that prevents recovery."

The deceased also assumed the risk involved in 40 going on the track contrary to the instructions

and warnings given (*Lapsley vs. United Electri Company,* 79 L., 131).

The United States Supreme Court in a very recent case held that a fireman who jumped on a slow moving engine while carrying a water cooler, even though he had done it many times before and *thought he could do it safely,* assumed a risk was obvious in legal compensation and he could not recover for injuries so sustained (*Jacobs v. L. V. Ry.,* 241 U. S., 230). 10

In *Dillenberger v. Weingartner,* 64 N. J. L., 292, 289-9, this Court said:

> "In this case the danger to which the plaintiff was subjected was an obvious one *in the sense in which the law uses that term.* She was an adult—the obvious dangers are those which are apparent in the exercise of ordinary observation and which are disclosed by the eyes and other senses. If the servant fails to observe what is obvious, and suffers, he 20 cannot charge the consequences upon his master. This risk so taken is implicitly assumed by him."

See also *Regan v. Polo,* 62 N. J. L., 30, and *Cetola v. Lehigh Valley R. R.,* 99 Atl., 310, to the same effect.

Upon these authorities it is respectfully urged that the Court erred in refusing the defendant's motion to direct a verdict for the defendant.

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IV.

The Court erred in charging the jury that they might take the speed of the passenger train into consideration in determining whether there was any negligence on defendant's part (p. 137).

There was no connection between the passenger
10 train and deceased, and unless the defendant knew a sufficient time before hand that these snow shovelers were going to jump off the train and down on the main track, it is difficult to see how or why the defendant should have notified the engineer of the passenger train to slow down, when he got four miles east of Port Morris. The case is bare of any evidence to show a duty on the defendant to run this train at a slower speed at that particular time. The charge loses sight
20 of the rule that an employer is required to exercise ordinary care, not the highest conceivable degree of care capable with occult powers of prophecy. We submit that this charge tended to mislead and confuse the jury and constituted error.

V.

The Court erred in refusing the defendant's first request that if the deceased left the gondola
30 cars, and went on the track without orders, he assumed the risk.

Harris v. U. S. S. Co., 75 N. J. L., 861.

VI.

The Court erred in refusing defendant's second request that if the deceased left the cars and went on the track without orders, the defendant was not guilty of negligence in not preventing his do-
40 ing so.

Harris v. U. S. S. Co., 75 N. J. L., 861.

VII.

The Court erred in refusing defendant's third request that if the locomotive whistle was sounded as soon as the deceased was discovered on the track, the defendant was not guilty of negligence.

The rule is settled that an employee who voluntarily leaves his place of work and goes to another place to which his duties do not call him is at best, a licensee to whom the master owes no duty except to refrain from wilful injury. If the whistle was blown as soon as the deceased was discovered on the tracks, it shows the performance of the duty demanded under the circumstances, and the request should have been charged. 10

Collyer v. Penn. R. R. Co., 20 Vroom, 59;
Gugenheim Smelting Co. v. Flanigan, 33 Id., 354;
Haber v. Jenkins Rubber Co., 43 Id., 171. 20

VIII.

The Court erred in refusing to charge the jury on the subject of assumption of risk (defendant's third exception to the charge) or as requested in the defendant's fourth request, as follows:

> "Risks which are incidental to the employment, risks which are obvious and those created by the want of reasonable care in the exercise by the servant of his employment, are all assumed by the servant when he enters or continues in the service and there can not in reason be any legal duty resting upon the master to establish rules and regulations to protect the servant from such risks." 30

Assumption of risk is specifically reserved as a valid defense under the statute, and the request properly states the law as applied to this case. *There is not one word with reference to assumption of risk in the entire charge,* and the refusal 40

to charge as requested constituted prejudicial error.

Horton vs. S. A. L. Ry., 233 U. S., 492;
Hardy vs. Sulphur Mining Co., 75 N. J. L., 237;
Goodrich vs. Cort, 80 N. J. L., 653;
Lapsley vs. United Electric Co., 79 L., 131;
10 *Dillenberger v. Weingartner*, 64 N. J. L., 292-289-9;
Jacobs v. L. V. Ry., 241 U. S., 230;
McConnell vs. Alpha Portland Cement Co., 74 N. J. L., 727;
Regan v. Polo, 62 N. J. L., 30;
Cetola v. Lehigh Valley R. R., 99 Atl., 310;

IX.

20 The Court erred in refusing the defendant's request 4-A, relative to the speed of the passenger train.

This point has been covered under the exception to the Court's charge on this subject, and is again urged in this connection.

X.

The Court erred in refusing the defendant's
30 fifth and sixth requests to the effect that if the deceased left the gondola cars and went on the track without orders or invitation he was a licensee to whom the defendant owed only the duty of refraining from wilful injury.

Harris v. U. S. S. Co., 75 N. J. L., 861.

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XI.

The Court erred in refusing defendant's eighth request to the effect that there was no proof that the track was a place designated as a place of work for deceased.

As we have mentioned before, no one testified who saw the deceased get off the gondola, and it is only assumed that he got off the car for the same reason that some of the witnesses did, i. e., because it had started to rain, or because he saw others do so, or because some other workman might have suggested it to him, thought he might as well follow them. No attempt was made to show that there was any work involved in going on the track and in view of the instructions relative to the care toward employees engaged in work, we were entitled to have the jury's attention directed to the fact that the deceased was not on the track as a place where he was required to go in the line of his duty. (*Collyer v. Pennsylvania R. R. Co.,* 20 Vroom, 59; *Gugenheim Smelting Co. v. Flanigan,* 33 Id., 354; *Haber v. Jenkins Rubber Co.,* 43 Id., 171; *Harris vs. U. S. S. Co.,* 75 N. J. L., 861.)

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We respectfully submitted that the judgment of the Hudson Circuit should be reversed.

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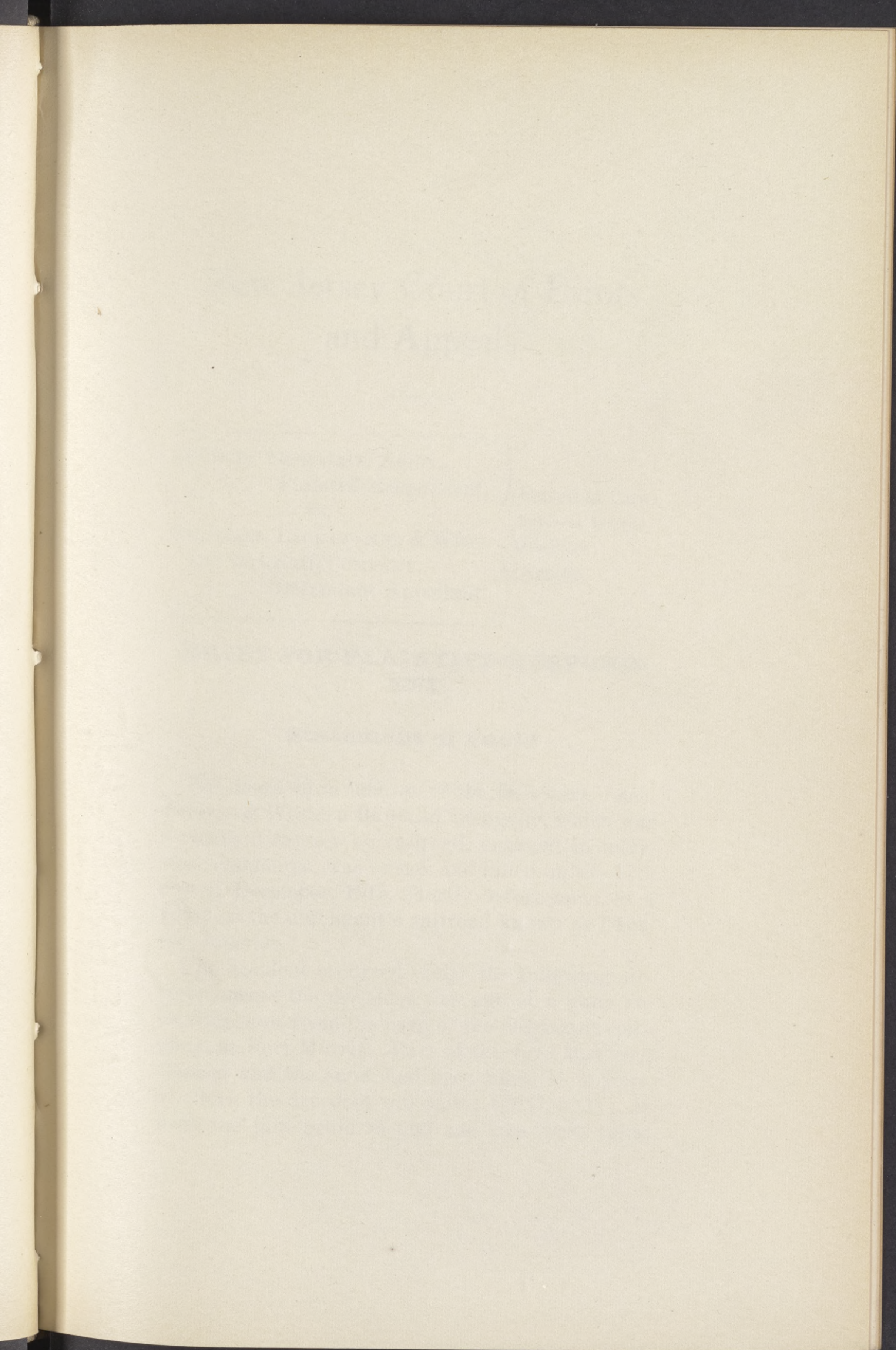

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New Jersey Court of Errors and Appeals

AUGUSTA AMBRECHT, Admx., Plaintiff-Respondent, vs. DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Defendant-Appellant.	Action at Law. Appeal from Hudson Circuit.

BRIEF FOR PLAINTIFF-RESPONDENT

Statement of Facts

The decedent, a laborer of the Delaware, Lackawanna & Western Railroad Company, which was a common carrier by railroad, engaged in interstate commerce, was struck and killed on the 17th day of December, 1915, shortly before noon, at a point on the defendant's railroad known as Chester Junction.

The accident occurred under the following circumstances; the decedent was one of a gang removing snow from the yard of the defendant company, at Port Morris. Part of the yard had been cleaned and the snow had been taken to a point at which the decedent was killed (S. C. p. 17), at least the jury could so find and was there being

discharged by workmen on the flat cars which contained the snow. Some of the men had finished, the snow having been removed by shovel from the track, which tracks were used by the defendant in interstate commerce, as was stipulated at the trial (S. C. p. 35).

The defendant's contention at the trial was that no snow was discharged at the point of the accident, although there was evidence from which the jury could find that snow had been so discharged. The defendant contends that the position of the train at the place of the accident was due to a switching movement.

Part of the snow having been removed by the laborers and having been removed and discharged the train was then making a movement to go up to the other side of the yard and take snow from other tracks (S. C. p. 69). The tracks were used in interstate commerce (S. C. p. 35). The snow train stopped to allow an express train, which was late, to pass, and no warning was given to the decedent of the passing or the approach of the train. No whistle (S. C. p. 18, l. 35; S. C. p. 39; S. C. p. 79), blew at the moment of accident (S. C. p. 57; S. C. p. 114, ll. 8 to 28; S. C. p. 118, ll. 28 to 30). The train ran into a crowd of men and killed several of them and injured several of them. Among those killed was the intestate of the plaintiff. The testimony showed that there was no warning given to the plaintiff's intestate until the time of the accident. The decedent did not know anything about the use of the tracks at the point where he was killed, whether they were busy tracks or otherwise. It was a siding and he had every reason to suppose that no train would run over the same at that time, at least without warning. Two day coaches were attached to the train

of snow cars for the men to ride in and eat their lunch in (S. C. p. 16, ll. 10 to 20; S. C. p. 25, ll. 10 to 15; S. C. p. 41, l. 35, *et seq.*; S. C. p. 72).

POINT 1

The decedent and defendant were engaged in interstate commerce at the time of the accident. Pedersen v. D. L. & W. R. R., 229 U. S., 146.

The decedent was on duty at this place, under the interstate commerce act, and therefore entitled to the protection which the act supplies. In fact there seems to be no dispute that at the time the defendant operated the train which killed the decedent and which was an interstate commerce train, both the plaintiff's intestate and defendant were engaged in the work of interstate commerce. If there was any dispute, under the circumstances, the jury might have so found.

Period during Which Employee is Engaged in His Master's Work

A railroad employee becomes the servant of the railroad, as his master, when he first comes on to the tract and lands of the railroad company to go to work for the day or trip, and is owed the duty that reasonable care be taken by his master that the premises on which he works are reasonably safe as long as he is on said railroad's land at the place he works.

Philadelphia, Baltimore & Washington R. R. Co. v. Tucker, 35 App. Dist. of

Columbia, 123; affirmed by Supreme Court of the U. S. (*per curiam* opn.), 220 U. S., 608.

In *Tucker v. P. B. & W. Ry. Co.*, 220 U. S., above, *Tucker was hired by the day off and on as an extra fireman.*

This duty continues until the servant is off the said railroad land, having finished his day's work or trip.

Fletcher v. Baltimore & Potomac R. R. Co., 168 U. S., 135.

Brownell, etc. Improvement Co. v. Sweeney, 233 Federal Reporter, 510.

There is a difference in the decision as to and between workmen on the track of a railroad and train crews, and those directing the movements of cars, in this, that the track is always engaged in inter-state commerce, day after day, besides being engaged in intra-state commerce, whereas, a car or locomotive may be in inter-state commerce at one time and intra-state commerce at another time.

In the case of *Minneapolis & St. L. R. R. Co. v. Winters,* U. S. Sup. Ct., January 8, 1917 (cited on defendant railroad's brief), there is this statement made which is not there quoted in the opinion of the Court:

"This is not like the matter of repairs upon a road permanently devoted to commerce among the states."

In *Boyle v. Penna. R. R. Co.* (C. C. of App., 3d Circuit, 12/8/15), 228 Fed. Rep., 267, Circuit Judge Wooley said:

"It thus appears in the *Maerkl, Zachary, Pedersen* and *McConnell* cases, the employ-

ment related to the preparation of the instrumentalities of commerce for use and not to the use of such instrumentalities."

Where there is both inter and intra-state commerce over railroad tracks, the presumption is that inter-state commerce is to be continued.

In the case of the *L. & N. R. R. Co. v. Parker* (Sup. Ct. of U. S., Nov. 13, 1916), Sup. Ct. Reporter, Pamphlet II, p. 5 (Federal Employers' Liability Case), Mr. Justice Holmes delivering the opinion of the Supreme Court of the United States, said:

> "The difference is marked between a mere expectation that the act done would be followed by other work of a different nature as in *Illinois Central R. R. Co. v. Behrens*, 233 U. S., 473, 478, and the doing of the act for the purpose of furthering the later work."

The *Illinois Central R. R. Co. v. Behrens, Admr.*, 233 U. S., 473, referred to a brakeman injured while working on a train of freight cars engaged in intra-state commerce, in which were being shifted in the yards of the Illinois Central Railroad, at New Orleans, Louisianne; HELD, no recovery under the Federal Act.

N. Y. C. & H. R. R. Co., v. Carr, 238 U. S., 260, which was a case of cutting off an intra-state car of a mixed train in which there were inter-state cars, so that the inter-state cars could be moved. The Court held that this was therefore inter-state business and allowed a recovery under the Federal Act, to an injured brakeman.

N. B.—The State Court, in this case, had sustained the Federal jurisdiction (158 App. Div., 891), which decision of the New York State Court

therefore repeals or to this extent modifies to conform to the Federal Act the decisions of the State Courts of New York.

See:

> Note VII to Lamphere v. Oregon R. & N. Co., 47 L. R. A. N. S., p. 52.
> M. K. & T. Ry Co. v. U. S., 112.

Employees Engaged in Inter-State Commerce

Pedersen v. D. L. & W. R. R. Co., 229 U. S., 146:

> "One engaged in the work of maintaining tracks, bridges, engines or cars in proper condition, after they have become and during their use as instrumentalities of inter-state commerce is engaged in inter-state commerce, and this even if those instrumentalities are used in both inter-state and intra-state commerce."

Pedersen was injured while carrying bolts in the repair of a bridge, at Hoboken.

Chicago & N. W. R. R. Co. v. Gray, 237 U. S., 399, Mr. Justice Holmes said:

> "This is an action for personal injury. The plaintiff, Gray, was a hostler at Antigo, Wisconsin, having various duties as to receiving and preparing engines for departure, including the emptying of their ashes into the cinder pit and seeing that the coals in the pit were wet down. Just before the accident he had visited the cinder pit to see whether the cinder pit man was doing his work, and had walked northward

> a short distance along a path between the track and a coal shed to a point opposite a rest house, where he would await his next call to duty. He started to cross the track to the rest house and was struck by an engine coming from the south. * * * The Court expresses no opinion as to whether Gray was in or not in interstate commerce."

Professor Thornton thinks Gray was in interstate commerce and criticizes the Supreme Court of Wisconsin because it had held Gray not to be in inter-state commerce.

> Thornton, Third Edition, p. 107, Gray v. C. & N. W. Ry. Co., 153 Wisconsin, 637.

Where the Supreme Court of the United States refused to pass on the question of interstate commerce, it has ruled that a person in Gray's position was in inter-state commerce in the *Zachary* case and since then the *Zachary* case (p. 5 of this brief), in the *B. & O. v. Whitacre* (pp. 5 of this brief), and in *Minneapolis & St. Louis R. R. v. Winters, supra.*

Gray had recovered a judgment against the railroad company, under the Statutes of Wisconsin, and the Court did not think it necessary to rule on the inter-state commerce questions in his case.

The Defendant's Brief Uses the Words, "Actually Working," (p. 12, l. 36).

Decisions: As to when an employee is actually working:

> M. K. & T. Ry. Co. v. U. S., 231 U. S., 112 (Hours of Work Act).

SYLLABUS: An employee, who is waiting for a train to move and liable to be called and who is not permitted to go away is on duty, under the Hours of Service Act.

North Carolina R. R. Co. v. Zachary, 232 N. S., 260, held that Zachary, a locomotive fireman, who left his engine and on the way to his boarding house was crossing tracks in the railroad yard prior to starting on an inter-state trip on no purpose inconsistent with the duty toward his master, and was killed by a shifting engine running at full speed, at night, headed backwards forwards, with no lights and its noise being obliterated by the blower of a locomotive standing on an intervening track, HELD: First, Zachary was in inter-state commerce; Second, he was actually engaged in work; Third, the running of him down without warning was actionable, even if the engineer of the shifting engine did not expect him on his track and thought that the switching engine had a clear field ahead, it being negligence to run the switching engine in the manner it was run, as the jury found.

B. & O. R. R. Co. v. Whitacre, 124 Maryland, 411, at 427, s. c., 92 Atlantic, 1060.

Judge Stockbridge, in delivering the unanimous opinion of the Court of Appeals of Maryland, said:

* * * * *

> "That the plaintiff must be rewarded as being engaged in inter-state commerce, at the time of the happening of the accident seems conclusively settled by two cases. In *P. B. & W. R. R. Co. v. Tucker*, 35 App. Div., D. C., 123, subsequently affirmed by the Supreme Court of the United States, Tucker was killed by being struck by an

engine when he was on the premises of the defendant, in response to its call to assume the duties he had been engaged by the defendant to assume for their mutual interest and advantage; and it was laid down that the obligation of the master commences when the servant, in pursuance of his contract with the master is rightfully and necessarily upon the premises of the master. (Here is cited the *Zachary* case.) Certainly the act of the fireman in going to his boarding house was no more an act connected with inter-state commerce than was the act of Whitacre in hunting for a tool boy, in order to obtain a tin cup for the use of the crew on his trip.''

Tucker was an extra man.

* * * Tucker recovered in Maryland under the Federal Act.

The crew on Whitacre's engine were accustomed to drink out of the top of the water can, when there was no cup.

B. & O. R. R. Co. v. Whitacre, Sup. Ct. of U. S., No. 71, decided Nov. 4, 1916, Vol. 37, Sup. Ct. Reporter, Pamphlet 3, p. 33; affirms 124 Maryland, 411.

Mr. Justice Brandeis, in delivering the opinion of the Supreme Court of the United States, said:

* * * * *

''The defendant (plaintiff in error), requested a peremptory instruction in its favor on the ground that there was not sufficient evidence to entitle plaintiff to recover. The Appellate Court was unanimous in

holding that the Trial Court had properly left the case to the jury. No clear and palpable error is shown that would justify us in disturbing that ruling. *Seaboard Air Line Railroad Co. v. Padgett,* 236 U. S., 668, 673. * * * *Great Northern R. Co. v. Knapp,* 240 U. S., 464, 466. * * * The defendant further complains that the Trial Court had refused to give certain instructions on the issues of negligence and the assumption of risk. These instructions were properly refused; because in each instance the recital therein did not include all the facts which the jury was entitled to consider on the issues presented and concerning which there was some evidence.

"The judgment is affirmed."

Facts Stated by the Court

"Whitacre, a freight brakeman, while walking through a railroad yard on a dark and foggy night, looking for a tin cup, fell into a water cinder pit and was seriously injured."

The pit failed to have a guard rail around it and certain lights were not lighted. It was admitted that Whitacre was, when working, on a train engaged in inter-state commerce and that the Baltimore & Ohio was an inter-state carrier.

Cases on the point that outside of the rulings in the *Zachary* and *Whitacre* cases, that times of rest, getting out of the rain, calls of nature and eating meals and going to and being in places of apparently of not present danger, that the employee is nevertheless *actually engaged* in the work of his employer and is still and nevertheless

entitled to the same protection as he would have if he was working with pick, shovel or other tools.

*　　*　　*　　*　　*

Getting out of the rain

Moore v. Lehigh Valley R. R. Co., 154 N. Y. Supplement, 20.

Call of nature

Neice v. Farmers' Cooperative, etc., Co., 90 Nebraska, 470.
Houston & Texas Central R. R. Co. v. Turner, 99 Texas, 547.

Lunch hour

Denver & Rio Grande R. R. Co. v. United States, 233 Fed. Rep., 62.

Blovelt v. Sawyer, Ct. of App., Law Rep. (1904), 1 KB. 271.

Wall fell on workman while eating lunch.
Farmers' Coop. etc. Co. ads., Neice, 90 Nebraska, 490.

Right to get a drink of water

Birmingham Rolling Mill v. Rockhold, 143 Alabama, 115.

The Supreme Court of Alabama said:

"While the mere act of getting water is not part of the 'duties' of the employee, yet it is a physical necessity which must be attended to while the employee is engaged in his duties and he is entitled to the same protection in the interval when he

leaves his work to get water as when he is actually working. * * *"

Also:

Keenan v. Flemington Coal Co., Ltd., Scottish Law Reports, Vol. 40, p. 144.

Heldmaier v. Cobbs, Ill. Sup. Court, 195 Ill., 173.

SECOND SYLLABUS: "If the master directs his servants to leave their tools and dinner buckets at the boiler house during cold weather, such directions amounts to an invitation for the workmen to eat their dinner at the boiler house, and they are not mere licensees while so doing."

THIRD SYLLABUS: "A workman employed by the day at so much an hour does not cease to be in the master's employ during the hour he is allowed in which to eat his lunch."

There is no doubt that prior to the *Zachary* case and the *Whitacre* case, that there was a conflict of decisions in different states, as to whether the necessary hours of rest and the moments of relaxation took the employee out of being actually engaged and as such entitled to his master's protection; but so far as inter-state commerce carriers are concerned, these two cases above now settled this point under the Federal Act. These two Supreme Court decisions destroyed as authority cases cited on Defendant's Brief, page 20, these cases criticized and distinguished.

Colyer v. P. R. R. Co., 29 Vroom, 59, fails to quote these words in the decision:

"A master is bound to take reasonable care and precaution to guard his servant against danger. * * *"

And the Court states that the duty is absolute and is not to be delegated.

Harris v. U. S. Steamship Co.

The *Harris* case helps Ambrechts, Admx., in that it states that it is the duty of the master to give the servant a safe place to work in, Ambrechts was in the *locus in quo* of his place of work; he did not leave it, he merely walked along it.

Brice v. Lloyd, 2 KB, 804.

Brice went up to the top of a boiler to eat his supper; he had been forbidden to do it and was hurt. HELD, not entitled to compensation in the English Court.

Allen v. Chehallis Lbr. Co., 112 Pacific, 338.

Allen had been forbidden to eat his lunch on the premises. There was implied contract between the railroad and Ambrechts and associates, that they could eat in the rest car.

McCann v. Atlantic Mills, 140 Atlantic Reporter, 500.

Case turnedon on contributory negligence. Abolished by the Federal Act.

Rose v. Morris, 80 L. J. KB, 1103.

It was unreasonable in employee to go under a hoist where he had to stoop down to get under to relieve nature.

L. & N. R. R. v. Hocker, 95 S. W., 526.

Ambrechts had no knowledge that he was walking deliberately into danger. The track was safe for hours or large parts of hours at a time.

Lenk v. Kansas Coal Co., 80 Missouri Appeals, 374.

Not in point. Ambrechts was at his place of work.

Southern Ry. Co. v. Bentley, 56 Southern Rep., 249.

Bentley, with a gang, had partly unloaded coal car; it had to be pushed down to a switch. He rode down on a pleasure trip, as the rest had done, down and back. He was hurt, seeking his own pleasure, away from the place of work.

Defendant's cases, page 20, distinguished

Smith v. Lancaster Ry., 1 Queens Bench (1899), p. 141.

The Court of Appeals held that it could not disturb the finding by a county judge that Smith, who was a ticket taker, got on a running board for his own pleasure, where he was hurt, as there was another place of safety for him to ride, as this was a finding of fact that bound the Court of Appeals; so that Smith did not come within the benefits of the English Compensation Act.

Lynch v. Texas R. R. Co., 133 S. W., 522.

Lynch was an engine hostler; a long freight train came by; he jumped the freight to get over quickly to an engine, contrary to express standing order, and was hurt. Had he been told to do so by another workman, that it was safe, or if he had judged that the engine had not been going too fast and it was customary for him to cross moving freights to get to the engine he was to attend to, he probably would come within the terms of the Federal Employers' Liability Act, as it has been interpreted by the Supreme Court of the United States.

Ellesworth v. Metheny, 104 Fed. Rep., 119.

Employee went visiting. Ambrechts had the right to go to his car. This case lays down the right to an invitee of the custom of giving warning and as to the *peculium* of the jury to decide disputed facts.

Schmonske v. The Asphalt Co., 129 Appellate Division, 500.

Schmonske knew the danger and walked deliberately into it.

Williamson v. The Berlin Mills, 190 Federal Rep., 1.

Williamson was discussing a Court decision with another workman, when he fell into a vat.

Russell v. Oregon Short Line R. R. Co., 155 Fed. Rep., 122.

Russell went to visit father-in-law and took along his family on a hand car and coming back his men was struck by a train.

Chesapeake & Ohio R. R. Co. v. Barnes, 132 Kentucky, 728.

Cited by the defendant railroad, on page 21. In this case Barnes stood directly in front of the locomotive which was dragging his work train, when he knew that it would soon move, thinking probably that the bell would ring or the whistle would blow. It did not and he was hit. The case turns on the question of contributory negligence, which is abolished by the Federal Act.

Precodnick v. Lehigh Valley R. R. Co., 74 N. J. L., 566, and *Lauter v. Hedden Construction Co.,* 83 N. J. Law, 617, do not state the law as enunciated by the Supreme Court of the United States in its adjudications of the Federal Employers'

Liability Act. Under it, even if Section 55 of the General Railroad Act, making it a statutory trespass to walk on railroad tracks without right, is not limited in its application by *Coyne v. Penna. R. R.*, 96 Atlantic Reporter, it certainly is repealed by the Federal Employers' Liability Act and the decisions in the *Tucker, Zachary* and *Whitacre* cases; and so are the other decisions cited on pages 24 and 25 of the Defendant's Brief, except that *Horton v. Seaboard Air Line Railroad*, as quoted by the defendant railroad's attorneys, fails to state the passage in it, which immediately follows and which is quoted on page 2 of this brief of law.

Jacobs v. Lehigh Valley Ry., 241 U. S., 230, is absolutely not in point, as Jacobs saw the train moving, plus the fact that he knew that one arm at least, if not both, were handling the water cooler.

Cetola v. Lehigh Valley R. R., 99 Atlantic, 310, is only a precedent in Ambrechts' case, to the extent that it does not contravene the federal decisions.

In *Shanks v. D., L. & W. R. R.*, 239 U. S., 556, the shop workman was repairing a machine in the shop, not a car or locomotive.

Harrigton v. C., B & Q. R. R., is not fully stated as to its effect. It holds that switching coal for the use of the railroad is not inter-state commerce. It is limited to the fact stated in the opinion and there can be no implication from it unfavorable to Ambrechts' case, since the handing down of the *Whitacre* case.

In the *Erie R. R. Co. v. Welsh*, cited on page 6, Welsh might have gotten an order to take out an intra-state car, and even if it had been decided by the Company that he was to take out an intra-

state car he did not know it. The Court in this decision said that it would have to draw the line somewhere.

On page 7, of Defendant's Brief, appears *Luchetti v. P. & R. Ry.*, 233 Federal, 137. The jurisdictional fact in Ambrechts' case has been alleged, proved and found to be the fact by the jury, and sustained on a rule to show cause by the Circuit Court Judge. The question is what do the words, "Actually Engaged," mean; and these have been judicially defined as above set forth.

Osborne v. Gray, 241 U. S., 16, cited on page 7 of Defendant's Brief is *obiter*, because there is no deficiency to be supplied.

As to *Pryor, Receiver v. Bishop*, 234 Fed. Rep., 9, this is not in point, as the men cleaning snow had the right to seek shelter from the rain, while they were waiting an indeterminate time for their train to make the cross over.

If Ambrechts had been hurt on his way to shovel snow, before any snow was shoveled, he would have been entitled to the protection of the Federal Act under the decision of the *Grand Trunk Ry. of Canada v. Knapp*, 233 Federal, 956.

In the *Hudson & Manhattan R. R. Co. v. Iorio*, cited on page 8, Judge Hough said in his opinion, but not quoted in the defendant railroad's brief, as follows:

> "There is plainly a difference between the actual or imminent employment of the bolts in repairing the bridge, as in the *Pedersen* case and the mining of coal wherewith to run inter-state commerce locomotives. Whether such difference entails a distinction is a matter upon which opinions might conflict, as the dissent in Supreme Court decisions under this statute clearly show."

There is this, however, whether Judge Hough is right or wrong: the rails which Iorio was handling might have been sold by the railroad to a contractor for non-inter-state work, for no commerce at all; they might have been sold for scrap to a junk dealer. But it is apparent that the track and switches that Ambrechts was helping to clean the snow from, had been, were and would continue to be inter-state commerce right of way and track, and were admitted by the interrogatories on page 12 of the state of case to be inter-state commerce instrumentalities.

The *Giovio* case against the New York Central Railroad, cited on page 9, merely anticipated the *Erie R. R. Co. v. Welsh,* decided by the United States Supreme Court and the New York Appellate Division, which handed down the decision, has no power to challenge the interpretation of the Federal Act even if such implication could be made of the decision, as interpreted by *Tucker's, Whitacre's* and *Zachary's* cases.

The argument in the plaintiff-in-error's brief, is that because the decedent was not actually working at the instant he was killed, therefore he was not engaged in interstate commerce.

The decedent was on duty at the time he was killed under the *Zachary* case and the cases referred to in it, although at the instant he was killed he was not actually shovelling snow. The jury might have found he had not finished his work but during the course of the work of the defendant was going to the covered car which was provided for shelter at the moment he was killed, or they might have found that there was no snow discharged at that point and that he was going to the sheltered car to be transported in the covered car to some place to continue the work. In either event

he was on duty and was under the protection of the act under the *Zachary* case.

In the cases cited by the plaintiff-in-error, the plaintiff was not engaged in interstate commerce at the time or in work connected therewith. He was either transferring from one employment to another or working upon instrumentalities which were not being used in interstate commerce.

In the case at bar, he was employed in clearing snow from tracks used in interstate commerce and in no other work. Whether he was at the instant he was killed, actually doing work or not does not take him out of the protection of the act. If he was on duty he was entitled to be protected.

In the case of *Welsh vs. Erie,* the plaintiff was not on duty in interstate commerce; he had finished his work and was going for orders which might or might not put him in interstate commerce. In the case at bar the plaintiff's sole employment was clearing snow from tracks used in interstate commerce. He was on duty in that work.

The decedent was one of a gang who were cleaning snow from interstate tracks. It is true he did not have a shovel in his hand when he was killed but the train was resting at a point where snow had been unloaded, the snow having been piled on the cars to take away from interstate tracks. At least the jury could have so found. While he was walking along the tracks approaching a covered car which was furnished by the company for the purposes of shelter during a cold rain storm, the train being halted at this place, he was injured. Under the decisions he was engaged in interstate commerce because his work was not a matter of indifference to interstate commerce.

Pederson v. D. L. & W. R. R. Co. *supra.*

When he was killed, although he wasn't actually shovelling, yet he was so far connected with his work as to be on duty. *Zachary* case and cases referred to, *supra*.

POINT 2

Negligence of the defendant.

The defendant operated the train which killed the decedent without giving him any warning of the approach thereof and placed him in a dangerous situation without warning him of the approach of the train. No whistle was given at any time, until immediately before the accident, and no warning given by the conductor, although the conductor of the train that he was on knew that the train was due and was late and would pass along at any moment. This was evidence of negligence.

Richey on Federal Employers' Liability Acts, p. 126. (second edition)

The negligence of the defendant consisted in halting the work train at this place, on one side of a curve and propelling an express train which was late from the other side of the curve, which could not be seen, without giving any adequate warning of the approach of the express train and running the same into the crowd of men on the track, although the engineer of the express saw the work train and knew there might be workmen on the track and although the custom of the company was to make the foreman the conservator of the care of the men employed by him. Everything was left to the judgment of the foreman, all that

he did was almost immediately at the time of the accident or within a very short time before, it was said, was to holler to warn the men; although he had known for sometime that the express train was late and was expected he did nothing to warn the men until immediately before the accident to all practical purposes. This was negligence, either as the failure of the company to use due care to provide a safe place to work and to warn the men of danger, he having that duty to perform for the company, or as the act, he being an employee of the company under the Federal Act, his negligence also was actionable.

As the action is under the Federal Employers' Liability Acts, rights and obligations depend upon it and applicable rules of common law as to servants as applied in the Federal Courts, are the test.

So. R. R. Co. v. Gray, 241 U. S., 333.
Cent. Vt. Ry. Co., v. White, 238 U. S., 507.

The train upon which the plaintiff was working was stopped on a siding for the purpose of allowing an express train which was late, to pass. This was known to the conductor of the work train but he did not inform the people on the work train knowing that it was likely that they would get off the work train and go to the covered car as the covered car was used for shelter in a storm and it was then storming. The cars on which the men were were open cars. In addition to this the engineer of the approaching train saw the work train and knew or should have known that there were men working on it who would be on the tracks in the vicinity of the train which was standing, yet he gave no warning of the approaching express train except a sharp blast of the whistle im-

mediately before he ran into the crowd of men. This train approached around a curve and could not be seen. Under these circumstances, it was for the jury to say whether the defendant had used reasonable care to supply a safe place for the plaintiff to work and whether the engineer in charge of this train had used reasonable care under the circumstances, and whether the conductor of the train and the foreman of the men had failed to warn them of the danger, they knowing of the danger; that is, knowing that the work train would stop—knowing that it was storming—knowing that some of the men were in the covered car and that some were likely to go to the covered car—knowing that an express train was approaching from around a curve where it could not be seen—knowing that no warning had been given thereof. The jury might have found that these co-employees were negligent in not warning the men who were leaving the train of the approach of the express train. There was some attempt to show that some warning was given, but this was not given until the train was upon the men and no warning whatever was given by the conductor of the work train when he left the work train. Under these circumstances it was for the jury to say whether the defendant was guilty of negligence.

Whether it was negligent to fail to have any system of work to govern such conditions as these, see Section 53, Second Edition Richey's Federal Employers' Liability Act, page 122 and 123, note 16.

That it has been held negligent to fail to warn employee of an unknown danger, see the following cases:

United States-Norfolk, etc., R. Co. v.

Holbrook, 131 C. C. A., 621, 215 Fed., 687.

Colasurdo v. Central Railroad (C. C.), 180 Fed., 832, affirmed in 113 C. C. A., 379, 192 Fed., 901.

Alabama-Alabama, etc., R. Co. v. Skotz (Ala.), 71 So., 335.

Kentucky-Louisville, etc., R. Co. v. Johnson, 161 Ky., 824, 171 S. W., 847.

Louisville, etc., R. Co. v. Holloway, 163 Ky., 125, 173 S. W., 343.

Minnesota-Bombolis v. Minneapolis, etc., R. Co., 128 Minn., 112, 150, N. W., 385.

Riley v. Minneapolis, etc., R. Co. (Minn.), 156 N. W., 272.

North Carolina-Saunders v. Southern R. Co. 167 N. C., 375, 83 S. E., 573.

Pennsylvania-Glunt v. Pennsylvania R. Co., 249 Pa., 522, 95 Atl., 109.

South Carolina-Koennecke v. Seaboard, etc., Railway, 101 S. C., 86, 85 S. E., 374, affirmed in 239 U. S., 352, 36 S. Ct., 126.

We cannot assent to the view that, under no circumstances it is the duty of the crew of a switching engine working in a switching yard, to give signals of its approach for the benefit of other employees working in the yard, even though they may know that it is moving about the yard, and be under the duty of looking out for it. But, if the law were so contended, the engine in question had not theretofore been moving about the yard. Its regular place of work was in another yard. It had just arrived in the yard where it ran over deceased, and its arrival may not have been expected. *Koen-*

necke v. Seaboard, etc., Railway, 101 S. C., 86, 85 S. E., 374, affirmed in 239 U. S., 352, 36 S. Ct., 126.

Where employees had been instructed by their foreman to go between cars for the purpose of urinating, and the foreman knew such a position was occupied by a section hand, and he saw or in the exercise of ordinary care could have seen cars approaching which would strike the ones he was between and injure him, it was his duty to exercise ordinary care to warn the employee of his danger and a failure was negligence. *Louisville, etc., R. Co. v. Johnson,* 161 Ky., 824, 171 S. W., 847.

Moving cars on repair track without warning repairmen, held a question for the jury. *Evans v. Detroit, etc., R. Co.,* 181 Mich., 413, 148 N. W., 490.

Whether defendant was under a duty to warn an employee that a car was too high to pass under bridges when the employee was on top of it, is for the jury. *Portland Terminal Co. v. Jones* (*C. C. A.*), 227 Fed., 8.

The negligence of defendant predicated on a failure to warn an employee that ties under a track that had been washed out were unsafe is not shown by evidence that the foreman told the employees to keep off the ties and ordered that they be planked. *Spinden v. Atchison, etc., R. Co.,* 95 Kan., 474, 148 Pac., 747.

The purpose to be served by warning signals is to give notice of the approach of trains so that persons on the track or in dangerous proximity thereto may protect themselves from danger.

A failure to observe the precaution when ordinary prudence and diligence requires it, even in the absence of a statutory injunction, is evidence of negligence; when there is such an injunction the mere failure to obey it is negligence *per se. Hunter v. Montana, etc., R. Co.,* 22 Mont., 525, 57 Pac.,

140. Employees come within the protection of the rule; otherwise, by entering into the employment of a railway company, an employee wholly releases it from the duty it owes to every member of the public whose business or pleasure may bring him in dangerous proximity to the line of railway. It may not apply so strictly in favor of employees as other persons, because in the performance of their duties they must be in the company's yards or on or near the track in other places, and for this reason must exercise care and diligence for their own safety commensurate with the circumstances, to the end that the movement of trains may not be obstructed. Nevertheless, the measure of duty which the company owes to them must be determined by the circumstances as they exist in each particular case. *Nelson v. Northern Pac. R. Co.*, 50 Mont. 516, 148 Pac., 388, 391.

It is the duty of the company to give to those in charge of a train reasonable warning of the presence of a work train upon its main track by placing torpedoes upon its track or by flagging or both, or in some other reasonable manner while the train was a sufficient distance from the work train as would enable those in charge of such moving train to have stopped the same by the exercise of ordinary care in time to have avoided a collision, *Louisville, etc., R. Co. v. Holloway*, 163 Ky., 125, 173 S. W., 343, 345.

Tulpom vs. Cantor, *et al.*, (No. 1) 93 Atl., 573. Syllabus 5.

"5. Master and Servant—150—Hidden Dangers—Duty to Warn.

"It is the duty of the master to warn and instruct his servant as to the dangers of the employment of which the master knows,

or ought in the exercise of reasonable care to know, and of which he knows, or ought to know, the servant has no knowledge, actual or constructive."

So in the case of *Louisville vs. Johnson*, 161 Ky., 824, where a servant went to a place of danger for purposes of his own, not inconsistent with the work. But, in the case at bar, part of the work was going toward a sheltered part provided for the purpose of conveying the workmen or sheltering them during storms and therefore was under the protection of the act, although not actually engaged in shovelling snow at the time he was killed. The conductor of the snow train gave no instructions to the engineer of the snow train, to watch out for the express, which was late, for no instructions to anyone (p. 76). No instructions were given to the decedent to stay on the train. When it was in Lake Hopatcong, the foreman said he told some of the men who were getting off at Lake Hopatcong to get back on, but this was evidently so they wouldn't be left at Hopatcong, getting back to work at once (p. 79). The protection of the men was left to the judgment of the foreman (p. 80). The foreman, to whose judgment was left the protection of the men, although he knew at Lake Hopatcong that the express train was late and he knew his train was going to stand at Port Morris Junction to let this express train pass, yet did nothing to warn or instruct the men, until the danger was imminent and all he did then was to stand on the steps of the car and holler. Whether this was a sufficient warning under the circumstances of his knowledge was for the jury to say. It was for them to say whether the warning was sufficient or insufficient; and if he was

charged with the duty of warning the men, then his negligence was a question for the jury.

Page 87, line 38, to page 88, line 10.

> "Q. You knew it was a dangerous situation? A. Yes.
>
> "Q. You knew it was raining? A. Yes.
>
> "Q. And you knew it was likely that the men would try to get the coach out of the rain? A. Yes, sir.
>
> "Q. And all you did was stand and holler. Now, when did you get off the caboose? A. When the train came to a standstill.
>
> "Q. You got off, did you? A. Yes, sir.
>
> "Q. Had '26' come in sight then? A. No, sir.
>
> "Q. Had any of your men got down then? A. Yes, sir."

As the Federal Employers' Liability Act makes a fellow servant's negligence actionable, it is immaterial whether the warning should have been given incidentally with the servant's work or as the duty of the master, under *Firth vs. Penn. R. R.*, 83 Atl., 896, 898.

In *S. A. L. Ry., v. Koennecke,* 239 U. S., 352, 355, Mr. Justice Holmes said;

> " * * *
>
> "We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the train track, and that there was no lookout on the end of the train and no warning of its approach.

In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz v. Humphreys,* 145 U. S., 418, 36 L. ed., 758, 12 Sup. Ct. Rep., 835, but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk. Upon a consideration of all the objections urged by the plaintiff in error in its argument and in its briefs, we are of opinion that the judgment should be affirmed.

"Judgment affirmed."

Decisions as to negligence in the defendant, and when it is proved.

See *Zachary's* case, *Tucker's* case and *Whitacre's* case. Failure to use safe methods of work, under the circumstances of any case and whether there is negligence or no negligence, or whether a risk is assumed because the master was negligent, see *Siegermund v. Chicago M. & St. P. Ry. Co.,* 229 Fed., 956. In *Southern Ry. Co. v. Cook,* 226 Fed. Rep., p. 1, Circuit Judge Woods, in delivering the opinion of the Fourth Circuit, Court of Appeals, said:

"High speed alone is not negligence. The general rule is that a railroad company must be allowed to run its trains at such speed as seems to be convenient for the conduct of its business. But the rule has the limitation that the company cannot run its trains at a speed which, in view of special

circumstances, subjects its employees or others, to unusual and unnecessary peril. These circumstances may be the presence of defects in the track, or curves, or other structures, or some negligent act or omission of the company, such as having no lookout (the Judge here cites the decisions) 'While an engineer knows that work must be constantly done on different portions of the track, ordinarily he may assume that section men will be on the look out and protect themselves against a train run in the usual way, even at a very high speed. But this does not exempt him from the duty of keeping a look out for trackmen who may be caught unawares, or who may be unable to get a hand car off in time, or of giving signals, or stopping the train according to the circumstances; and the duty is more pressing if he is running at a high and unusual rate of speed. While therefore, under ordinary conditions, neither high speed or failure to give signals, standing alone, would constitute negligence towards workmen on the track, both would aggravate the negligence of running without a look-out. Conversely, running at a very high rate of speed without a look-out would be negligence. It is not necessary to look at each of these different charges of negligence separately, as a distinct cause of action. If they are so related, as we think they are, that taken together they cause one or more acts of negligence, it is sufficient.' "

N. B.—This is a trackman case. This case has not been reversed or cited since.

In *Connelly v. Penna. R. R. Co.,* 221 Fed. Rep., 508, the facts were that Connelly was a yard master and had himself ceased to use an air whistle provided by the company, but used his own fingers to whistle with; he also did not station a look-out, as the custom required. He was killed, because these two safeguards did not exist in the yard. He also walked into a place of danger that he himself had made more dangerous because of his violation of instruction, and the risks of which he himself had greatly increased.

Willever v. D., L. & W. R. R., Sup. Ct., N. J. (1915), 94 Atlantic, 595. This case is contrary to the *Chesapeake & Ohio v. Profit,* 241 U. S., 462. Willever was also under the duty to look out and protect the men who were under him. He was look-out. He also had long experience in the yard, and the switch engine which killed him was only going as fast as a man could walk.

Duty to keep a look-out for switchmen or trackmen in a yard.

Southern Ry. Co., v. Smith, 205 Fed. Rep., 360 (C. C. A. 6th).
Southern Ry. Co. v. White, 232 Fed. Rep., 144 (C. C. A. 6th).

The duty to warn of approaching danger not yet seen, or if when seen it would be too late to avoid is based in New Jersey on the following grounds:

1. Custom.
2. Nature of work occupying workman's attention, so that he could not pay attention to his work and watch at the same time.
3. Geographical proximate origin of incoming danger, *viz.,* whether behind curve or obstruction.
4. A reasonable apprehension on the part of the master or his *alter ego* that a gang of trackmen

working on or along the track would not see a train coming, the time of which coming they did not know, either that it was late, or not knowing the time table, or that it was a special train.

The cases *dovetail.* They reiterate the principle.

> Albananese v. C. R. R. Co., of N. J., Ct. of Errors, 41 Vroom, 241.
> Precodnick v. L. V. R. R., 45 Vroom, 566, Ct. of Errors, 41 Vroom, 241.
> Germanus v. L. V. R. R., 45 Vroom, 662 Ct. of Errors, 41 Vroom, 241.

Question for jury if warning of train coming was sufficient. *Firth v. P. R. R.,* 54 Vroom, 467, Ct. of Errors. Judgt. affirmed. Whether it was the duty of the master or fellow servant to warn question for jury. This case was not brought under the Federal Act.

> Ondis, Admx. v. Gt. At. & Pacific Tea Co., 53 Vroom, 511, Ct. of Errors, duty of master to warn.

In *Mullen v. C. R. R. N. J.,* 48 Vroom, 241, Sup. Ct.

> "SYLLABUS: Where a workman in the discharge of his duty has placed himself in a position of probable danger, relying upon receiving *timely* warning of probable danger, before the danger becomes actual and he is injured because no warning is given, the question whether he is guilty of contributory negligence is for the jury."

N. B.—This case holds that the failure to give timely warning is negligence. Otherwise the servant could not be guilty of contributory negligence.

The previous day was the first time in the lives of these snow shovellers that they had ever been near Chester Junction or near the main line of the Lackawanna Railroad or any other railroad. They were dock laborers from Hoboken. They had been brought the day before to clean snow in the yard, at Port Morris. The previous night they had been taken home to Hoboken. The next morning shortly after six they started back again to Port Morris from Hoboken. The reason their snow train was stopping at the switch at Chester Junction, five miles east of the Port Morris yard, was that it had to cross over the main line track and get to the other side of the yard, and this it had to do via the Chester Junction crossover.

The stopping at this junction was to allow train "26," a fast train from up the railroad, bound east, late at the time and travelling sixty miles an hour, to pass, and then the snow train would cross over the main line tracks. It was at the cross-overs on a siding and not in a yard. A train travelling at the rate of sixty miles an hour, travels 400 feet in approximately between four and five seconds and 200 feet in approximately two or three seconds (see the testimony of Fernane on pages 113, 114, 115 and especially at 118).

The fact that Chester Junction, the schedule of trains on the main line, the speed with which they travelled when late, were unknown perils to these dock laborers, runs through the entire evidence in the case as well as the fact that the company's superintendents, supervisors and foremen had knowledge for at least fifteen minutes to half an hour before, or more, that "26" was late, was making up its time and was travelling as fast as it possibly could with safety to its passengers.

Some of the men had finished their work; others had not finished when the storm came up and the decedent, together with the other men, some forty or more, got down from the cars on which they were to go to a covered car which was furnished by the defendant for their transportation and their shelter. While these men were walking along the tracks to go to the covered car, the train that ran into them approached without any warning except a sharp whistle immediately before it struck them, which was of no use as a warning.

The gondolas had *not* been all unloaded as stated in the defendant railroad's brief (p. 41, lines 30-35). (P. 53, lines 10-20.)

And

It was *the boss* who gave the orders to go into the shelter cars (s of 6, p. 41, lines 35-40) (p. 41, lines 30-35).

And

There is no evidence in the case that decedent was ever warned until "26" was *five seconds* away.

And

The men went to their shelter and lunch cars as there was no unloading then going on—they were merely waiting for "26" to pass—they did not know how long they had to wait—some boss told them to go (p. 41, lines 30-35) as the weather was very cold (p. 44, line 40).

There is also an incorrect statement on page 5, lines 15 to 30 of defendant railroad's brief. The work was not concluded according to some testimony that all the gondolas had *not* been unloaded and according to the rail road company's own witnesses after the crossovers had been taken, the train was to load more snow in another part of the yard. See testimony of Gosline, inspector in

charge of work (p. 78, ll. 5-12), Sexton, p. 119, ll. 34-40, Simcox, p. 53, ll. 35-40.)

POINT 3

Contributory negligence.

Contributory negligence is simply a matter of diminution of damages.

Act of Congress, April 22nd, 1908. 35 Statutes at Large of U. S., 65 Chapter 149, § 3. (Federal Employes' Liability Act).

POINT 4

Assumption of risk.

The decedent assumed the risks incident to the work or those that were obvious. *The risk was not incident to the work of having the express train propelled around the curve without warning.* The decedent as far as the testimony shows, did not known that trains passed over the tracks on which he was. He had never been there before. Although it was a railroad track it might as well have been a siding of the main line or a switch and to make the assumption attach to him as a matter of legal duty, this must be apparent. *Horton v. Seaboard Line* and cases collected. The risk then was a jury question and was properly submitted to the jury.

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492, at 504. * * *

"* * * and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not. *But*

> *risks of another sort,* not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employer is not treated as assuming until he becomes aware of the defect or of the disrepair or the risk arising from it, unless the defect and the risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them."

The risk the decedent assumed as a matter of law was not the risk of the master's negligence or unusual condition. He did not assume that the train, which was late, would be moved at sixty miles an hour along that track, without warning him that it was late or that it was expected. If he knew that it was a railroad track which was in use frequently by trains of this nature, he would not assume the risk as a matter of law, but he did not know this, without fault on his part. There was no proof that he was warned of it. His train was stopped and he was in a usual movement to a covered car and was in such a movement with the knowledge and through the custom of the defendant. Therefore it could not be said as a matter of law that he assumed the risk. Whatever risk he assumed was for the jury.

> Richey on Federal Employers' Liability Law, Section 75.

Warning of danger necessary to make it apparent danger, so that the risk is assumed by the employee.

Switchman killed by a train in yard. Speed with no light, look-out nor whistle blown.

Pittsburg, C. C. & St. L. Ry. Co. v. Glynn, 6th Circuit, 219 Fed. Rep., 148.

Cinn., N. O. & T. P. Ry. Co. v. Jones, 6th Circuit, 192 Fed. Rep., 769.

"While it is the duty of a switchman in a railroad yard to avoid trains, it is the duty of the railroad company to take precautions to avoid running him down," *Hughes v. D., L. & W. R. R.*, 233 Fed. Rep., 118."

A servant does not assume risks that are latent or those created by his master's negligence, or those discovered only at the time of injury.

The Themistocles, 235 Fed. Rep., 81.

In, *Gila Valley etc. Ry. Co. v. Hall,* 232 U. S., 94, held that one employed only for a few days, etc., etc. (defective equipment case), held not to have assumed unknown risk, or unannounced risk.

Apparent risk continued.

See,

Chesapeake & Ohio R. R. Co. v. De-Attley, 241 U. S., 310.

In *Chesapeake & Ohio Ry. Co. v. Proffitt,* 241 U. S., 462, at 468, Mr. Justice Pitney, on this point, said:

"* * *

"* * * The employee has the right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, and this *includes care in establishing a reasonably safe system or method of work* and is not

> to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known it * * *."

This case is the Supreme Court decision of the Federal Employers' Liability Act, and as such it repeals the decisions cited by the defendant railroad on pages 16, 17, 18 and 19 of its brief.

The decision cited on page 13 of defendant's brief *Aerkfetz v. Humphreys,* 145 U. S., 418, holds that a signal man who got in the way of a slowly moving switching engine, signaling it to come on and thought that it would follow him instead of hitting him, and that it would stop for him, could not recover. It was a case on contributory negligence.

Further References to Testimony

All page references are to the State of Case.

Defendant railroad engaged in interstate commerce; interrogatories 1 and 2, p. 12, State of Case.

Stipulation as to the above, p. 35.

The train that killed Ambrecht; interrogatories 3 and 4, p. 12.

Ambrecht was cleaning snow and switches, (p. 67, *et seq.*); interrogatories, 6th, p. 12. P. 13, line 20. At Port Morris, p. 50.

Accident killing Ambrecht and others happened at Chester Junction, Simcox, p. 47, line 35. Date of accident, Dec. 17, 1915, about 11 a. m. Simcox, p. 50. Zimmerman, p. 13. Debiasce, p. 41, line 35 to 40; p. 42. Zimmerman, p. 16, line 35.

The men were going into a closed car for lunch. Zimmerman, p. 17, lines 17 to 20. Welsh, p. 72.

Weather conditions. Debiasce, p. 41, line 35.

> "We stopped at the switch and then it started to rain and was freezing at the time. We could not stand it and then the boss gave orders that everybody should be in the car."

Simcox, p. 89, line 20.

> "They wanted to get out of the rain."

Debiasce, p. 44, line 38.

> "They (his fellow workers) said that the boss had called and said that it was raining."

Page 45.

> "Do not stand any longer, and we should go into the covered car";

line 10;

> "the boss was three or four cars in back of us."

Description of the lay of the train. Debiasce, p. 44.

> "The caboose came first, after the gondolas; and then came the covered lunch car. The gondolas were east of the other cars and the train was being backed westerly down the track to the switch."

Pages 42 and 43, the story of the accident. No warning, snow. The train has stood at the switch ten minutes. Welsh, the conductor of the snow train, did not see the accident, as he had started for the tower, so the towerman would let him cross after the express train had passed, p. 71. Simcox said he was too late when he warned, p. 93. Drake, pp. 64 to 67, shows 26 came around a curve. 26 was going about 60 miles an hour. Simcox, p. 88, line 32. Welsh, p. 71, "26 blew one long whistle."

Gosoline's warning; p. 79, was to keep the men on the open cars, so that they would be ready to work after they had crossed over the tracks. He knew the train was late and he knew they were disposed to go out of the closed car and his warning was given at Lake Hopatcong. He was foreman and was responsible for the safety of 80 men. Safety of the men was partially left to the judgment of the foremen. No set of rules for rules for safety. It was up to the foreman. Simcox hollered to the whole crowd, knowing they were in danger, p. 80. He did not see the decedent get off his car, p. 82, line 35. Welsh, the conductor of the snow train, warned no one that 26 was late, pp. 73, 74 and 75. P. 76, line 35; No. 26 was going 60 miles an hour. Patrick Kelly did not know decedent; didn't give him any warning, except to walk up and down the tracks and count the cars and shout at the workmen, and the whistle of 26 blew right on top of them, and the confusion was added to by their own engine blowing a whistle, p. 99, *et seq.* Debiasce saw the express train 8 feet away for the first time. Zimmerman saw him picked up by the train after 26 had passed, p. 18, lines 1 to 28. See the testimony of Fernaue, the engineer of No. 26, p. 113, *et seq.* P. 68, Welsh, conductor of the snow train. "It was going west."

Description of the train. Two or three coaches next to the engine; then one caboose; then seven gondolas. The train stood at Chester Junction unloading whatever snow had been left, ten or fifteen minutes. Zimmermann, p. 24, lines 37 to 40.

The workmen start for the covered car. Zimmermann, p. 25.

Ambrecht was on the last gondola car from the locomotive. Debiasce, p. 42, line 18.

> "Men walking along the track, in the middle of the track, because we could not go otherwise. There were piles of snow still on some of the gondolas."

One hundred and fifty men were working at the snow. P. 91, line 40. Decedent was one of forty-two men under Simcox, p. 49, line 35. See testimony of Simcox, 48 and 49.

The movement of the snow train. Was going down the siding crossing the express tracks, and then going back on the other side of the yard to move more snow. Testimony of Simcox.

The warning. Was insufficient and was contemporaneous with the arrival of the train. P. 85, lines 10 to 20. Simcox knew 26 was late, at Lake Hopatcong, and the only warning he gave was to "holler at the men at Chester Junction." P. 83; he first gave the real warning when he saw the train. It was on top of them. 26 blew its whistle at the same time its engineer first saw the men, after seeing steam blowing across the track, p. 118.

POINT 5

Since the abolishment by the Federal Employees' Liability Act of the rule of Fellow Servant, it cannot be said that the failure to warn Ambrecht was the negligence of a fellow servant, for which the railroad company was not responsible.

> Dirken v. Great Nor. Paper Co., 86 Atlantic Reporter, 320.

"Second Employers' Liability Cases, 223 U. S., p. 1, held, in an opinion by Justice Vandevanter, that the Federal Employers' Liability Act., of 1908, abolishes the rule of Fellow Servant.

POINT 6

The following *specifications of appeal* have been previously discussed in matter of the substantive law of the case. These include Specifications of Appeal, Nos. 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14. So far as the facts in this case were not indisputably in favor of the plaintiff below and the defendant in error here it certainly was the peculium of the jury to decide it, and it would have been an error of the Trial Judge to have taken away these facts from the jury. Undoubtedly the law is that any Appellate Court of competent appellate jurisdiction in any given litigation has the right to test and review the principles of law laid down by the Trial Judge in his charge to the jury, but certainly not where the Trial Judge throughout his entire charge, as in this case at bar, submitted only disputed facts and disputes in evidence, and the other matters that are always the peculium of the jury, to the jury, at the trial of this cause, to decide as to the facts and the inferences from these facts, and thereon to return and rest their verdict. *Lynch, Adms., v. Cent. Vermont Ry. Co.,* 95 Atl., 683, 688. What constitutes inter-state commerce as against intra-state commerce is a question for the Court and is a question of law. But, on the other hand, what facts have been brought out which, which if believed in whole or in part to have been truthfully testified to, or surely established by the jury, it is up to the jury to determine those facts and to settle any conflict in the testimony as to the veracity or capability of the witnesses. These principles are so fundamental that they require no citation of authority. It is admitted that the D., L. & W. R. R. was a com-

mon carrier by railroad, in inter-state commerce, and it is furthermore proved beyond peradventure that Ambrecht was working on the track over which the inter-state trains ran, and that an inter-state train hit and killed him. The jury was certainly entitled to find these facts, even if the plaintiff did not request the Court to charge them as a matter of law. Certainly the defendant could not have requested any contrary charge. As to the other specifications of appeal in this heading discussed, they were all properly denied, and they have been previously thoroughly discussed in this brief with the true law stated to the jury, and not with the strained interpretation put upon it by the defendant railroad company.

It was held in the *Chicago & Northwestern Railway Co. v. Gray,* 237 U. S., 339, that an Appellate Court will not reverse a lower Court, where the error, if any, did the appellant no harm. If the Trial Judge allowed this question to go to the jury for the jury to settle, when the testimony was unanimous supporting the plaintiff in her claim as to them, then certainly the defendant was benefited to the extent that it had, under the judge's ruling, an opportunity to get the jury's determination, and not to have been summarily ruled against itself, as a matter of law. Of course the judge could not have been expected to charge error in favor of the defendant, and all the questions of substantive law raised by the assignments of error were also raised in the motion of nonsuit, and the motion to direct a verdict in favor of the defendant railroad and have been discussed previously in this brief.

As to the second specification of appeal, "Why were you going into the covered car?" over the objection of the defendant appellant, certainly

the plaintiff had the right to cross-examine the witness in this way, and if the question was immaterial (p. 106) it certainly was not prejudicial to the defendant below who is the appellant here. The railroad company at the trial did not object to the question because it was illegal or because it was incompetent. They objected to it on the ground that it was merely immaterial, and if immaterial, at best all it could do when answered would be to make more prolix, to that little extent, the trial. Certainly the immateriality of this question was a matter of discretion addressed to the Trial Judge, and might have been raised on a rule to show cause, but certainly not on a writ of error.

For these reasons, the plaintiff-respondent submits that the appeal in this cause be dismissed and the judgment entered in the Circuit Court of Hudson County be affirmed.

Respectfully submitted this day of March, 1917.

ALEXANDER SIMPSON,
Attorney of and Counsel to the
Plaintiff-Respondent,
586 Newark Ave.,
Jersey City, N. J.

THE ARTHUR H. CRIST CO., Cooperstown, N. Y.
New York Office, 220 Broadway

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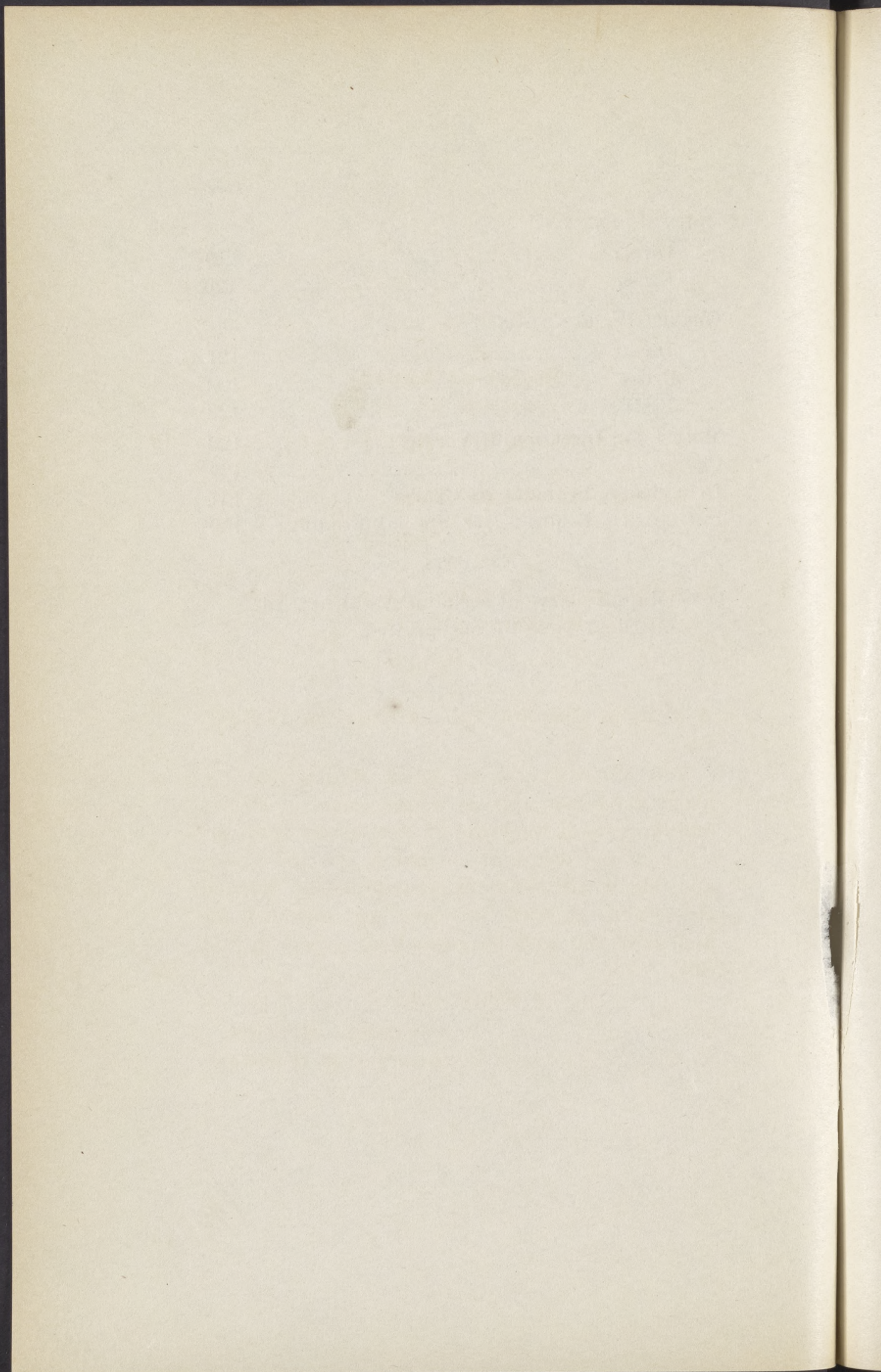

Notice of Appeal.

(Filed Jan. 29, 1917.)

HUDSON COUNTY CIRCUIT COURT.

10

AUGUSTA ARMBRECHT, Admx., *Plaintiff,* *vs.* THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

20

ALEXANDER SIMPSON, ESQ., Attorney of Plaintiff.

SIR:

YOU WILL PLEASE TO TAKE NOTICE that the above defendant appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above case, and that it will hereafter, as required by law and the practice in such case made and provided, file and serve you with its grounds of appeal in said case.

30

Yours truly,

FREDERIC B. SCOTT,
Attorney of Defendant.

40

Grounds of Appeal.

(Filed, Feb. 8, 1917.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

AUGUSTA AMBRECHT, Admx.,
Plaintiff-Respondent,
vs.
THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant-Appellant.

10

The Delaware, Lackawanna and Western Railroad Company, the above defendant, herewith sets down its grounds or specifications of appeal to be as follows:—

20

1. Because the Trial Court erred in refusing to direct a non-suit in favor of the defendant-appellant and against the plaintiff-respondent for the grounds and reasons,

(a) That the plaintiff failed to show any negligence as specified in the complaint or otherwise.

(b) That if the decedent was killed by Train No. 26 while walking on the track, he assumed the risk of injury.

30

2. Because the Trial Court erred in allowing the following question to be put to the witness, John Ignatowitz:

> "Q. Why were you going into the covered car?" over the objection of the defendant appellant.

3. The Trial Court erred in its refusal to direct a verdict in favor of the defendant-appellant and against the plaintiff-respondent on the grounds.

40

Grounds of Appeal.

(a) That there was no negligence shown upon the part of the defendant.

(b) That the plaintiff had failed to show that at the time of this accident the plaintiff's intestate was engaged in interstate commerce.

(c) That the decedent assumed the risk of injury.

(d) That the decedent was injured while doing something in violation of his duty. 10

All of which grounds are more fully and particularly set out at length in the record of said cause.

4. Because the Trial Court erred in submitting to the jury the question of whether the deceased was engaged in interstate commerce at the time of the accident.

5. Because the Trial Court erred in instructing the jury to take into consideration the speed of Train No. 26 in considering the duty owing to the decedent by the defendant. 20

6. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language:

> "If you find that the deceased left the gondola car on which he was standing and got down on the track to walk toward the coach without an order or direction to that effect and not for the purpose of performing any work assigned to him, in that case he assumed the risk of injury from trains passing on that track." 30

7. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language:

> "If you find that the deceased got off the gondola car without any direction or order 40

so to do, the defendant is not guilty of negligence in failing to prevent his getting off the car."

8. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific languages:

10 "If you find that whistles were blown or other warnings given as soon as the men were discovered in the track and that the express train was approaching, no negligence can be imputed to the defendant."

9. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language:

"Risks which are incidental to the employment,—risks which are obvious and those
20 created by the want of reasonable care in the exercise by the servant of his employment are all assumed by the servant when he enters or continues in the service and there cannot in reason be any legal duty resting upon the master to establish rules and regulations to protect the servant from such risks."

10. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language:

30 "No negligence can be predicated upon the fact that the defendant company, did not notify the engineman of the passenger train that it would pass the work train in question standing upon a parallel track, standing partly on a curve of said track."

11. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language:

"If you believe that the deceased, of his
40 own knowledge and volition, and without the knowledge of the defendant, departed from

the safe place provided and occupied a dangerous place for the purpose of personal convenience, he became at most a licensee to whom the defendant has no duty except to abstain from wilful injury and in this case there is no proof at all of a wanton injury having been inflicted upon the deceased."

12. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language: 10

"If you believe that the deceased did not take his position on the main track where he was killed in obedience to any request of any agent of the defendant company or that his duty did not require him to be where he was at the time he was struck, then your verdict must be for the defendant company."

13. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language: 20

"Where a servant goes to some other part of the master's premises for his own convenience and accommodation, the general rule is that he is regarded as a licensee."

14. The Trial Court erred in refusing to charge the defendant's request to charge in the following specific language:

"And if you believe that the deceased had left his position in the car in which he was just prior to the accident in question to him, and had gone upon the main east-bound track of the defendant railroad company for his own personal convenience or necessity, then I charge you that there can be no recovery, because there is no proof that the railroad company by and through its agent had indicated the track upon which the deceased was struck as one to be used by the deceased prior to or at the time he was injured, or 30

40

that the railroad company, through its servants or agents knew, or should have known, that it would be so used or that necessarily it could be used for the purpose for which the deceased was using it just prior to and at the time he was injured."

FREDERIC B. SCOTT,
Attorney of Defendant.

Complaint.

10 (Filed, Feb. 4, 1916.)

HUDSON CIRCUIT COURT.

AUGUSTA ARMBRECHT, Admx. of the Estate of WILLIAM ARMBRECHT, deceased, *Plaintiff,* *vs.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, *Defendant.*	Action at Law.

20

The plaintiff who resides at No. 75 Bloomfield Street, Hoboken, in the County of Hudson says that:

1. That she is the administratrix of the estate of William Armbrecht, deceased, and brings into Court Letters of Administration granted to her upon the said estate by the Surrogate of the County of Hudson.

30

2. That the defendant, Delaware, Lackawanna & Western Railroad Company is a corporation of the State of Pennsylvania and a common carrier by railroad engaged in interstate commerce in that it transports goods and passengers for hire, from the State of New Jersey to the State of Pennsylvania and other states and territories.

40

Complaint.

3. That on the 17th day of December, 1915, at Boonton, in the County of Morris, the intestate of the plaintiff was employed by it and engaged in interstate commerce clearing snow from the tracks used by it in interstate commerce, and on said day was killed by reason of the negligence of the defendant.

4. The negligence of the defendant consisted in this: **10**

That it did not use reasonable care to maintain a system to warn employees working upon the said tracks of the approach of trains and it did not use reasonable care to give any warning of the approach of said trains, it did not use reasonable care to propel the said train at a safe rate of speed but propelled the same at an excessive speed, whereby the intestate of the plaintiff was struck by a train and killed. **20**

5. The intestate of the plaintiff was at all times in the exercise of due care for his safety.

6. The intestate of the plaintiff left him surviving a widow and next of kin, who have suffered pecuniary injury by reason of his death.

7. The within action is commenced within twenty-four calendar months after the death of the said intestate of th plaintiff.

The plaintiff demands $10,000 damages. **30**

Alex Simpson,
Attorney for Plaintiff.

40

Amended Answer.

(Filed April 1, 1916.)

The answer of the above defendant, the Delaware, Lackawanna & Western Railroad Company, to the allegations contained in the above plaintiff's complaint says:

1. That it has no knowledge or information sufficient to form a belief so as to answer the alle-
10 gations contained in the first paragraph of the plaintiff's complaint.

2. That it admits the allegations contained in the second paragraph of the plaintiff's complaint.

3. That it admits the following allegations contained in the third parapraph of the plaintiff's complaint, to wit: "That on the 17th day of December, 1915, at Boonton, in the County of Morris, the intestate of the plaintiff was enploy-
20 ed by it clearing snow", but this defendant denies the balance and remainder of the allegations contained in the said third paragraph of the plaintiff's complaint.

4. That this defendant denies the allegation contained in the fourth paragraph of the plaintiff's complaint.

5. This defendant denies the allegations contained in the fifth paragraph of the plaintiff's complaint.
30
6. This defendant has no knowledge or information sufficient to form a belief so as to answer the allegations contained in the sixth paragraph of the plaintiff's complaint.

7. This defendant admits that the above action was commenced within 24 calender months after the death of said intestate of the plaintiff.

And for a first and separate defense, this dedeath of the plaintiff's intestate as alleged in the
40 fendant says that at the time of the injuries and

plaintiff's complaint the said intestate, William Armbrecht, was not engaged in intersate commerce:

AND FOR A SECOND AND SEPARATE DEFENSE, this defendant says that at the time of the injuries to the said William Armbrecht as alleged in the plaintiff's complaint, the said William Armbrecht was guilty of contributory negligence in this, that he put and placed himself in a position of great known danger and failed to exercise reasonable care for his personal safety: 10

AND FOR A THIRD AND SEPARATE DEFENSE, this defendant says that the said intestate, William Armbrecht, assumed the risks incident to the work at which he was employed at the time and the place of his injury as alleged in the plaintiff's complaint. 20

AND FOR A FOURTH AND SEPARATE DEFENSE, this defendant says that the said intestate, William Armbrecht, willfully and negligently violated and disregarded the directions and orders of the defendant for his protection and that the said injury to the said William Armbrecht was caused solely by his said disregard of the orders and directions aforesaid.

AND FOR A FIFTH AND SEPARATE DEFENSE, this defendant says that the plaintiff's said intestate, William Armbrecht, voluntarly took upon himself, encountered and incurred the risk to which his injury was due and that he waived all and any right of action which he may have acquired by said injury. 30

WHEREUPON, this defendant prays that the above suit may be dismissed against it with its costs in the premises.

FREDERIC B. SCOTT,
Attorney of Defendant. 40

Reply.

(Filed April 3, 1916.)

The plaintiff denies the matters set up in the answer of the defendant under paragraphs entitled, "And for a first and separate defense", "And for a second and separate defense", "And for a third and separate defense", "And for a fourth and separate defense", "And for a fifth and
10 separate defense".

Dated March 31, 1916.

ALEX SIMPSON,
Attorney for Plaintiff.

Judgment.

This action was tried before Judge Luther A. Campbell with a jury at the Hudson Circuit, January second (2), 1917.

20 The cause having been heard and submitted to the jury, they returned their verdict as follows:

They say they find for the plaintiffs, and against the defendants and they assess the damages of the plaintiff on occasion of the premises at the sum of Eight Thousand Four Hundred Dollars ($8,400.00).

Whereupon it is adjudged that the plaintiff recover of the defendants the sum of Eight Thousand Four Hundred Dollars ($8,400.00) damages
30 and his costs which are taxed at the sum of Sixty-four Dollars and Forty-one Cents ($64.41), making in the whole the sum of Eight Thousand Four Hundred and Sixty-four Dollars and Forty-one Cents ($8,464.41).

Judgment entered this 29th day of January, 1917.

LUTHER A. CAMPBELL,
Judge.

40 (N. S.)
Attest:
JOHN J. MCGOVERN,
Clerk.

Answer.

The answer of Luther A. Campbell, Esquire, Judge of the Circuit Court, holden in and for the County of Hudson, and within named, the record and proceedings of the plaint whereof mention, is within made with all things touching the same, I send to the Judges of our Court of Errors and Appeals of the last resort of all causes at Trenton, N. J., at the day and year within contained, in a certain schedule to this appeal annexed as within I am commanded.

10

LUTHER A. CAMPBELL,
Judge.

Testimony.

HUDSON COUNTY CIRCUIT COURT.

AUGUSTA AMBRECHT, *vs.* D. L. & W. R. R. Co.	At Law.

20

APPEARANCES:

MR. ALEXANDER SIMPSON for the Plaintiff.

MR. MAXIMILIAN M. STALLMAN and MR. FREDERIC B. SCOTT for the Defendant.

30

The above-entitled case was tried January 2, 1917, before Hon. Luther A. Campbell, Judge, and a jury.

Mr. Simpson opened the plaintiff's case to the jury.

Mr. Stallman opened the defendant's case to the jury.

MR. SIMPSON: There were certain interrogatories submitted to the defendant:

40

Reading of Interrogatories.

1. Was the defendant a common carrier by railroad on the day of the accident, December 17, 1915? A. Yes.

2. Was the defendant on the date of the accident, December 17, 1915, operating as a carrier by railroad in carrying freight and passengers from the State of New Jersey to other states and from other states into the State of New Jersey? A. Yes.

3. Was the train which killed the intestate of the plaintiff an empty train, or was the same carrying freight and passengers? A. Carrying passengers.

4. If the same was carrying freight or passengers was it carrying the freight or passengers which had been brought within it from without the State of New Jersey into the State of New Jersey; or was the said freight and passengers to be carried out of the State of New Jersey into any other states or territories of the United States of America? A. Yes.

The fifth I will not read.

6. State the particulars of his employment, what his employment was, what he was actually doing at the time he was killed on the day in question. A. The plaintiff's intestate was employed to shovel snow from and upon the tracks of the defendant's railroad; immediately prior to and for some time before the accident to him he was standing in an open freight or gondola car on a track parallel to the track on which the train that subsequently struck him was traveling.

Richard Zimmerman, sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Zimmerman? A. 82 Bloomfield, Hoboken.

Q. What is your business? A. Work along shore, sir. 10

Q. On the 17th of December where were you working? A. In the same place where Mr. Ambrecht was working.

Q. Where was that? I mean on what railroad? A. The Lackawanna.

Q. Lackawanna Railroad? A. Yes, sir.

Q. And how long had you been working there? A. Second day.

Q. Were you in the same gang with Ambrecht? 20 A. Yes, sir.

Q. How many of you were in the gang? A Well, between 30 and 40.

Q. And who was the foreman? Was it a mar named Simcox? A. Well, I guess that is th(name; I don't know exactly.

Q. If you don't know his name, say you don't know. A. No.

Q. What was your work? What did you do? 30 A. Shoveling snow.

Q. Shoveling snow from where? A. From the station to the cars, and discharge it afterwards.

Q. Yes, but where did you get the snow; on the tracks or where? A. Yes, sir.

Mr. Stallman: Now, don't lead, Mr. Simpson.

Q. Just tell us where you got the snow. Where was the snow? A. It was all around that station, 40

picking up the snow from the tracks, putting it on piles. The train passed in; we took it from the piles on to the cars.

Q. What did you do with it then? What did you do with it then? A. They took it away and dumped it.

Q. Where did you dump it? A. Well, I don't know exactly the place, but we were shifted a couple of times.

Q. You dumped it somewhere? A. Yes.

Q. When you dumped it what did you do then? What did you do after you dumped it? A. Shoveled it out of the cars.

Q. When you got your snow shovelled out then what did you do, after you shovelled it out of the cars? A. When we was finished I was in one of the first—

Q. No, I am not talking about the day of the accident. I want to know what kind of work you did before the accident? A. Day before the accident, same kind.

Q. What did you do? A. Shoveling snow.

Q. And you were shoveling it on the cars? A. Yes.

Q. And off the cars? A. Yes.

Q. When you had dumped that load did you go and get another load? A. Yes.

Q. Where? A. Some place.

Q. What place? A. From the station.

Q. What station? A. Well, somewhere around close to Lake Hopatcong. I don't know exactly the name of the place.

Q. Around Lake Hopatcong? A. Yes, sir.

Q. How much of the track did you clean on the first day? A. Well, we were not shoveling always from one place. We was shoveling around.

Q. Well, how much territory did you cover, a mile, two miles or ten miles; shifted around how much? What space? A. I couldn't say that.

Q. But you shifted in different places, didn't you? A. Yes, sir.

Q. And cleaned the tracks? A. Yes, sir.

Q. Now, on the day of the accident what time did you go to work? A. We went away about five or six o'clock in the morning from the Lackawanna Railroad; Hoboken train. 10

Q. Where did you leave from, Hoboken? A. Yes, sir.

Q. What kind of train did you get on? A. Working train; special train for us.

Q. Working train? A. Yes, sir.

Q. And where did you get off the working train? A. I don't know the place. I say it was above Lake Hopatcong, next station. 20

Q. All right. When you got off the train on the morning of the accident what did you do? Where did you find your gang? A. We had our gang together.

Q. Well, where was your gang together? A. Well, around the same station, gathered.

Q. Where did you get your shovels? A. We got those shovels along with us.

Q. Brought them on the work-train? A. Yes. 30

Q. What did you start to do when you got to this place? A. Well, we stick them in right away; start to shovel.

Q. Shovel snow? A. Yes.

Q. Did you get a load? A. Yes.

Q. How many loads did you get before the accident? A. I think that was the second load.

Q. Second load? A. Yes.

Q. Now, what kind of work train—what kind 40

of train was it you shovelled the snow on? What kind of cars were they? A. Open cars.

Q. And how many of them were there? A. About six or seven cars.

Q. And what was at the end of them? What was the last car? A. Closed; snow car.

Q. What? A. The last car was a snow car.

10 Q. Where was the recreation car, the closed car? A. Right behind the engine.

Q. That was the first car? A. Yes.

Q. All right. What kind of a car was that? A. Well, regular passenger car like.

Q. What was there in it? What was it used for? A. Tools—

Q. Yes. A. —and where we kept our clothes.

Q. Did you get your lunch in there? A. We
20 got our lunch in there; yes.

Q. That was a closed car, was it? A. Yes.

Q. Where did you dump your first load on the day of the accident, December 17th? Where did you dump your first load? A. We dumped that upsideway from the station like we did the other one. I don't know the name of the place.

Q. Then what did you do? A. We went back to get the second load.

Q. Then what happened when you went back
30 to get the second load? A. Well,—

Q. Did you get a second load? A. Same place again.

Q. Did you get the second load? A. Yes, sir.

Q. You got the second load before the accident, did you? A. Yes.

Q. Well, what time was the accident? A. Well, it must be around eleven, half-past ten or something; I don't know.

Q. How many loads did you get that morning?
40 A. It was the second load.

Q. Second load that you got. And had that load been dumped before the accident? A. Yes.

Q. Was the snow out? A. Yes.

Q. And where were you going then? Going to get another load? A. Yes.

Q. Did your train stop? Did it stop—the train you were on? A. Oh, yes.

Q. And what kind of weather was it? A. Kind of misty weather. 10

Q. And when the train stopped where did it stop, do you know? A. Well, around—I saw a sign there "Lake Hopatcong;" just before that we stopped first.

Q. Did you get to Lake Hopatcong? Was there more than one track where you stopped? A. Oh, yes.

Q. How many tracks were there? A. I think there were three tracks if I don't— 20

Q. Did your train do any backing and siding? A. Yes, sir.

Q. Then when it finally stopped what did the men on the train do, or what did you do? A. Well, we finished our car and went in the lunch car.

Q. You had finished dumping your car? A. We had finished dumping our car.

Q. At the second place where you stopped? A. At the second place where we stopped. 30

Q. All right. You finished, and as soon as you finished what did you do? A. We went into the lunch car.

Q. That is the car in front, closed car? A. Yes, sir.

Q. And did you get in the car? A. I just happened to get in; yes.

Q. You got in? A. Yes, sir. 40

Q. Now, what was the next thing you knew after you got in the lunch car? A. Well, I heard screaming. An accident—

Q. What did you do? A. I went out right away, and I seen everything laying there.

Q. What did you see lying there? A. Well, bones, everything, you know.

10 Q. Legs? A. I went up so far about half a mile and I picked up three caps, rubber boots—high rubber boot and some other kind of stuff; rags—

Q. What do you mean, the clothes? A. Clothes that was torn up.

Q. Did you see anything else there? Any bodies? A. Yes; sure.

Q. Well, what did you see? Tell us. We weren't there. Tell us what you saw. A. Well,

20 I seen Mr. Ambrecht's head lay there. The train went right over here; his head was flat, smashed up. I seen one hand cut off here. I see a leg torn off right from the knee up to the joint, and so on. It was all the same. Guts was tumbled around there; was smoking yet.

Q. And did you see this train that had done this? A. Yes.

Q. Where was that? A. It stopped.

30 Q. What kind of train was it? Passenger train? A. Yes, sir.

Q. And after you got in the lunch car and before you heard the screaming did you hear any whistle of this train? A. No, sir.

Q. Hear any whistle at all? A. No, sir.

Q. Then what did you do when you found Ambrecht's head and all this? What did you do? A. Well, we picked up so much we could from the clothes and things, and I found—I found Mr.

40 Simcox, the foreman himself—

Q. Did you see him here to-day? A. He was just outside, down below. I spoke to him just now.

Q. He is not in the court room? A. No; he give me his badge, his check from his working card, and a purse with thirty cents. The purse was clean torn out of his body there, and we found it there, and they gave it to me to give to his wife. 10

Q. Were there other men killed? A. Yes.

Q. How were they lying? A. All over.

Q. And how far up the track from where you found Ambrecht's body lying was this passenger train standing that had gone over this track? How far away was it stopped? A. Well, I couldn't say.

Q. Was it a mile or two miles? A. No; it was about half a mile, I think. 20

Q. Half a mile it stopped? A. Yes.

Q. Now where were you standing before you got into the recreation car? Where were you standing; in the gondola? A. I was just walking into the car.

Q. I know, but before you walked into the recreation car you were somewhere. Where were you riding on this train? What kind of a car? A. In the same car. 30

Q. In the recreation car? A. Yes.

Q. What? A. In the lunch car. We was riding in the lunch car, and as soon as we was on the other place we went to the lunch car, and we rode to the place, dumped out the snow.

Q. You rode up the lunch car? A. Yes.

Q. And you went back and dumped your snow? A. Yes.

Q. And when you were through you went back in the lunch car? A. Yes. 40

Q. You didn't ride in the lunch car? A. No.

Q. Did Ambrecht ride in the lunch car? A. Yes.

Q. When the train stopped you went back and dumped the snow and you went back? A. Yes.

Q. Did you see what car Ambrecht was working on? A. Yes, the last car.

10 Q. And what car were you working on? A. The first one.

Q. Now, on the day of the—on the day before the accident is that the way they carried you? You were carried to the place in the closed car and got out and dumped your snow, and got back in the closed car? Is that the way they carried you on the previous day? A. I don't know; I could not say.

20 Q. Do you remember whether that was so or not? A. I don't know whether we had a lunch car the first day we were working or not, Mr. Simpson.

Q. How long did it take you to get a load—to load up your car? How long did it take you? A. An hour or an hour and a half.

Q. To make a load? A. Yes.

Q. Now, when you got off—or when you started to walk up to the recreation car just before the 30 accident, did anybody tell you to look out; that there was an express late? A. No.

Q. Anything of that kind said that you heard? A. No.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Stallman:

Q. How many days had you been working up there, Mr. Zimmerman? A. On the snow you 40 mean?

Q. Yes. A. The second day; two days.

Q. Did you know Ambrecht yourself? A. Yes, sir.

Q. Were you acquainted with him? A. Yes, sir.

Q. Did you see him there the day before? A. Yes, sir.

Q. And the day before you shovelled snow around Lake Hopatcong station? A. Yes—well, in the territory around there. I don't know exactly the place we shovelled the snow; but around there somewhere.

Q. And you were up there all day? A. Yes, sir.

Q. The day before that? A. Yes, sir.

Q. And you would load up these snow cars and then take them to one end of the yard and dump them; is that right? A. Yes, sir.

Q. And you did that half a dozen times the day before? A. Oh, not half a dozen times.

Q. What? A. Not half a dozen times.

Q. I thought you said six times? A. No; I didn't say that.

Q. How many times? A. Three or four times at least.

Q. Now, the snow that you put into these cars, that came off the platform, did it? A. No, between the tracks.

Q. Oh, between the tracks? A. Yes, sir.

Q. Did you clean the platforms at Lake Hopatcong station? A. No; I didn't do it.

Q. Did you see anybody else do it? A. I could not say; no.

Q. I see. Now, on the day of the accident after you got your first load, which direction did you go with the loaded cars? Did you go towards

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Hoboken or— A. No; we backed up the other side.

Q. Went west? A. Yes.

Q. And you went down a slight distance and unloaded the snow? A. (No answer.)

Q. And then you came back again and got another load? A. Yes.

10 Q. Is that right? A. Yes.

Q. And did you go west again with that load? A. We went up toward Lake Hopatcong.

Q. Did you dump the second load of snow? A. Yes; I did.

Q. In the same place where you dumped the first one? A. No, the opposite way.

THE COURT: The opposite way.

20 Q. The opposite way. I see. And you dumped that near Lake Hopatcong station? A. Yes; somewhere around there.

Q. Then you had an empty train then? A. No; the train wasn't empty. The train was empty when the accident happened.

Q. Yes. I mean after you got the second load dumped, then you had an empty train? A. Yes.

Q. This empty train started toward Chester Junction, didn't it? A. No, the train stopped

30 there.

Q. What is that? A. The train was stopping there for at least an hour and a half.

Q. Well, is that the place where the accident happened? A. Yes, sir.

Q. Well, now, didn't you back that train up, down the side track toward Chester Junction? A. Yes, sir.

Q. And was it empty? A. No, sir.

Q. Do you know how far it was from the place

40

—how far it was that the train moved after you got your second load? A. I could not tell; I could not tell the distance, how far it was. It is over a year ago, you know.

Q. Yes. Do you know how long it took to run that far? A. Five or six minutes or seven minutes; I don't know; I couldn't say.

Q. Now, when you got the gondola cars loaded with snow did you immediately go into the coach? A. I went. 10

Q. You did? A. Yes.

Q. Did Ambrecht? A. Yes.

Q. How long did Ambrecht stay in the coach? A. Well, as soon as we arrived at the place where we were going to dump the snow—

Q. And then did he get out? A. Sure; he passed by me. 20

Q. And did you get out? A. Yes, sir.

Q. Next to the coach was a gondola car? A. He went to one of the last cars; yes.

Q. Now, which one of the last cars? A. Well, I guess it was the last one altogether from the whole lot.

Q. And which one did you go on? A. I was on the first car.

Q. And you unloaded the snow right where you stopped? A. Yes, sir. 30

Q. Is that your recollection? A. We didn't unload the snow on the first station. We shifted once and we dumped the snow on another station —further down again, the rest of it.

Q. You stopped in two different places to unload the snow? A. Yes, sir.

Q. And how much did you unload the first time? A. Oh—

Q. Unload all of it? A. There was some left; yes. 40

Q. How much was left? A. It was in the last car; there was some left in the last cars.

Q. There was not any left in your car; was there? A. Because the cars were bigger; no.

Q. What? A. The cars were a little higher; different cars, you know, so much—some was higher, you know.

10 Q. The car you were in, the snow was all gone, the first time you stopped? A. No, the second time.

Q. What? A. I say we shifted place. We finished the cars by the second station.

Q. You finished them on the second stop? A. Yes.

Q. Now, do I understand you to say that the train didn't move after you had the snow unloaded and before the accident? A. The train
20 was laying still where she was laying and discharged the last snow.

Q. And how long had you been there before this accident happened? A. I don't know.

Q. Well, was it five minutes? A. I couldn't say how long it was.

Q. What? A. I couldn't say how many minutes it was we was stopping there.

Q. Now, you say you unloaded snow at that
30 place? A. I did, yes.

Q. All right. Now, how long did it take you to unload the snow and how long were you laying at that particular place from the time you got there until this accident happened? A. Well, it didn't take us long, because we were half empty before we came there.

Q. You were half unloaded? A. Our car; yes.

Q. Now, how long did it take? Was it five minutes or an hour? A. To unload that? No;
40 about ten or fifteen minutes.

Q. Of course, you got into the coach—how did you get into the coach from where you were working, or from where you were on the gondola car? A. Well, the same place like everybody had to go. We couldn't go no other way.

Q. I don't know how you went, though. I say how did you get into the coach? A. We got in the track to get into the coach. Where could they walk anywhere else? They couldn't walk anywhere else. 10

Q. Did you get off the gondola car and go down on the track? A. Yes, we had to.

Q. Yes. You could see it was a railroad track, couldn't you? A. Sure it was.

Q. And you knew there were trains running on that railroad track; didn't you?

Mr. Simpson: I object to whether he could see there were trains, or what his knowledge was. I have not examined him about his knowledge. This is not his suit. It is not a question whether he took the risk or not. 20

The Court: That is true, but he has described the accident—

Mr. Simpson: Yes.

The Court: —described the location where the train was. I think it is proper, while, of course, his actions would not bind the intestate. 30

Q. (Last question repeated by the stenographer.) A. No; I don't know whether there was trains running on that railroad track. How could I know that? The company has three tracks there and we were lying on the inside track and there were two tracks more.

Q. Were there a great many tracks up there in that yard? A. In the yard himself? 40

Q. Yes. A. Oh, yes.

Q. And from the time you had been working there did the trains go up and down, while you were cleaning the snow? A. Yes.

Q. You saw the trains going towards Hoboken at different times? A. Yes.

Q. Express trains? A. Yes, sir.

Q. And were they running fast? A. Well, I
10 don't know. I don't know what you call fast.

Q. Did you see express trains coming from Hoboken, going the other way? A. I didn't have no time to look around there.

Q. What is that? A. I didn't have time to look around there. I don't know how many trains and how fast they went.

Q. You don't understand me.

MR. SIMPSON: Oh, yes, he does.

20

Q. Now, the day before, Mr. Zimmerman—the day before when you were working there, there were trains going in both directions, weren't there?

MR. SIMPSON: I object. There is no proof that on the day before they were working at the place. This question is, "When you were working there." There is no proof they were at that point the day before; so that question
30 assumes something as a fact which is not a fact—that they were working there the day before. I object to it on that ground.

MR. STALLMAN: The testimony shows they were on both sides of the Lake Hopatcong station, in that territory, Port Morris yard.

THE COURT: I will overrule the objection.

Q. (Repeated by the stenographer.) Now, the day before, Mr. Zimmerman—the day before when
40 you were working there, there were trains going in both directions, weren't there? A. Well, there

must be. Of course, there is no station there. I guess so. We had no time to look around.

Q. Didn't you see trains going to Hoboken? A. Yes, yes.

Q. Didn't you see trains coming from Hoboken? A. Oh, yes; I guess I did.

Q. And this day of the accident, didn't you see trains going in both directions? A. The time of the accident? 10

Q. The day of the accident? A. When the accident happened?

Q. That day.

> THE COURT: From the time you started work that morning up to the time of the accident, the question is.

THE WITNESS: Yes. 20

> THE COURT: Didn't you see the trains going in both directions?

THE WITNESS: Yes, yes; well, I seen trains going there, but we were busy. We can't look around, you know. We have to work.

Q. Now, you say you got down on this track and you walked down the track until you came to the coach; is that right? A. Yes.

Q. And then you got on the coach and you got inside? A. Yes, sir. 30

Q. And then you heard a scream? Is that right? A. Yes, sir.

Q. Do you know who it was that hollered? A. Yes, sure; I know the man what was hollering, but he ain't here.

Q. Where was he? A. He was just coming to the platform.

Q. Just coming out on the platform. What was the next car to this coach? A. The next car to the coach? 40

Q. It was a caboose, wasn't it? A. Yes; a little bit of a one.

Q. A yellow caboose? A. Yes.

Q. And beyond the caboose was a snow car—and other snow cars? A. There was a snow car; yes.

Q. You couldn't see the snow cars from where
10 you were standing on the coach; could you? A. (No answer.)

Q. You couldn't see the snow cars from where you were standing on the coach? A. Standing inside of the car, how could I see it?

The Court: You could not see it, the question is.

A. No, sir.

Q. You didn't see the train hit Mr. Ambrecht,
20 did you? A. I seen the train passing by; yes.

Q. I say you didn't see the train strike him? A. No, no; oh, no.

Q. No. You don't know what he was doing at the time he was struck? A. I don't know.

Q. Do you? A. No.

Q. When you finished—when you went into the coach did you take your tools with you? A. Shovel, yes.

30 Q. You took a shovel with you? A. Yes, sir.

Q. When you went into the coach did you leave any of the rest of the men of your gang on your car? A. Well, I don't know. Some went in, some went not in. I don't know who went in and who didn't come in. I went in myself.

Q. You were only looking out for yourself? A. Well, not that way; but if we were finished we went in the car.

Q. And this happened about half past ten or
40 eleven o'clock in the morning? A. I couldn't say exactly the time.

Q. Well, I say around half past ten or eleven. A. Yes, about that time; it must be. Of course, we had no clock there.

Q. Now, did you say that you were at the place of the accident about fifteen minutes? Is that right? A. I didn't get that.

Q. (Last question repeated by the stenographer.) A. After the accident happened? 10

Q. No, before the accident.

The Court: How long had your train been where it was; that is, where the accident happened, before the accident did happen? How long had you been in that particular spot with your train?

The Witness: When the accident happened, you know, I don't know what the reason was, we laid there a good while afterwards. 20

The Court: Oh, before that. Listen now—

The Witness: Yes, sir.

The Court: With this second load, you said, as I remember it, that you had been in one place and partly unloaded the load of snow you had, and then you shifted to another place,—

The Witness: Yes. 30

The Court: —and there you finished unloading, and it was that second place where the accident happened. Is that true?

The Witness: Yes.

The Court: Now, how long had your train been at that second place where you finished unloading before the accident happened?

40

The Witness: I couldn't say—well, she might have been there fifteen or twenty minutes; I don't know; somewhere around that time.

Q. Now, all that time—all that fifteen or twenty minutes were you on the gondola car? A. Well, as I say, I was finished before the rest was finished. The last car was the last car what was
10 finished with the snow. We went in before.

Q. Now, you say that you went in the coach just at the time that the accident happened? A. Yes.

Q. How long had you been in the coach? A. I just walked into it.

Q. Just walked in? A. Yes.

Q. Well, if you were lying there fifteen or twenty minutes, were you out on the gondola car that long? A. What?

20 Q. If you had been lying there fifteen or twenty minutes all that time, were you outside on the gondola cars? A. No; I finished my car, I told you.

Q. How long did it take you to finish your car? A. I don't know. I don't know.

Q. From where you were working could you see the other railroad tracks there? A. Sure we could see the railroad tracks.

Q. Yes. Was there any railroad track on the
30 south side of the train? A. I don't know; I could remember south or north side there. I am strange there.

Q. You were on the railroad track, weren't you? Your train was on a track? A. Yes, on an outside track.

Q. On the outside track. All right. Now, how many other tracks were there? A. I don't know; one or two, I think.

Q. Don't you know that there were four tracks
40 there? A. No.

Q. Don't you think, Mr. Zimmerman, that you were in this coach two or three minutes before this accident happened? A. I couldn't say—no.

Q. What? A. Could not be.

Q. You are sure of that? A. Yes.

Q. All right. Who was your foreman? A. What is the name of your foreman? A. I don't know the name. I saw him outside there a while ago. 10

Q. Did you see him on the track or on the gondola car before you came in the coach? A. Sure; I gave him a hand to carry him in, too, because he was hurted.

Q. I mean before the accident. A. Before the accident?

Q. Did you see him? A. Yes, sure; he was around.

Q. And where was he? A. I couldn't say where he was. I know he was around there. 20

Q. Well, now, what were you doing when you saw him? A. I don't know.

Q. You don't know what you were doing? A. No.

Q. You don't know if you were shoveling snow? A. Well, I might have been shoveling snow.

Q. How long before the accident was it that you saw your foreman? A. I couldn't say.

Q. You don't know that? A. No.

Q. When you left the gondola car to go into the 30 coach what was your foreman doing? A. I don't know.

Q. Why, didn't you see him? A. No.

Q. Oh, you didn't see him that time? A. No.

Mr. Stallman: That is all.

Mr. Simpson: That is all.

Witness Excused. 40

Robert Besner, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Besner? A. 504 Willow Avenue.

Q. Hoboken? A. Yes, sir.

10 Q. What are you doing now? A. In the ice business now.

Q. Were you in this gang that Ambrecht was in, that went snow-shoveling? A. Yes, sir.

Q. Were you at the place of this accident? A. Yes, sir.

Q. What had you been doing on the day of the accident? What was your work? A. Shoveling snow.

20 Q. Where did you get the snow that you shoveled? A. Morristown.

Q. Where else? A. Well, around Morristown; right around there—

Q. Where did you get the snow? Was it near the tracks, near the station, or where was it? A. It was near—right around—er—station there; around the roundhouse.

Q. Around the roundhouse? A. Yes.

Q. You mean the roundhouse where the engines are? A. Yes.

30 Q. And what did you do with the snow after you got it? A. Dumped it on the side track there, down at the junction.

Q. How many loads had you got before the accident? A. Two.

Q. And that was the second load that you were dumping before the third load? A. Yes; that was the second load.

Q. Where did you get that load, that second load? A. That second load we got at the same

40 place.

Q. Around the Morristown station? A. Yes, sir.

Q. What did you do with it? What did you do with the snow? A. Dumped it.

Q. And where did you dump it? Do you know where the train was when you dumped it? A. Where the train was was below Lake Hopatcong.

Q. And about how many tracks were there where you dumped it there? A. There were four tracks. 10

Q. Where you dumped it? A. Yes, sir.

Q. And which track were you on when you dumped the snow? A. Side track, on the south side I think it was.

Q. And was the snow on open cars? A. Yes, sir.

Q. And was there a closed car? A. Yes, sir.

Q. And when you went shoveling snow, when you were riding to dump the snow off, where did you ride? Where did you ride when you were riding to the place where you dumped the snow? Did you ride in the closed car or in the open car? A. I rode in the open car. 20

Q. You rode in the open car? A. Yes, sir.

Q. Now, when you got to the place and dumped the snow, and your train was standing, what did you do? A. Well, we got through shoveling the snow out of the car and I went inside.

Q. Did you see Ambrecht when you went in? A. No; I was in the first car, and he was in the last car. 30

Q. After you got in the closed car did you hear anything of the accident? A. Yes; I heard some scream and we took two men in there—

Q. Now, wait a minute; don't go like a race horse. You heard somebody screaming and you were then in the inside of the car? A. Yes, sir.

Q. What did you do when you heard the screaming? A. I went right out. 40

Q. What did you do when you went out—what did you see when you went out? A. I seen the bodies laying around there.

Q. Many bodies? A. Yes, sir.

Q. Did you see the train that had gone on that track where the bodies were? A. Yes, sir.

Q. How far away was that train stopped? A.
10 Stopped about half a mile away.

Q. Which way was it going? Towards Hoboken or towards— A. Towards Hoboken.

Q. Before you heard the screaming and while you were in the closed car did you hear any whistle of any locomotive, or any whistle of any kind? A. No, sir.

Q. What was it first attracted your attention, the screaming? A. Yes, sir.

Q. Now, did you see Ambrecht lying there
20 when you got out? A. Yes, sir.

Q. Where was he lying? A. Well, he wasn't lying. He was all cut up to pieces.

Q. Well, on the same track, was he, that this train was on? A. Yes, sir; yes, sir.

Q. Now, was this train—as this train approached did it come around a curve? A. Didn't hear any whistle—

Q. I know you didn't. What was the ground there? Was there a curve? A. Yes, sir; there
30 was a curve.

Q. How far was the curve from where the accident happened? A. It was about two hundred feet away.

Q. The curve was 200 feet away? A. Yes.

Q. And your train stood, then, just around the curve? A. Yes, sir.

Q. Did you see this train as it went by your car? A. I certainly did.

Q. How was it going, fast or slow? A. Well,
40 it was about 65 miles an hour; 60 or 65.

Mr. Simpson: Cross-examine.

Cross-Examination by Mr. Stallman:

Q. Were you working in the same gang with Zimmerman? A. No, sir—yes, sir; I worked in the same gang with Zimmerman; sent up from Hoboken up there.

Q. You know Zimmerman, of course? A. What is this?

Q. You know Mr. Zimmerman? A. Well, I know him by working there; yes, sir. 10

Q. You have been talking to him about this case? A. No, sir.

Q. Didn't say anything to him? A. I didn't see him since.

Q. What? A. I didn't see him since, except up here in the courtroom.

Q. Been talking to him this morning? A. No, sir. 20

Q. Now, you don't want to tell the jury that you were anywhere near Morristown that day; were you? A. Yes, sir; I went out in Morristown.

Q. Now, do you know where Morristown is? A. Yes, sir.

Q. How far is it from Lake Hopatcong? A. It is about a mile on—well, a mile from Lake Hopatcong, I think.

> Mr. Simpson: Mr. Stallman is willing to stipulate that these tracks were used interchangeably; that these men were working on intra—and interstate tracks. 30
>
> The Court: That is the admission that is made?
>
> Mr. Simpson: Yes.

Q. Now, you say you were working in Morristown, and Morristown is about a mile from Lake Hopatcong; is that right? A. Well, I think it is a mile or a mile and a half; it is about that. 40

Q. Don't you know that Morristown is about sixteen miles from Lake Hopatcong? A. I don't think it is.

Q. When you say "Morristown" don't you mean Port Morris? A. Oh, excuse me; yes. It is Port Morris. Excuse me.

Q. And Port Morris is—well, now, there is no
10 passenger station at Port Morris, is there? A. I couldn't tell you—yes, there is, a small station there.

Q. There is a freight station there, isn't there? A. There is a small station there, too.

Q. A switchman's shanty and an office, and that sort of thing? A. Yes. I know we got in the train there.

Q. You were up there around the buildings in Port Morris yard shoveling snow? A. Yes, sir.

20 Q. Is that right? A. Yes, sir.

Q. And did you do that the day before? A. Yes, sir.

Q. And then did you clean up around Lake Hopatcong station, too? A. No, sir.

Q. Well, all the snow that you picked up was right in the neighborhood of Port Morris yard, wasn't it? A. Yes, sir.

Q. And you dumped that snow at the west end of the yard, didn't you? That is, going away
30 from Hoboken? A. Well, the first day we did; yes.

Q. And— A. The second—

Q. —did you work there all the day, the day before? A. Yes, sir.

Q. As you were working shoveling snow into the cars— A. Yes, sir.

Q. —and while your train was going to the place where you were going to dump the snow, did you see freight trains and passengers trains
40 passing that place? A. Well, I did; yes.

Robert Besner—Cross.

Q. What is that? A. Well, I did; yes.

Q. And before this accident didn't you see freight trains and passenger trains going up and down the railroad? A. Up and down the railroad; yes, sir.

Q. And some of the passenger trains moved pretty fast, didn't they? A. Why, certainly.

Q. What is that? A. Yes, sir. 10

Q. Now, do you know where Chester Junction is? A. No; I don't.

Q. What is that? A. I don't.

Q. Do you know the name of the place where this accident happened? A. Well, it was near Lake Hopatcong; below Lake Hopatcong.

Q. Yes. Do you know how long it took you to go from Lake Hopatcong down to the place where the accident happened? A. Fif—fifteen minutes.

Q. Took you about fifteen minutes to go down 20 there? A. Well, about that; yes, sir; where we dumped the snow; of ten minutes; ten or fifteen minutes; I couldn't say.

Q. Now, this load that you were going to dump, did you get that near Lake Hopatcong station? A. No; we got that over in Morristown.

Q. You mean Port Morris? A. Yes, sir.

Q. What is that? A Yes, sir.

Q. You got that in Port Morris yard? A. Yes, sir. 30

Q. Now, where did you dump it? A. We dumped it near Lake Hopatcong.

Q. You dumped it near Lake Hopatcong? A. Yes, sir.

Q. You mean near the place where the depot is? A. Yes; below that.

Q. Yes. Now, after you got the snow dumped then where did you go? A. In the cab

Q. What did you say? A. In the car. 40

Q. You went in the car? A. Yes, sir.

Q. How long did you stay in the car? A. I just got in there.

Q. Just got in? A. Yes, sir, when this accident happened.

Q. What car were you working on? A. On the first car from the right—

Q. What is that? A. —from the workingman's
10 car.

Q. The first car from the caboose? A. Yes, sir.

Q. Did you go through the caboose? A. No, sir.

Q. Did you go in the coach before Zimmerman? A. Well, I think we both went in together, at the same time.

Q. You both went in together. And did you have the door shut? A. We had the door sh— no, we had it open; somebody was coming in.

20 Q. What is that? A. Somebody was coming in; I don't know who it was.

Q. Well, when you went in did you shut the door behind you? A. Yes, sir.

Q. Somebody else came and opened it? A. Yes, sir.

Q. Well, how many men got in the coach after you did? A. I couldn't tell you.

Q. Two or three? A. I think they did; two or three or four something like that.

30 Q. Four? A. I couldn't tell you how many.

Q. Did you know Ambrecht? A. Yes, sir.

Q. You didn't see him get struck, did you? A. I didn't see him get struck; no, sir.

Q. You don't know what he was doing when he got hit? A. Well, he was work—

Q. You didn't see him? A. I didn't see him.

Q. When you got off the gondola car to get into the coach where was Ambrecht? A. He was laying around the tracks.

40 Q. What is that? A. He was on the tracks.

Q. Did you see him there? A. Well, I seen his head and everything.

Q. No; I mean when you got out of the snow car to go into the coach. A. No; I didn't see him.

Q. You didn't see him then? A. No.

Q. You don't know where he was? A. No.

Q. Now, you say there are four tracks up there? A. Yes, sir. **10**

Q. And you were on the side track? A. Yes, sir.

Q. What were the other tracks? A. Well, I don't know about the other tracks. I think there were three tracks alongside.

Q. Well, did they run trains on those tracks? A. Certainly do.

Q. Well, did they on that day? A. Yes.

Q. Did they the day before? A. I guess so. **20**

Q. When you got off the snow car where was your foreman? A. Foreman standing right in the caboose there.

Q. What is that? A. Right in the—right in the car there.

Q. Yes. Did you hear him say anything to you? A. No, sir.

Q. How many men were on your car? A. Oh, there were about six on our car.

Q. About six men? A. Yes. **30**

Q. How many got off beside yourself and Zimmerman? A. I don't know; I couldn't tell you.

Q. Well, didn't you see them? A. I didn't count them.

Q. Well, did they all get off or did some stay on? A. Only six in our car; I don't know how many on the others.

Q. No, I mean on the car you were on. A. I couldn't tell you how many got off. Some of them stood on. **40**

Q. Did you see Zimmerman get off? A. Yes; I seen him get off.

Q. Did he get off before you or after you? A. He got off before me.

Q. And you followed him? A. Yes, sir.

Q. What did he say to you? A. He didn't say nothing to me.

10 Q. Did he say "Come along; get in the coach"?

MR. SIMPSON: I object to this; there is no foundation for this.

MR. STALLMAN: I can test his recollection.

THE COURT: What is it for? Entirely for the purpose of testing the recollection of this witness?

MR. STALLMAN: Just as to the details of what happened.

20 THE COURT: I will allow it.

MR. SIMPSON: I ask for an objection.

Q. (Repeated by the stenographer) Did he say "Come along; get in the coach"? A. He didn't say nothing of the kind.

Q. Did you say anything to him? A. No.

Q. Do you know, Mr. Besner, whether there was any train on the same track where your train was? A. There was another train coming.

30 Q. What is that? A. The train was coming around the curve.

Q. I mean on the same track that you were on. A. No, sir; I didn't see no train there; I don't know; I couldn't tell you.

MR. STALLMAN: That is all.

MR. SIMPSON: That is all.

WITNESS EXCUSED.

40

Luigi Debiasce, a witness on behalf of the plaintiff, sworn and examined through interpreter, testified as follows:

Direct Examination by Mr. Simpson:

Q. How old are you? A. Nineteen and a half.

Q. Where do you live? A. Boonton, New Jersey. 10

Q. Were you in this gang of snow shovelers on the 17th of December, 1915, with the D. L. & W.? A. Yes, sir.

Q. What had you been doing? What kind of work had you been doing the morning of December 17th? A. To remove the snow from the tracks.

Q. How long had you been removing snow from the tracks before the accident? How many hours? A. About four or five hours. 20

Q. And how many loads had you got before the accident? A. About a couple of loads.

Q. How many cars were there in your train? A. About ten.

Q. And how many men were there on each car? A. I do not know; in my car there were ten men.

Q. Well, how did your ten men work at your car? What did you do? A. To remove the snow from the car, dumping it at the side.

Q. Before you moved it from the car you put it on the car? A. From the tracks. 30

Q. Well, was it all at one place or different places? How did you get it? A. Some places where there was more snow, and then we took it from that place and put it on the car.

Q. When you got your second load what did you do with your second load? A. We stopped at the switch, and then it started to rain and was freezing at the time; we could not stand it; and then the boss gave orders that everybody should be in the car. 40

Q. In what car? A. The covered car.

Q. The covered car. Did you start to go in the covered car then? A. Yes, sir; we went.

Q. Now, then, what happened when you went— I will withdraw that.

Q. How did you start to go in the covered car after the boss said everybody must go in the covered car? A. Well, we started lively across— because it was cold; it was raining at the time; it was freezing at the time.

10

Q. All right. Now we have that. Now, then, how did you start to go in the car? How did you get there? Did you walk over the cars or along the ground, or how did you go? A. Walking along the tracks, in the middle of the tracks; because we couldn't go otherwise. There was a space where there was about three palms of snow. (By the interpreter: "'Palm' is the span of the hand plus the tongue.")

20

Q. Well, you walked in this place that you have described; is that a fact? A. Yes; we did.

Q. Now, then, what happened? What happened? A. What happened that the train came along and killed two or three persons; I don't know how many.

Q. Did you hear any whistle before the train came along? A. No, sir.

Q. What happened to you, if anything? Did anything happen? A. I was also injured, and when the train came I was not able to get out of the way.

30

Q. And what happened to you after you were not able to get out of the way? A. I broke my leg.

Q. And did it throw you any distance? A. I was knocked by the train, and then I tried myself to avoid it.

Q. Did you hear any whistle from this thing that hit you? A. No, sir.

40

Q. Had anyone told you to look out, there was an express train late? A. No, sir.

Q. Had the foreman told you that they had stopped there because they were waiting for a late express train, and to look out? A. I do not know that.

Q. Well, did he tell you that? A. I did not hear that. **10**

Q. And this train that came and struck you and these other men, how did it come? A. From around the curve.

Q. On a straight line? A. I could not say that; I do not know.

Q. You don't know the condition. Did you see Ambrecht's body lying there after the train passed? A. No; I did not see it.

Q. You saw some bodies lying there? A. I saw one who died alongside of me in the hospital; man **20** who was taken in the caboose before.

Q. Anybody else? You say there were othe people lying there. Did you see any others? A No; I heard other people were killed.

Q. How fast was this train going as it cam along and struck you? A. Like a lightning.

Q. Was your foreman's name Spike? A. The boss?

Q. Yes; was the boss's name Spike? A. I think his name was "Jack" Kelly. **30**

Mr. Simpson: He thinks the name was "Jack" Kelly?

Interpreter: "Jack" Kelly.

Q. Do you see him here in court? A. No.

Q. How long had this train been standing there when you were struck by the other train? A. About ten minutes.

Mr. Simpson: Cross-examine.

40

CROSS EXAMINATION BY MR. STALLMAN:

Q. What car were you working in? A. The last.

Q. What? A. The last car.

Q. Is that the last car from the caboose, or the one nearest the caboose? A. The last car down, not the one next to the caboose; not the one
10 next to the caboose.

Q. Was there any snow in your car when you got off of it? A. When we were stopping there? No; it was clean.

Q. How long had your car been cleaned when you got off? A. About fifteen minutes.

Q. How did you work? Did you shovel the snow out of the car? A. Yes, sir.

Q. Did you get all the snow shoveled out of that car fifteen minutes before the express train
20 came? A. I do not know how long it really took us to unload—shovel the snow.

Q. How long did you stay in the open car after you had all the snow out of it? A. About fifteen minutes.

Q. Did you know William Ambrecht? A. No, sir.

Q. Was William Ambrecht in your gang? A. No, sir.

Q. Was William Ambrecht on the car you were
30 working on? A. No, sir.

Q. Do you know whether William Ambrecht got down on the track before you did or after you did? A. I did not see him; I do not know.

Q. Who was it that told you to go into the coach, covered car? A. Other people were there; working companions.

Q. Some of your companions who were working told you to go into the coach? A. They said
40 that the boss had called and said that it was rain-

ing, to not stand any longer, and we should go into the covered car.

Q. Well, now, who told you that? A. I do not know the persons; the persons who were working there.

Q. At the time that your companions spoke of going into the coach do you know where your boss was? A. The boss was about three or four cars in back of us. **10**

Q. When they talked to you about going into the coach did they say that in your language—in the Italian language? A. Sure; they said that in Italian.

Q. Have you brought suit against the railroad company? A. Sure.

Q. Has that suit been tried yet? A. Not yet.

Q. Now, did you say that you went into the coach, or your companions spoke of going into the coach because it was raining? A. Yes, sir. **20**

Q. Did you when you got out of the car—the snow car,—were you the first one off, or did somebody else get off before you did? A. I do not know if I was the last or the first. I do not know.

Q. Did you see the express train before it struck you? A. I saw this express train when it was at a distance from where I am now to this table. **30**

Mr. Simpson: About eight feet.

Q. After you got off the car, snow car, how far did you walk before you saw the train? A. About ten paces.

Mr. Stallman: I think that is all.

Re-Direct Examination by Mr. Simpson:

Q. How near were you to the covered coach when you were struck? A. I had to walk about two more cars before I would reach this caboose. **40**

Q. Do you know the names of the people who were hurt and killed there? A. I know the names of two Italians.

Q. Well, was there a German killed there? A. I heard through others that a German, another, was killed, and also two Italians.

Mr. Simpson: That is all.

10

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

Mr. Simpson: I object to it on the ground he let it in to see what good it would do him first, and then wants it stricken out.

The Court: Let me hear the answer.

A. (Repeated by the stenographer.) I heard through others that a German, another, was killed, and also two Italians.

20

Mr. Simpson: I won't object to having it stricken out.

Mr. Stallman: I also move to strike out this testimony that the foreman told him to go in the car, because it developed on the cross examination that some of his fellow-employees said to him in Italian, "Let's go into the coaches", and even if they did tell him, all he heard them say was that the boss said so. It is purely hearsay.

30

Mr. Simpson: I object to having it stricken out, because he examined at length upon it, and it is well settled if you ask for incompetent testimony and it comes out, that you are bound by it. He didn't on cross examination put such a question as would show that what the man said he heard was hearsay. In other words, "Do you know that of your own knowledge?" But he examined him carefully along the line of statements—what was

40

said, who said it, and all that; and having got that testimony out, he can not move to strike it out. He is bound by it. That is elementary. If he asked him a question on cross examination which showed that what he said was hearsay he could move to strike out; but he didn't do that. On cross examination he carefully examined—Who said so and so? When did they say it? What did they say to you? and having gotten all that out, now, without objection on my part, it is competent testimony; and I object to having any testimony stricken out. 10

MR. STALLMAN: It was also necessary for me to bring out on the cross—that the foreman was three or four cars away from this place at the time of this alleged conversation about going into the coach. 20

THE COURT: I won't pass upon it now.

WITNESS EXCUSED.

HERBERT SIMCOX, a witness sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. SIMPSON: 30

Q. What was your employment on December 17th, 1915? A. On the day of the accident?

Q. Yes. A. Assistant foremon, Pier 9.

Q. Were you in charge of this gang of snow shovelers? A. Yes, sir; just the gang from Pier 9.

Q. Pier 9? A. Yes, sir.

Q. Where did the accident occur? A. At Chester Junction.

Q. How long did the train stay there at the time of the accident? A. I don't know exactly 40 how long it stayed there.

Q. What was it waiting there for? A. For an express train.

Q. To go by? A. Yes, sir.

Q. Was the express train late? A. Yes, sir.

Q. You knew it was late, didn't you? A. Did I know it?

Q. You knew it was late? You knew what you
10 were waiting for? A. Yes, sir.

Q. And you were in charge of these men? A. Yes, sir.

Q. Now, what was the configuration of the ground from the direction from which that express train came? When it came would it come around a curve? A. There is a curve the other side of it.

Q. I mean the curve in the direction from which it came. A. Yes, sir.

20 Q. And how far was that curve from the place where your train was standing? A. I didn't notice the distance at all.

Q. Well, haven't you any idea? You know where you were standing, don't you? A. No, sir —where our train was stopped?

Q. Yes. A. And where the other train would come around?

Q. I mean how far is the curve? A. I don't know.

30 Q. I am not asking you about the express train. Get that out of your mind. How far is the physical curve— A. I don't know.

Q. —from the point where your train was standing? A. I don't know the distance at all.

Q. Can't you approximate it? A. No.

Q. Was it a mile? A. No; it was not a mile.

Q. Was it half a mile? A. I couldn't tell you how far it was.

40 Q. Was it more than half a mile? A. I was

only up there three days. I don't know anything about the district up there at all.

Q. Who was the engineer in charge of your train? A. I don't know that.

Q. Don't know? Do you see him in court here now? A. No, sir.

Q. You don't see him? A. No, sir; I don't know their names. 10

Q. Well, do you see him? You might not know his face? A. No, sir.

Q. Now, this train that this gang was working on that you were in charge of, what did this train consist of? How many cars? A. Old coaches—

Q. How many? A. I think it was three coaches.

Q. And how many gondola cars? A. I don't know how many they had on the train because there were some cut off back in the yards. 20

Q. You don't know much about it? A. I know there were gondola cars on there, but I didn't count how many.

Q. Are you still working for the Lackawanna Railroad? A. Yes, sir. Of course, I had nothing to do with the crew of the cars.

Q. What do you mean by the crews? A. Well, the cars—that was all up to the crews, not me.

Q. But you were in charge of the snow shovelers and loading and unloading of these cars? A. There were others there who had charge of them. 30

Q. Weren't you the boss? A. Just the men I fetched out from Hoboken with me.

Q. How many did you take out from Hoboken? A. 42.

Q. Well, that was on this train? A. Yes, sir.

Q. You were in charge of those men? A. 42 men; yes, sir.

Q. At this place? A. Yes, sir. 40

Q. How long had you been out working at the

time you stopped your train there at this point to let the express go by? A. I got out there somewheres around eight o'clock, at Port Morris.

Q. But I mean— A. Then I came back somewhere around eleven o'clock, when the man was struck.

Q. How long had you been working these men?
10 From eight to eleven? A. Yes, sir; up till the time of the accident.

Q. What was the time of the accident? It was nine something wasn't it? The accident was around nine-thirty, wasn't it? A. I guess it was later than that.

Q. Do you know how many loads of snow you had got? A. Down there?

Q. No, how many altogether that day. A. We didn't get any down there that day at all. We
20 worked above in the yards.

Q. Yes; but how many had you got? You dumped some loads, didn't you? A. They were loading the cars back in the yards.

Q. Supposing this accident hadn't happened, where were you going to take this train after the express train had passed by? A. Back in the yards.

Q. To get more snow? A. Yes.

Q. And take it out and dump it? A. Yes.

30 Q. What is this yard you spoke of? Is that a freight yard? A. Port Morris yard; yes, sir.

Q. Where they switch? A. That is where the freight trains are made up.

Q. And that is where the roundhouse is? A. Yes, sir.

Q. And you were clearing the snow from that yard? A. Yes, sir.

Mr. Simpson: I think that is all.

40 The Court: Cross examine.

CROSS EXAMINATION BY MR. STALLMAN:

Q. Mr. Simcox, you say this accident happened at Chester Junction? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. What were you doing at Chester Junction? A. The cars were fetched down there—the train was pushed down on the road as far as Lake Hopatcong station to leave a train pass—a coal train, the way I understood it, and then this coal train went past, and then we had other orders —the conductor, of course, got the orders to go down— 10

MR. SIMPSON: I object.

Q. Not what some other trains were doing, but what were you doing? What were your men doing at Chester Junction? A. Wasn't doing anything at all; just standing on the cars waiting till the cars went back in the yard again; no work done there at all. 20

Q. Was your train empty or did it have snow in it? A. I don't know whether the last cars had any snow in it or not; I couldn't say. I was at the caboose and I counldn't tell whether there was any snow in the last cars or not.

Q. Were there any gondola cars near where you were? A. Yes, sir; next car to me. 30

Q. Do you know what men were working in that first gondola car? A. There were some from all over—paint shop, and carpenter shop.

Q. Well, were any of your men there? A. There were some of my men there; yes, sir.

Q. Did you know William Ambrecht? A. Yes, sir.

Q. Did you know what end of the train he was working on? A. When they came down he was in the first car. 40

Q. First car near the caboose? A. That was when we got back to Port—Lake Hopatcong station. He was next to the caboose; he was on the platform; and then I told them all to stay on, don't get off.

MR. SIMPSON: I object to the statement. I haven't asked him anything about—

10 THE COURT: Read the last two questions.

Q. (Repeated by the stenographer.) Did you know what end of the train he was working on? A. When they came down he was in the first car.

Q. (Repeated by the stenographer.) First car near the caboose? A. That was when we got back to Port—Lake Hopatcong station. He was next to the caboose; he was on the platform; and then I told them all to stay on, don't get off.

20 THE COURT: Is that what you mean?

THE WITNESS: Back near Lake Hopatcong station. Then we pulled down to Chester Junction, and what he went and got on I don't know. He might have gone back further.

Q. Now, where did you dump the snow? A. That was back in the Port Morris yards.

Q. Do you know whether or not any more snow was taken on on the way to Chester Junc-
30 tion, or before you got to Chester Junction? A. No, sir; not after we left the yards; no snow on at all.

Q. Now, before you got to Chester Junction what was the last stop that you made? A. Port Morris—at Lake Hopatcong station; we stopped there and then went down to Chester Junction, on the siding.

Q. Do you know what the stop at Lake Hopatcong was for? A. That was for to leave a train
40 pass; some kind of a coal train.

Q. Between Port Morris and Chester Junction had you unloaded any snow? A. No, sir; not after we left the yards; unloaded no snow at all; were just on the cars.

Q. What is that? A. The men were just on the cars only; there was no snow taken off at all going down, after we left the yards.

Q. Now, so far as your personal recollection serves you, do you know whether or not there was snow on the cars on the way from Port Morris to Chester Junction? A. I didn't notice any; whether there was any in the back cars or not, there was none in the front cars next to me, where I was standing. 10

Q. Did you supervise any unloading of snow? A. No, sir.

Q. At Port Morris? A. No, sir; they were back in the Port Morris yards and the orders were to dump—throw it over the bank. Some of my men was just by me. 20

Q. Maybe you call it dumping, and we call it unloading. A. They shoveled it over the embankment.

Q. Did they do that before they started for Chester Junction? A. Yes, sir.

Q. Do you know how long it took to run from Port Morris to Chester Junction? A. No, sir.

Q. Do you know how long you had been at Chester Junction before the express train came along? A. Very few minutes. 30

Mr. Stallman: I guess that is all.

Re-Direct Examination by Mr. Simpson:

Q. What was the purpose of the movement from the Port Morris yard of your train to the Chester Junction? A. Down to the junction?

Q. Yes; what was the purpose of that move- 40

ment? A. Well, so far as I understood they were to come down and go up on the other side of the yard.

Q. The other side of the same yard? A. Yes, sir.

Q. That is, you came down to the Junction, waited there until the express pulled by, and
10 then came back to the other side of the Port Morris Yard? A. Whatever orders the conductor had to go down to the yard, to go on the other side of the yards, down on the freight house—

Q. This was part of a movement then to go back on the other side of the yard? A. Yes, sir; then they had orders to go down to—

Mr. Simpson: That is all.

Mr. Stallman: That is all.

20

Witness Excused.

Pietro Abatta, a witness sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Abatta? A. 505 Jefferson Street, Hoboken.

30 Q. Were you in this snow-shoveling gang on the 17th of December, 1915? A. Yes, sir.

Q. What were you doing? What was the work of the gang? A. We reached Port Morris and then we loaded cars with snow, and then went to dump that snow at "Dover" in the same yard.

Q. Then what did you do after that? A. Then we went to another station, and at the first station I got out of my car because it was open and it was raining at the time; and then I went to
40 the covered car, and then the train started to go to the station where this accident happened.

Q. Go on. Describe what you saw, what you know. A. And then when the train reached there it stopped again, and people who were at the time in the uncovered cars came to the covered cars, because it was raining at the time; and while they were going from one car to another—

Q. Go ahead. A. Then the train came and caught them. Some were killed. 10

Q. You were in the covered car all the time, were you? A. When this thing happened I was in the covered car.

Q. You didn't go into the covered car at the place of the accident? A. No, sir; at the first station.

Q. Now, did you hear any whistle before this train came? A. I heard a whistle, but there many cars moving, maneuvring at the time.

Q. Well, what did you do when you went out? 20 What called your attention to the accident? A. The train passed and I went to see, because there were a lot of my countrymen there.

Q. Well, what did you see? A. I saw the people were killed.

Q. Did you see this German called Ambrecht killed?

> Mr. Stallman: I object to that. The witness has already said he was in the coach 30 at the time.
>
> Mr. Simpson: Well, he went out and saw the dead men.
>
> (Question withdrawn.)

Q. When you went out did you see these dead men there? A. Yes, I saw them on the track, all in pieces.

Q. And had you known any German working in the gang before the accident? A. Yes; he was 40 working with me at Pier 9.

Q. Did you see him when you went out? A. But I didn't see him in the morning.

Q. Did you see him when you went out after the accident you saw the dead men lying on the tracks? A. Yes; he was on the track, but the only thing could be seen was the head and mustache.

10 Q. Did you see this train that struck these men as it passed your car? A. I did not see at the time the train killed these people, but after—

Q. I did not ask you that. Did you see it as it passed your coach? A. Yes.

Q. Was it going fast or slow? A. Very fast.

Q. Where was the train when you went out afterwards? A. It was about at the third station; I don't know what they call that station.

Q. Well, how far away from your coach was 20 this train standing after it had done all this damage? A. About ten paces.

Q. Ten paces.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Stallman:

Q. Where was the snow train when you went into the coach? A. The uncovered cars were ahead.

30 Q. What snow car did you work in? A. Who can remember that? It is a year now.

Q. Did you go into the coach—did you get off of the snow car and go into the coach at the same place where this accident happened? A. No, sir; on the first station.

Q. You say that you heard whistling at the place where the accident happened, didn't you? A. There were a lot of engines there; I do not know which one whistled.

40

Pietro Abatta—Cross.

Q. Well, these whistles that you heard, were they loud whistles? A. The usual whistle of a train.

Q. How long before the accident happened did you hear that whistle? A. That moment; very near by. At that moment; very near by.

Q. Did you work on the snow train the day before? A. Yes, sir; two days. 10

Q. During those two days did you see trains carrying freight and passengers going up and down the railroad there? A. At the first day we went down to Port Morris there were no passengers there; we were at a place where there were all engines there.

Q. On the second day did you work in any place where passenger trains were going up and down? A. That was the first train that I saw that day. 20

Q. What time of the day was it that this accident happened? A. Half past ten or a quarter after eleven; I am not sure. I don't remember.

Mr. Simpson: That is all.

Mr. Stallman: That is all.

Witness Excused.

30

40

Augusta Ambrecht, sworn on behalf of the plaintiff, testifies as follows:

Direct Examination by Mr. Simpson:

Q. Where do you live, Mrs. Ambrecht? A. 75 Bloomfield Street, Hoboken.

Q. And this was your husband that was working for the D. L. & W., on the 17th of December? A. Yes, sir.

10

Q. And what was his age on the 17th of December, 1915? A. 48 years old.

Q. And how old are you? A. 42.

Q. Did he leave any children? A. Two by his marriage, and two I have from my first marriage.

Q. No, I mean his children. A. Two children.

Q. How old are they? A. Five and three.

Q. What are their names? A. William Ambrecht and Louis Ambrecht.

20

Q. How much money did he earn before he was killed? A. Well, about $65.00 or $70.00 a month.

Q. A month? A. That was when he was on the railroad; but before, of course, he worked more, when he was down on the docks.

Q. How much did he earn on the docks? A. Well, about twenty or twenty-five dollars.

Q. A week? A. A week.

Q. He was a longshoreman? A. On Pier 9, on the D. L. & W. Railroad.

30

Q. And he was shoveling snow? A. Yes, sir.

Q. How much was he earning then, at the time he was killed at the snow-shoveling? A. About sixty-five dollars a month.

Q. And how long had he been working at that? A. He worked there since June.

Q. On the pier, you mean? A. On the pier; yes.

Q. Or both? A. It was the second day he was at that same place working shoveling snow.

40

Q. How much did he make on the pier, $65.00? A. $65.00.

Q. And longshoring you say he made seventy-five? A. Yes.

Q. What was the reason he was not making more? A. Why, the ships were laid up on account of the war.

10

MR. STALLMAN: I—

MR. SIMPSON: I have a perfect right to show.

THE COURT: There isn't any objection.

Q. He worked at Hoboken as longshoreman? A. Yes; he worked on the Hamburg line.

Q. When was the last time you saw him alive? A. On the morning of the 17th of December.

Q. What did he do with his money? Did he give it to you? A. Certainly; every cent that he earned.

20

Q. And did you run the house and take care of the children? A. Yes, sir.

Q. And out of that money, of course, you paid for his clothes, didn't you? A. Yes, sir.

Q. He ate in the house? A. Yes, sir.

Q. You paid the rent and bought the food? A. Yes, sir.

Q. And whatever clothes he wanted or shoes, he got out of that money that he gave you? A. Yes, sir.

30

Q. He had no other income? A. No.

Q. Can you tell how much it would cost to feed him? A. Well, about four dollars a week.

Q. That he would eat in food? A. Yes.

Q. What was his biggest expense, for shoes or for clothes? A. Well, mostly for shoes.

Q. He used a great many shoes in his work? A. Yes.

40

Q. Could you tell how much his expenses were

ı year for shoes? A. That I don't know just exactly.

Q. You don't know that. Can you tell how much you had to spend for clothes for him? A. Well, not very much; mostly on working clothes.

Q. On working clothes. Could you tell how many suits of working clothes he would get a
10 year? A. Well, I don't know exactly.

Q. Did he use overalls? A. Yes, sir.

Q. Then he had a good suit, I suppose, also? A. Yes.

Q. And how was he as to work? A. He was a steady man. He worked every day ever since he worked on the Lackawanna Railroad; not a day missing, either Sunday or a work-day.

Q. When was the last time you say you saw him alive? A. In the morning, 17th of December.

20 Q. When did you next see him? A. I didn't see him any more at all.

Q. Where was the funeral, from your house? A. From Volk's undertaking place.

Q. You didn't see the remains? A. No, sir.

Cross Examination by Mr. Stallman:

Q. Mrs. Ambrecht, when did your husband stop working on the German docks? A. When he started working there, do you mean, or stopped?
30 Q. What was the last work he did? A. I couldn't just exactly say when the last ship was laid up on the Hamburg-American Line.

Q. He was out of work a good while? A. Well, he worked; but, of course, that time he didn't work so much.

Q. He didn't go to work for the Lackawanna Railroad until June? A. June.

Q. And before that was he out of work a good
40 deal? A. No; he was not exactly out of work; he helped on the ice wagon a little work around.

Q. He was not able to earn as much as he was on the dock, was he? A. No; not on the dock.

Q. Now you say that he got sixty-five or seventy dollars a month. Did you see his pay? A. Why, he brought his pay home every two weeks.

Q. How often did he bring his pay? A. Every two weeks. 10

Q. How much was it every two weeks? A. About thirty-five or thirty-four dollars.

Q. And he had been working on the dock about six months before he was killed; is that right? A. When the last ship came in—

Q. No, I mean on the Lackawanna dock, on the pier. A. On the Lackawanna he started to work in June.

Q. He worked there about six months? A. Yes.

Q. Did Mr. Ambrecht smoke? A. Yes, tobacco 20 —well, he smoked a pipe.

Q. Did he belong to any organization? A. He belonged to the longshoremen's association.

Q. Longshoremen's association? A. To the union, yes.

Q. Had to pay some dues there? A. Yes; he paid the dues there, certainly.

Q. Did you give him any certain amount per week for his use? A. No; he needed very little money by himself, except for the shaving and for 30 the smoking.

Q. You didn't give him any regular allowance? A. No.

Mr. Stallman: That is all.

Mr. Simpson: That is all, Mrs, Ambrecht.

Witness Excused.

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MR. SIMPSON: That is the case.

THE COURT: This motion to strike out, Mr. Simpson, as I understand it, (I do not know whether you understood it or not) is a motion to strike out that portion of the witness's direct testimony—

MR. SIMPSON: Oh, yes; I have no objec-
10 tion to that as long as the cross—stands.

THE COURT: —where he said the boss told him.

MR. SIMPSON: I have no objection to that. I was objecting in regard to the cross—

THE COURT: That portion of the testimony of Luigi Debiasce where the witness said he was directed by the boss to go into the covered car, it having developed on the cross examination that he did not get that direc-
20 tion from the boss—the defendant moved to strike that out, and it is stricken out.

MOTION TO NON-SUIT.

MR. STALLMAN: We ask to have this case taken from the jury on the ground that the plaintiff has failed to show any negligence as specified in the complaint or otherwise. If he was killed in the manner which the complaint alleges—although there is no direct
30 testimony to show how he was killed or what he was doing, or where he was when he was killed; there does not seem to have been any witness who saw him at the time—but assuming that he was struck by this train "26" while he was walking on the track, that was a risk which was perfectly obvious and which he assumed.

I said that there was no negligence. I would like to add to that that there is no
40 testimony which has been brought out in the

case to show that under the particular circumstances at the time of this accident there was any particular duty belonging to this company which was not performed. The barrenness of the plaintiff's case, and the effect that there were no witnesses produced to testify what he was doing at the time he was killed, only leaves us with the bare assumption that he was probably walking the track. 10

THE COURT: Isn't that sufficient to be substantial, as it stands, to put you to your defense?

MR. STALLMAN: I say if we assume that that is what he was doing. He was not then engaged in the performance of any work. It does not appear that he was walking the track either by invitation or by orders of any of his superiors, and that in walking down the track he was not doing it for his own convenience; possibly he was walking down the track for the reason some of these other witnesses were walking down the track—because it was raining and he didn't want to stay in the open car at that time. 20

On those grounds I ask for a non-suit.

THE COURT: I will decline to non-suit.

MR. STALLMAN: I want to have my objection noted to your Honor's ruling. 30

RECESS TO 2:00 P. M.

40

AFTER RECESS.

DEFENDANT'S CASE.

JOHN T. DRAKE, a witness sworn on behalf of the defendant, testified as follows:

10

DIRECT EXAMINATION BY MR. STALLMAN:

Q. Mr. Drake, what is your business? A. Civil engineer for the Lackawanna Railroad.

Q. Referring to the map which is hanging on the easel, did you make that map? A. Yes, sir.

Q. What does it show? A. It shows the Lackawanna Railroad tracks in the vicinity of Chester Junction, New Jersey.

20

Q. I notice that the map is made in two parts, one on considerably larger scale than the other. What is the scale of the upper map? A. The upper part is scale of ten feet to the inch, and the lower part shows all of the upper part and more on a scale of thirty feet to the inch.

Q. Now, have you indicated, or can you indicate on the smaller scale the section that is embraced in the larger scale? A. I think so. (Witness indicating.) You will find marks on the map in the lower part, indicating the portions which represent the same place as the whole of the upper part.

30

Q. That is between the lead pencil lines? A. Between the lead pencil lines.

Q. Now, is that an accurate representation of the tracks from Chester Junction west for considerable distance? A. Yes, sir.

Q. About how far? A. For about 1,900 feet.

Q. 1,900? A. Yes.

40

MR. STALLMAN: I want to offer the map. Any question.

CROSS EXAMINATION ON THE OFFER:

Q. I notice you have something on the map which says "point of curve p. c. 55 curve" What does that mean? A. That is the easterly end of the curve.

Q. Well, you have not drawn the curve on the map. A. Yes.

Q. Where is it? A. From that point it is curved, and from this point. 10

Q. Yes, but you haven't curved it. A. Yes; I have.

Q. Well, where is the curve from here? Point out to me. A. Here it is.

Q. Well, that is straight. Isn't that a straight line here to here? A. No.

Q. This is not straight? A. No.

Q. You say that from here to here is not a straight line? A. Yes. 20

Q. There is a curve there? A. Yes, sir.

MR. SIMPSON: I think that is all.

RE-DIRECT EXAMINATION BY MR. STALLMAN:

Q. Does the curve also show on the other map? A. Yes.

Q. Same map? A. Yes, sir.

Q. Just show the jury where the curve on the smaller map is shown on the larger map. A. This is the point of curve on the large map, and this is the point of curve on the smaller scale, same place. 30

Q. Did you show the curve on the smaller scale also? A. Yes, sir.

MR. STALLMAN: I offer the map.

MR. SIMPSON: I have no objection to the map—

40

By Mr. Simpson:

Q. How much curve is there there? A. 55-minute curve.

Q. What does that mean? A. That means a curvature of 55 minutes in 100 feet.

Q. 55 minutes in 100 feet? A. Yes, sir.

Q. And what distance and space does the curve
10 take in? From what point to what point?

The Court: In other words, the total length of the curve.

Q. Yes. A. Well, it is a short curve; the westerly end is just off the margin of the map.

Mr. Simpson: Read the question.

Q. (Repeated by the stenographer.) And what distance and space does the curve take in? From
20 what point to what point?

Q. In feet. How many feet is the curve? A. The curve is about 1000 feet long.

Q. The curve is 1000 feet long. Is that part of the curve down there that I see shooting off, looks like a switch, 'way down at the other end where you made a pencil mark? A. Oh, no; that is another thing altogether.

Q. Now, is this map a correct representation of how these tracks were on the 17th of Decem-
30 ber, 1915? A. Yes.

Q. Were you there at that time? A. Not on that day; no, sir.

Q. When did you make that map? A. Last May.

Q. How do you know that this shows the correct condition of December 17th, 1915? A. Why, I have made surveys there many times in the past.

Q. In how long a period of time? A. Various times in the last ten or fifteen years.
40

Q. And haven't the D. L. & W. changed or improved their tracks there at all? A. Since fifteen years, yes. The two outer tracks were added. I was on the ground daily, I suppose, when they were built.

Q. Since December, 1915, have they made no change at all? A. No.

10

(Map received in evidence and marked Exhibit D-1.)

WITNESS EXCUSED.

GEORGE WELCH, a witness sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. STALLMAN:

20

Q. Where do you live, Mr. Welch? A. Boonton.

Q. What is your business? A. Conductor D. L. & W.

Q. On the 17th of December what were you engaged in doing? A. I was engaged in clearing snow from the tracks on the snow train.

Q. What was your work? A. My work was conductor on the train.

Q. You were the conductor of the snow train? A. Yes, sir.

30

Q. Work train? A. Yes, sir.

Q. What movements did you make that day, and what work did you do? A. We were clearing snow out of the Port Morris yard on the west end.

Q. And where is that with reference to Chester Junction, the place shown on this map? A. Well, I should judge it is about five miles from where we were clearing snow.

40

Q. Five miles west of this place? A. East—east of it.

Q. That is, Chester Junction is five miles east — A. East of Port Morris.

Q. And five miles west of Chester Junction? Now, on the day in question how many trains of snow did you handle? A. Well, I think we load-
10 ed and unloaded four or five trains.

Q. Well, do you remember the accident that happened? A. Yes, sir.

Q. How many before the accident happened did you handle? A. Three or four trains.

Q. Yes. Now, what was the last unloading that you did before the accident occurred? A. We unloaded seven cars on the east-bound main track on the west end of the Port Morris yard.

Q. On the east-bound main at the west end of
20 Port Morris yard? A. Yes.

Q. And that was snow that you had picked up somewhere? A. In the yard; yes, sir. There is a bank there and we came on the main track to throw the snow down the bank.

Q. On the east-bound track. And how was your engine headed? A. My engine was headed west, the same way it was headed when we went from Hoboken up.

Q. Now, there were seven gondolas? A. Yes,
30 sir.

Q. What else did you have on your train? A. We had a caboose and two or three coaches.

Q. And an engine? A. And an engine.

Q. Now, starting from the engnie, how was this train made up? A. Coaches next to the engine, then the caboose, then these gondolas—empty gondolas.

Q. Now, what did you unload at Port Morris? A. Unloaded snow.
40

Q. Well, how much? A. We unloaded those cars; five or seven cars.

Q. Then what did you do? A. Then I had orders to go on the other end of Port Morris yard, on the east end, and we went right—started down the main track, the east-bound main track.

Q. Backing up? A. Backing up.

Q. Then where did you go? A. And when I got down there, why, I couldn't get in the east end of the Port Morris yard on account of a freight train in there, and this passenger train behind the freight train; so I was on that track—No. 4 track they call it. The only way I could do to get out of this freight train's way was to go on to Chester Junction and cross over there and come back on the west-bound track to Port Morris.

10

Q. That was a freight train. Now, how about any passenger trains about that time? A. She was due there right behind this freight train.

20

Q. I see. Then, you say, the only thing you could do was to go to Chester Junction? A. Yes, sir.

Q. What was your purpose in going to Chester Junction? A. To get out of the way of this passenger train—the freight train.

Q. Now, how far is Chester Junction from the east end of Port Morris yard? A. About four miles; I should judge.

30

Q. Yes. Now, did you do any snow-clearing work of any kind at Chester Junction? A. No, sir; no, sir.

Q. Unloading? A. No, sir.

Q. When you got to Chester Junction where were the snow-shovelers? A. In these empty cars that we just unloaded at Port Morris.

Q. On the way down from Port Morris to Chester Junction what part of the train were you on? A. I stood on the rear end of the caboose.

40

Q. That rear end, is that the direction in which the train was going? A. Yes, sir; on the east end.

Q. You were backing up, I understood you to say? A. Yes, sir.

Q. That is, you were on the side nearest to the gondolas? A. Yes, sir.

10 Q. What were you doing? A. I was watching for the signals going down there, to see they were all right.

Q. And what track were you on? A. Track 4.

Q. Which track is that? A. That is a slow track, for slow freights.

Q. Now, there are four of them? A. Yes.

Q. Was it one of the inside ones or outside ones? A. Outside track.

Q. Outside track. And what is the track next 20 to that? A. That is the east-bound main track "2".

Q. East-bound main track? A. Track "2".

Q. And what is the next one to that? A. Track "1"; that is the west-bound main track.

Q. And then are there any more tracks? A. There is one slow west-bound track "3".

Q. So "2" and "4" are running in one direction and "1" and "3" the other way? Is that the way you figure it? A. Yes, sir.

30 Q. Now, as you are going down these four miles from Port Morris to Chester Junction did you see the snow-shovelers? A. Yes, sir; I could see them; they were in the cars.

Q. When you got to Chester Junction did your train come to a stop there? A. Yes, sir.

Q. Then what did you do? A. Then I got right off and started down to the tower to instruct the towerman what we wanted to do.

40 Q. Yes. Now, in order to get to the tower did

you have to pass these gondola cars? A. Yes, sir.

Q. And what were the men doing? A. Standing in them.

Q. You heard of the accident, I suppose? A. Yes, sir.

Q. Did you see it? A. No, sir.

Q. What was the first you knew of the coming of the express train, east-bound train? A. Why, I heard our engineer blowing his whistle; I was very near to the tower at that time, and I turned around and I saw "26" coming. 10

Q. Do you know whether "26" blew any whistle? A. I think she blew one long whistle.

Q. By that time you were east of your train, you say? A. Yes; more than a train-length east of it.

Q. Do you know whether there was any unloading done at Chester Junction? A. None. 20

Q. You don't know? A. None.

Q. There was none? A. None.

Q. Did you do any unloading in the east end of Port Morris yard? A. No, sir; the cars were all empty.

Q. Did you know, Mr. Welch, where you were going to do your next work, next snow work? A. Yes, sir.

Q. Where? A. East end of Port Morris yard. 30

Q. That was four miles west of Chester Junction? A. Yes, sir.

Mr. Stallman: Cross examine.

Cross Examination by Mr. Simpson:

Q. You were the conductor of this train, were you? That is, you were in charge of this snow train? A. Yes, sir.

Q. And what was the purpose of your train being at this junction, standing? Why were you 40

there? A. We went down there to let this train by, passenger train.

Q. Was that the only way you could get to the other side of Port Morris yard that you wanted to go to? A. No, sir.

Q. Well, then, why did you go that way? A. On account of this freight train and passenger
10 train due there; that I couldn't cross over where I was.

Q. Then you couldn't go any other way, could you, but the way you were going, on account of the freight and the passenger? A. At that time; yes, sir.

Q. I am talking about that time, not about the Sunday before it. Now, you had a combination car on there, didn't you? A coach that the men used for their clothes and their lunch and things
20 of that kind? A. No, sir.

Q. Didn't they have a car on there, a coach of any kind, that the men used? A. A coach; a coach, yes.

Q. Well, what was it used for in a snow train? A. For the men to be in.

Q. For what purpose? A. To ride in.

Q. To ride from point to point in? A. Yes.

Q. How many men were in it, in that coach, when you stopped there to let this express go by?
30 A. I don't know; I wasn't in the coaches at all.

Q. Well, it was your train, though; you ought to know what is the matter with your train. Don't you know who was in the coach or how many were in the coach? A. No, sir.

Q. Don't you know how many were in the open cars and how many were in the coach? A. No, sir.

Q. Don't know anything about that? A. I didn't have charge of those men. Those men were not
40 under my jurisdiction.

Q. Well, whether you did or not, do you know anything about it? A. I knew there were some men in the cars, both cars; but I don't know how many.

Q. Of the snow-shovelers? A. Yes, sir.

Q. And you don't know how many were outside in the open cars? A. No, sir; I don't.

Q. How long was your car standing before you started to the tower? A. It was not standing for a minute. Just as soon as it stopped I started. 10

Q. Did you know the express was coming along past your train? A. I knew she was due.

Q. Did you know she was to come and pass your train? A. Yes.

Q. Did you know she was late? A. Yes, sir.

Q. How much was she late? A. It must have been ten or fifteen minutes late.

Q. And when she stopped you walked along—got down off the caboose and walked along the track alongside of these gondolas, where you saw these snow-shovelers on your way towards the tower, is that a fact? A. Yes, sir. 20

Q. And as you walked to the tower did you walk towards "26" or away from the direction she had come? A. Away from it.

Q. Away from it? A. Yes, sir.

Q. So that you were walking away from your train and "26" was approaching her on the other side? A. Yes; I was on the west-bound— 30

Q. And as you passed the men on the gondolas you knew "26" was coming along, and you knew she was late; didn't you? A. Yes, sir.

Q. You then went on to the tower? A. Yes, sir.

Q. Have you told us everything you said and did up to that time— A. Yes, sir.

Q. —to everybody? A. Yes, sir.

Q. Then you heard the whistle of your locomotive blow; is that right? A. That is right. 40

Q. You turned around and saw "26" coming? A. Yes, sir.

Q. Was she coming fast? A. Well, when she went by me she was stopping.

Q. Well, when you saw her first, when you turned and saw her. Was she coming fast? A. Fast she was.

10 Q. You continued on your way, did you; towards the tower? A. No; I stopped.

Q. You didn't go back to your train at all, did you? A. No, sir.

Q. Didn't do anything about the men on your train; you simply stopped there? A. Yes, sir.

Q. Did you see the train as it ploughed through this crowd of men—"26"? A. I did not.

Q. Why not? A. It was too far away; it was on the curve.

20 Q. Well, you saw it coming. How far away was she when she hit all these men? A. I was two train-lengths away.

Q. How much would that be in feet? A. A thousand feet, I should think.

Q. A thousand feet; and it was ten o'clock in the morning, wasn't it, or eleven o'clock? It wsa broad daylight? A. Yes.

Q. And you could see your own snow train, couldn't you, a thousand feet away? You saw 30 your snow train from where you stood, didn't you, a thousand feet away from it? A. Yes.

Q. Well, why didn't you see this train plough through these crowd of men? A. Well, I didn't.

Q. And you were looking right at your train, at your snow train? A. I turned around and looked; yes.

Q. And looked at "26"? A. I looked back; yes.

Q. And you didn't see her go through this crowd of men, did you? A. No, sir.

40 Q. What did you do then? Did you go back? A. No, sir.

Q. Where did you go? A. I stopped and stayed there.

Q. Didn't you go back to help these men that were hurt? A. No, sir.

Q. Why not? A. Why didn't I go back?

Q. Yes. A. Because there were other men to do it.

Q. I know, but you were conductor of that train, weren't you? A. I was; yes. 10

Q. You had the orders; the train was going under your orders, wasn't she? A. Yes, sir.

Q. You had the instructions, didn't you? A. Yes, sir; but—

Q. You knew the express was late? A. Yes, sir.

Q. And you saw her coming along and you didn't go back to help anybody? Did you ever go back to your train from that day to this? A. Oh, yes. 20

Q. When? When did you go back? A. (Witness laughs.)

Q. What is funny about it? A. I went back when I got ready to go.

Q. Well, when? How long did it take you to get ready to go back? A. Why, after "26" had gone and these foremen had gone out and done their duty, took care of the men, and we got a chance to cross over, then we went back. I should judge we laid there half an hour. 30

Q. What did you see when you went back? Did you see any dead men? A. (No answer.)

Q. What makes you hesitate so much? A. Dead men were laying all along by me.

Q. All along by you? A. Yes, sir.

Q. Yet you didn't see any of the accident? A. That is all I saw; what happened after.

Q. Now, did you have any conversation with your engineer? Did you tell your engineer that 40

the express was coming along on that track and that she was late? A. I wasn't anywhere near my engineer. All I told him when we left Port Morris, what we were going to do; that we had to go to Chester Junction and cross over.

Q. But you didn't go back after your train stopped? You didn't go up to the engineer and
10 say " '26' is late; she is coming by here; look out", things of that kind? A. No, sir; I don't remember it; had my other duty.

Q. What was your other duty? A. Inform the towerman what move we wanted to make there.

Q. How he should put you on—what tracks he should put you on? A. Yes, sir; yes, sir.

Q. Now, that was all you were doing, just in charge of this snow train that day? A. That is all.

20 Q. And that is all the men were doing on the snow train—collecting snow, putting it on and taking it away; they had no other duty? A. No.

Q. And when they stayed there it was part of your movement back to the yard, wasn't it? A. Yes, sir.

Q. Although at the time you say they were not actually shoveling snow? A. No, sir.

Q. Where was "26" when you turned around? How near to the snow train? A. I didn't see her
30 at all then; it was above the curve.

Q. Oh, she was beyond the other side of the curve: you couldn't see her? A. No, sir; no, sir.

Q. When you heard your engineer blow his whistle you looked and saw nothing, because "26" was on the other side of the curve? A That is it, above me.

Q. I see. Well, how soon after did she come in sight? A. Well, a very short time; they say she was running sixty miles an hour; I don't
40 know; it must have been half a minute, maybe.

Q. How near was your snow train stopped to the curve? How far away from the curve was it? A. She was right on the curve, about the middle of the curve, I should suppose.

Q. That is, your train was about the middle of the curve? A. Yes, sir.

Q. Part of it was around the curve, and the other part was on what? What would you call it, east or west of the curve? A. East of the curve. 10

Q. East of the curve? A. East of the curve.

Mr. Simpson: That is all.
Mr. Stallman: That is all.

Witness Excused.

Carl E. Gosline, a witness sworn on behalf of the defendant, testified as follows: 20

Direct Examination by Mr. Stallman:

Q. Where do you live, Mr. Gosline? A. Boonton.

Q. What is your business? A. Inspector for the Lackawanna.

Q. What were you doing on December 17th, 1915? A. I was in charge of the general work or handling snow at Port Morris—general charge. 30

Q. Were you there the day before? A. No, sir.

Q. This is the first day that you had charge of the snow? A. Yes, sir.

Q. What movements did you make on the day of this accident? A. We came—went up in the morning, and went directly to the west end of the yard, west end of Port Morris yard, and after unloading part of the men at the east end of the yard the train was—the train crew and engine 40

picked up the cars which had previously been loaded and started to get them out on the east-bound main, to unload them.

Q. Yes. A. After they were unloaded I gave the Conductor, Welch, an order to go to the east end of the yard, to get the empties along there so that we could proceed with loading snow at
10 that point, and when we got down to Hopatcong, which—which is Port Morris junction—

Q. Just a minute. Hopatcong is the east end of the Port Morris yard; that is correct geography, isn't it? A. Just beyond it, yes; east of it. We got down there and conductor Welch told me he had instructions to go to Chester Junction to clear "26" and a freight train and a passenger train; to cross over and come into the yard from the westbound track, and at Hopatcong I got
20 off of the train and went back to Port Morris tower.

Q. Were you on the train when it went to Chester Junction? A. No, sir; I was on it just before it left for Chester Junction.

Q. Oh, you didn't go down to Chester Junction? A. No, sir.

Q. I see. Do you know if any instructions were given relative to getting off the train or any other movement the men were to make before the
30 train went to Chester Junction? A. While standing at Hopatcong some of the men got off on the platform at the station there, and I cautioned them to get back on the train—

Mr. Simpson: I object to that unless he can show this was one of the men. What he said to somebody else—here are some Italians, Swedes and other men.

The Court: Just what is the question,
40 Mr. Victory?

Q. (Repeated by the stenographer.) Do you know if any instructions were given relative to getting off the train or any other movement the men were to make before the train went to Chester Junction? A. (Repeated by the stenographer.) While standing at Hopatcong some of the men got off on the platform at the station there, and I cautioned them to get back on the train— 10

Q. Had you finished your answer, Mr. Gosline? A. Yes, sir.

Q. Did you know William Ambrecht? A. No, sir.

Q. Did you know him when you saw him? A. No, sir.

Q. When the train left Lake Hopatcong for Chester Junction did you see where the men were, what part of the train they were on? A. Why, part of the men—I noticed stopping—when they stopped at Chester Junction—or Hopatcong— that part of the men went back into the coaches, while the others were out in the gondolas, as they had received instructions to stay there and we were going to shovel snow at once, and expected to get right back. 20

Q. When you say received instructions to stay there, whom did they get the instructions from? A. I had given the instructions to the foremen who were right on the caboose, standing in front of the caboose when some of these men got off the train, see? to Hopatcong. I cautioned them to tell those men to get back on the train again, and told the foremen to keep the men right in the cars as we were going back to work at once. 30

Q. Did they go back in the cars? A. Yes, sir; the men I cautioned, they got right back on.

Q. How many cars were there on the train at that time? Those gondolas? A. I think there were seven. 40

Q. Do you remember what part of the train it was that these men got back into? A. I think it was the second and third car—no, the first and second car from the caboose, east of the caboose.

Mr. Stallman: Cross examine.

Cross Examination by Mr. Simpson:

10

Q. You said you told these men to go back on the car; that they were going to shovel snow. They were not going to shovel snow; were they? A. We expected them to, yes.

Q. They went down to this junction to let two trains go by? A. I don't know anything about that.

Q. You don't know anything about that? A. No.

20

Q. But you were in charge of the work? A. Yes, sir.

Q. Who had charge of the safety of the men while they were doing this work doing this work, or while they were on duty? A. The foremen in charge of their men.

Q. Well, of this particular gang, who was the man who had charge of the safety of these men while they were on duty? A. The foreman is responsible for the men.

30

Q. And did you give him a set of definite instructions, or is that left to his judgment? A. That is left partially to his judgment.

Q. As to how he shall protect them? A. Yes, sir.

Mr. Simpson: That is all.

Mr. Stallman: That is all, Mr. Gosline.

Witness Excused.

40

Herbert Simcox, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Stallman:

Q. Now, Mr. Simcox, I think you testified this morning that you were the foreman of the gang of which this man Ambrecht was a member? A. Yes, sir. 10

Q. How many men did you have in your gang? A. 42—41 workmen and one man to assist and help me—assist me in looking after the men, keeping them together.

Q. How many of those men went down to Chester Junction? A. As near as I could tell there were about fifteen of them stayed back in the yard. Mr. Gosline said: "Leave some of them here to go around the roundhouse," which I left 20 with my helper and went over there.

Q. When you got down to Chester Junction—you went to Chester Junction, didn't you? A. Yes, sir.

Q. What part of the train were you on when you got there? A. On the caboose, the end of the caboose, next to the gondola cars.

Q. Next to the gondolas? A. Yes, sir.

Q. Did you issue any order or instructions of any kind with reference to the men getting on or 30 off the cars at that point? A. The conductor told me—he went to get off—

Q. No, no, no; not what the conductor told you; what you did. A. When the conductor went to get off he said this train was due, not to let any of the men off; and I hollered in as loud as I could not to get off, everybody to stay on, and they could hear me when I hollered; they could hear me for three car-lengths, at least. 40

Mr. Simpson: I object to that and ask to have it stricken out.

The Court: How do you know they could hear you?

The Witness: By the way I hollered.

The Court: That is your opinion?

10 The Witness: Yes, sir.

The Court: Oh, well, it may be stricken out.

Q. When was that with reference to the time the conductor left? A. He jumped right off the train and I gave that holler.

Q. Did you do any work at Chester Junction? A. No, sir.

20 Q. Unload any snow? A. No, sir; there was no work to be done there.

Q. Unload any snow? A. No, sir; not at all down there.

Q. Where had you done your last work? A. Back in the yard, Port Morris.

Q. Where were you to do the next work? A. At the lower end—

Q. Our orders were to get the men on the cars and go down to the lower end of the yard; that

30 we had—

Q. Port Morris yard? A. Yes, sir.

Q. After you arrived at Chester Junction, did you see anybody try to leave the train? A. Yes, sir.

Q. Did you know William Ambrecht? A. Yes, sir.

Q. Did you see him get off? A. No, sir; I didn't see him get off.

40 Q. What did you do when you saw the men getting off? A. I jumped down off the caboose

and ran down the track, cleared them off the track, hollered—at the same time hollering to keep on the train, and what was down to get off the track.

Q. Well, now, from the time you got off your caboose, running down the track, how far did you go? A. About the length of three cars, or two cars perhaps. 10

Q. Was anybody on the track? A. Yes, sir.

Q. What did you do to those men? A. Told them to get off as quick as they could; just told them to get off the track, the train was coming; not to get off at all; and I turned and just as I turned I heard a whistle and I turned—and I ran back—and just as I turned I seen the engine, and I ran back the track. Then I thought the men would get out of the way when they saw 20 what was coming. I turned back what was in back of me, and I just got as far as the end of the caboose and pushed two men on the other side of the track, clear out off the track, and three men towards our own train, and then I grabbed by the left hand and got hold of the handle, and the step of the engine struck my left foot.

Q. Cut your foot? A. Broke my foot.

Q. Now, Mr. Simcox, where was your train 30 then with reference to Chester Junction? A. Well, I don't know much about that map, how it is laid out.

Q. Well, were you east or west of Chester Junction? A. I don't exactly know where Chester Junction lays. It is below Lake Hopatcong.

Q. I see. A. I never stopped there before at all; it was the first time.

Q. Now, you say when you jumped off your train you ran about three car-lengths. Tell me 40

whether that was towards the engine or the rear of your train. A. The rear of it.

Q. That was away from your engine? A. Yes, sir.

Q. I see. Well, now, did you say anything on your way down the track? A. Just hollered to the men to say off the track—stay on the cars and
10 get off the track. Some got on and some got off the track—off the track on to the other track, towards the other side.

Q. Did they go back on the train? A. Yes; a lot of them got back on the train.

Q. How long did you continue to holler at that time? A. I just hollered until I heard this whistle, and when I heard the whistle I turned all of a sudden and went back the other way.

20 Q. You went back towards the caboose? A. Went back towards the caboose; yes, sir.

Q. How far back towards the caboose did you get before the train got there? A. I just got to the end of the caboose.

Q. So that you left the caboose and went three car-lengths towards the end of the train and three car-lengths towards the caboose again; is that right? A. I started down to the other end of the train and when I heard the whistle I turned
30 and came back again. There were other men there at the same time; other foremen.

Q. What I am trying to get at is, did you travel six car-lengths from the time that you first left the caboose until you got back to it? A. I didn't go the full length—you couldn't say it was three car-lengths. As near as I could say, about two car—or three car-lengths. Then I turned and came back again, and I was just at the end of the caboose.

40 Q. Did you do any hollering on your way back? A. Yes, sir; both ways.

Q. You say you heard a whistle. Do you know which whistle it was? A. No, sir; I could tell you. I couldn't say which whistle it was.

Q. You don't know whether it was from your engine or some other engine? A. No, sir; I couldn't say.

Q. Did you hear the whistle before you saw the train? A. No, sir; I heard the whistle and I turned and I seen the train coming. 10

Q. Now, did you say whether or not you gave any instructions to the men before you got off the caboose? A. There wasn't any instructions given to get off the cars at all at Chester Junction.

Q. No; I say did you give any instructions before you got off the caboose? A. To get on—to get off the train?

Q. To stay on or get off? A. To stay on, yes, sir; before I got off. 20

Q. And it was after you got off the caboose that you ran down the track hollering the instructions; is that it? A. Yes, sir; yes, sir.

Mr. Stallman: You may cross examine, Mr. Simpson.

Cross Examination by Mr. Simpson:

Q. When was the first that you knew that there was an express train which was late, which was going to pass your train? A. The conductor told me. 30

Q. When was that? A. When I went down from Port Morris to Lake Hopatcong station. He said he was going down; that the train was late.

Q. You didn't know it when you left Lake Hopatcong? A. He just told me at the time when he left there.

Q. Then you knew it before you got to this junction, did you? A. Yes, sir. 40

Q. All you did when the train got to the junction—you stayed on your caboose and hollered; that is all you did? A. Yes, sir; I couldn't—

Q. Is that all you did? Don't start to explain. A. That is all I could do.

Q. Is that all you did? A. That is all I could do; isn't it?

10 THE COURT: Answer the question.

Q. I want to know when you first knew there was an express train that was late, which was going to pass your train. A. It was at Lake Hopatcong.

Q. Was that before you made your stop at Chester Junction? A. Yes.

Q. And you didn't do anything until your train stopped at Chester Junction? A. Yes, sir.

20 Q. That is when you did what you did? A. Yes, sir.

Q. At Hopatcong you did nothing? A. No, sir.

Q. But when you got to Chester Junction you stood on the steps of your caboose and hollered? A. Yes, sir.

Q. And that is all you did? A. Yes, sir.

Q. How many cars were there behind this caboose? A. Towards the engine.

30 Q. No, the direction you hollered.

THE COURT: You mean gondolas?

THE WITNESS: The gondola cars?

Q. Yes. A. I don't know exactly how many we had on. We were supposed to have ten on at first, and we left some up in the yard. How many we had on I don't know.

Q. How many were there? If you don't know, say so. A. I don't know.

40 Q. Were there more than five? A. There were more than that from the length of it.

Q. How many men were in the gondola car next to the caboose? A. Next to the caboose?

Q. Yes. A. Well, as near as I could say, there were about twenty men.

Q. How many in the next gondola car to that? A. I couldn't say.

Q. How many in the third from the caboose? A. They were scattered all along— 10

Q. How many in the third gondola from the caboose? A. I don't know.

Q. How many in the fourth? A. I don't know.

Q. In the fifth? A. I don't know.

Q. In the sixth? In the seventh? You don't know? A. I don't know exactly, how many men.

Q. You know how many men you had in the gondola or caboose? A. No.

Q. And you were charged with the safety of these men? A. I had forty-two with me and there were other men with their men. 20

Q. And you were charged with the safety of these men? A. Forty-two men.

Q. And you were charged with the safety of these men? A. Forty-two men only.

Q. Well, forty-two men. How many men do you want? A. I was supposed to take care of my own men.

Q. You had forty-two men under you and you don't know whether any of them was in the gondola cars? A. They were scattered all along; some were in the caboose and some in the gondolas. 30

Q. You don't know whether any of them were in the gondolas when you stopped at Port Morris? A. No.

Q. You knew it was a dangerous situation? A. Yes.

Q. You knew it was raining? A. Yes. 40

Q. And you knew it was likely that the men would try to get into the coach out of the rain? A. Yes, sir.

Q. And all you did was stand and holler. Now, when did you get off the caboose? A. When the train came to a standstill.

Q. You got off, did you? A. Yes, sir.

10 Q. Had "26" come in sight then? A. No, sir.

Q. Had any of your men got down then? A. Yes, sir.

Q. How many of them were on the ground when you got down? A. When I got down and ran down the track there were about twenty men.

Q. Did you get to those twenty men? A. No, sir; I didn't get all the ways down.

Q. Before you heard "26?" A. No; I didn't get all the ways down.

20 Q. Did you get down before you saw "26"? A. No.

Q. So that the men were between you and "26" when "26" was coming? A. When I got off the train there were some on that side of me and some on that side.

Q. And you were on the ground and there was a bunch of men below you, and then "26" on the other side? A. Then "26" was the other way.

30 Q. Coming towards you? A. That was coming this way and I went the other way.

Q. How fast was she coming? A. Perhaps fifty-five or sixty miles an hour; something like that.

Q. You got hit yourself, didn't you? A. Yes, sir.

Q. Has this train stopped at all the same day before the stop at this junction? A. The passenger?

40 Q. No, no; your train. Had she stopped any-

where beside this junction at Chester Junction? A. Stopped at Port Morris and stopped at Lake Hopatcong coming back.

Q. Did you see the men get out of the gondolas in the coach, or the men in the coach on the gondolas? A. Some got in at the Hopatcong station.

Q. You saw them get in? A. Yes, saw them get back in the cars; and I told them to stay in the cars. 10

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

Q. Now, when this train made the last stop, the last stop before Chester Junction, you saw the men get off the gondolas and go into the coach? A. Yes, sir.

Q. But you knew it was the custom to do that? A. They wanted to get in out of the rain. 20

Q. But you saw them do it, didn't you? A. Yes, sir.

Q. And you saw that some stayed in the gondolas? A. Yes, sir.

Q. What were those coaches used for? A. I think they were put on there to carry the men from Hoboken to Port Morris.

Q. Well, you saw the men using them to ride from place to place? A. Just to go from Hoboken to Port Morris. 30

Q. What did they use them for the day before that? A. Same purpose.

Q. Well, on this day— A. And they kept their clothes in there; some kept there clothes in there and their lunch that they took with them.

Q. Did they eat their lunch in there? A. Some, may be, after twelve o'clock.

Q. Did you eat your lunch in there? A. No, sir. 40

Q. You knew lots of these men were foreigners and couldn't understand English? A. Yes, sir.

Q. What did you holler? A. "Keep in the cars." They could understand me.

Mr. Simpson: I ask to have that stricken out, as not responsive.

10 The Court: It may be.

A. I told them to stay in the cars.

Q. You knew they spoke only Italian, a lot of them? A. Yes, sir.

Q. And Norwegian. How long did you holler? A. I kept on hollering until I got down with the men.

Q. How loud did you holler? A. How loud?

Q. Yes. A. Well, if you were off two lengths of a car or three lengths of a car, you could hear 20 me.

Q. I could hear you? A. Yes, sir.

Q. Where do you say was the first information you got that this express train was going to pass you and she was late? A. At Port Morris—at Lake Hopatcong station.

Q. And how far is that from the place where the accident occurred? A. I don't know the distance at all; I couldn't tell you.

30 Q. How long did it take you to go there? A. I don't know the time.

Q. Oh, yes, you do. Did it take half an hour from the time you first knew? A. I couldn't tell you.

Q. Or an hour or ten hours or two days? How long did it take you? A. I don't know exactly how long it took.

Q. Can't you approximate the time it took you to go from Port Morris to the place of the acci-40 dent? A. It didn't seem to be very long.

Q. How long was it, fifteen minutes? A. Longer than that.

Q. Half an hour? A. Maybe half an hour; something like that.

Q. And you had that half an hour to know, to know that you were going to stop at this junction and that this express was going to pass you, and that you had some men in gondola cars and some in coaches; didn't you? A. Yes, sir. 10

Q. And all you did was stand on your caboose and holler? A. Until the train come to a standstill.

Q. Did you see this man here? Was he working for you? A. No, sir.

Q. He was on the car, shoveling snow? A. He was none of my men.

Q. Well, he was on there shoveling snow. You say "none of my men." Who else was there in charge of men? A. Why, there were two or three other foremen. 20

Q. Who else? Who else was there in charge of men? A. I don't know exactly the names. Mr. Baker I think was one.

Q. Mr. Baker. Is he here? A. It is "Ward," isn't it?

Q. You are testifying. Anybody else?

The Court: Well, do you see these other foremen in the court? 30

The Witness: Mr. Gosline was one; there is a man here and a man back there (indicating).

Q. Mr. Gosline wasn't there at all. A. Well, he was out there; he was one of the foremen. There is one man sitting back there in the corner, and another man right there in the front seat.

Q. How many men were working on the snow? A. I think there were 150 in all. 40

Q. All told? A. Yes, sir.

Q. You had charge of forty-two? A. Yes.

Q. Who had charge of the others? A. I don't know their names. Mr. Ward is one, and this man back there.

Q. Where was Mr. Ward when you got down off the caboose step? A. Well, I ain't sure whether
10 he was in the car or not—on the gondola car or not.

Q. Did you see him there at all? A. He was there when we started.

Q. Did you see him around at all before the accident? A. After the accident.

Q. Did you see him before the accident? A. Back towards Port Morris—back at Lake Hopat cong.

20 Q. Did you see him at this junction where the cars were standing immediately prior to the accident when you were hollering? A. I don't remember seeing him there. He might have been there.

Q. Did you hear him say anything? A. No.

Q. Who was the other foreman? A. This foreman back here in the court room.

Q. What is his name? A. I don't know.

Q. Did you hear him say anything? A. Not to my hearing.

30 Q. Were they down on the ground at the same time that you were trying to get these men off the track? A. I didn't see him; I didn't look for anybody else.

Q. How long were you down on the ground trying to get the men off the track before the accident? A. I couldn't say; about four or five minutes; something like that.

Q. Four or five minutes? A. Yes, sir.

Q. And in that four or five minutes you couldn't
40 get the men off the track? A. No; I couldn't get

them off, because they were scattered all along the track. One man couldn't do it.

Q. In this four or five minutes you didn't get to this group of men who were only two car-lengths away from you? A. I got two car-lengths, but the whole length of the cars, how many were there?

Q. Were there any men about the first two cars? A. Yes, sir. 10

Q. Any at the three cars? A. There were lots ahead of me on the ground, on the same track.

Q. How many cars did you go down? A. About two cars, or three cars.

Q. That is all the distance you got in five minutes, is it? A. Yes, sir.

Q. You saw the conductor ahead of the train—you saw the conductor get off the train and walk up the track, didn't you? A. He went down the track on his duty. 20

Q. Which track did he go on? The same track the express was on? A. He started on the same track; yes, sir.

Q. How far? How far did he get on that track? How far did he go before you got down? A. I didn't notice it. When he got off I followed right after him, and where he went I don't know; he went after his duty. 30

Q. Now, when you got off this train it was for the purpose—you knew there was danger, and it was for the purpose of getting these men off the track? A. Yes—so far as I could.

Q. That was the first time you tried it? A. Couldn't do any better.

Q. Well, that was the first time you tried it? A. Yes, sir.

Q. And you were too late, weren't you? A. Yes, sir. 40

RE-DIRECT EXAMINATION BY MR. STALLMAN:

Q. You said something, Mr. Simcox, about what you told the men down at Chester Junction, was that the first you said to them after you warned them—or somebody warned them, at Lake Hopatcong? A. They were told at Lake Hopatcong.

10 MR. SIMPSON: I object to that as a misquotation of the testimony, and also as leading.

Q. Was there anything said at Lake Hopatcong— A. To stay on the train only. There was a passenger train due.

Q. And do you know who said that? A. No, sir; I couldn't say who said it.

Q. I mean do you know who gave that an-
20 nouncement? A. I don't know who it was exactly. I gave the instruction to stay on. I told them—

Q. Oh, you gave these instructions? A. I told them to stay on the train—on the cars. Of course, there might have been others said it; I don't know anything about that.

RE-CROSS EXAMINATION BY MR. SIMPSON:

30 Q. I understand you say now that at Lake Hopatcong you told somebody— A. I told the men to stay on the train; yes.

Q. Where were you when you told them that? A. On the car; on the gondola car.

Q. On the caboose? A. On the gondola car.

Q. Which one? A. The first car. I told some of the men who came back in the caboose—some of the men.

Q. Those were the men in the first gondola
40 car? A. Yes.

Q. And those were the men you talked to? A. Yes, sir.

Re-Direct Examination by Mr. Stallman:

Q. Where was Ambrecht when you first saw him? A. He was on the same train—on this gondola next to the caboose when we left Lake Hopatcong station. 10

Q. On the same gondola car? A. Yes, sir.

Q. When you left Lake Hopatcong to go to—A. Chester Junction.

Q. —Chester Junction? A. Yes, sir.

Q. And the train was in motion all the way down? A. It was on a standstill at Lake Hopatcong.

Q. Yes, but I mean did you stop between Lake Hopatcong and Chester Junction? A. No, sir; we went right straight down. 20

Q. These gondola cars, have they got fronts or back to them? A. Sides and ends.

Q. Sides and ends? A. Yes, sir.

Q. Was there any facility for walking along the length of the train? A. No, just climbing over the top at the end here, and get to the end of the car here, and walk the length of the car.

Q. No platform to walk along them, or bridge or anything of that kind? A. No. 30

Re-Cross Examination by Mr. Simpson:

Q. You testified that you didn't see Ambrecht when you got to Chester Junction? A. Chester Junction?

Q. Yes. A. I didn't see him down there. This was back—

Q. Will you let me ask you the questions, or are you going to argue the case all the way 40

through? Just answer this question. You said you didn't see Ambrecht when you got to Chester Junction? A. No, sir; I didn't see him.

Q. Now, you rode to Hopatcong in the first gondola car? A. No, sir.

Q. What did you ride in? A. In the caboose again, after it started from Lake Hopatcong sta-
10 tion.

Q. When you came back from the caboose did you see Ambrecht in the first gondola car? A. No, sir.

Q. You didn't see him at all? A. No, sir.

Q. You know as a matter of fact he was in the last gondola car? A. In the last car?

Q. Yes. A. Next to the caboose he was at Chester Junction—at Lake Hopatcong.

20 Q. What do you mean by the caboose? Is the caboose the end of the train? A. The engine, the coaches and the caboose. The gondola cars were here (indicating).

Q. What do you mean by the last gondola, then? A. The caboose it was on this platform, and the gondola was right here next to the caboose; the first one here.

Q. What do you mean by the last gondola? What do you mean by the last gondola? A. The
30 last one next to the caboose.

Q. Then you don't mean the other end of the train? A. Not the other end; no, sir.

Q. Well, is the other end the rear end or not? Is it the end away from the engine or the end towards the engine? A. The car he was on at first was the gondola car next to the caboose, not that was toward the engine.

Q. There was an engine, wasn't there? What was next to the engine? A. Engine, tender, and two
40 coaches.

Q. What is next to the coaches? A. That is our caboose.

Q. And then the gondola? A. And then the gondola.

Q. So that the last car on the train was a gondola? A. Next to the caboose.

Q. Oh, leave the caboose out. He commenced, didn't he, on that gondola—Ambrecht? A. I don't know whether he was back there. He might have been back there, for all I know. 10

Q. How many men were inside of the car you say you talked to at Lake Hopatcong? A. There were about fifteen or twenty men on that car at the time.

Q. Do you recollect their names? A. I don't know; some were my men; some didn't belong to me. 20

Q. How many were Italians? A. I couldn't say that.

Q. What was it singled out Ambrecht to you, so that you remembered Ambrecht was on that? A. He was on the car when I told the men to stay on the car.

Q. How do you know that? A. Because I seen him.

Q. Oh, you saw him? A. Yes, sir; on that first car. 30

Q. Did you see Zimmerman on this first car? This live man who can tell whether you are lying or not. A. I didn't notice him.

Q. But you know you saw the dead man on the car; you are sure of that? A. If I seen him I would.

Q. How about this next man, who is alive, too? Did you notice him on the car? A. I didn't notice him on the car; he might have been there.

40

Q. But you saw the dead man? A. I saw the dead man.

Q. Did you see this other man on the gondola car, too? He is alive, too. A. I don't know.

MR. SIMPSON: That is all.

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10 WITNESS EXCUSED.

PATRICK KELLY, a witness sworn on behalf of the defendant, testified as follows:

DIRECT EXAMINATION BY MR. STALLMAN:

Q. Mr. Kelly, what is your business? A. Foreman.

Q. Lackawanna Railroad? A. Lackawanna
20 Railroad.

Q. Did you have a gang on the 17th of December, at the time of this accident? A. Yes, sir.

Q. Did you go down to Chester Junction? A. Yes, sir.

Q. With this train? A. (No answer.)

Q. Do you know, Mr. Kelly, of any instructions being given to the snow-shovelers about getting on the train or getting off the train or going into the coaches? A. Well, when we unloaded these
30 seven cars of snow I went back to Mr. Ward and asked him what to do with them.

MR. SIMPSON: I object to that.

Q. (Last question repeated by the stenographer) A. When we unloaded these seven cars—gondola cars of snow, I told the shovelers to remain there until we went back to the east end of the yard for another trainload. I told them to
40 stay in the cars.

Q. What cars were they in at that time? A. In the gondola cars.

Q. They were in the gondola cars? A. After we unloaded these seven cars—gondola cars of snow I told them to remain there; that we were going back to the east end of the yard for another train of snow, to load them up again; that would take about four or five minutes, and to stay there; not to come out of them until we went back again and loaded them up again. 10

Q. When you got to Chester Junction did you tell anybody, any of the men, to get off the cars and go into the coaches? A. No, sir; the orders were to remain there until we went back to the snow again.

Q. What is that? A. I didn't tell them anything to that effect. 20

Q. (Last question repeated by the stenographer.) A. (Repeated by the stenographer) No, sir; the orders were to remain there until we went back to the snow again; (witness continuing:) to load up another load of snow.

Q. Do you know whether there was any whistle signal given of the approach of train "26" at the Chester Junction? A. I heard the whistle blowing; the "26" blew her whistle.

Q. You did hear "26" blow? A. Yes; long whistle. 30

Q. Did you hear the engine of your train blow? A. The engine of our train also blew her whistle.

Q. Were you out on the track when the men got off the gondola cars? A. I went into the caboose—on the caboose platform, and the track also. When I saw them coming down I went out on the track and told them to clear the track; that the train was coming; to get off the track.

Q. How did you give them that warning? A. When I heard the whistle blowing. 40

Q. I mean did you do it by motion, or by your voice, or how? A. By my voice; by my voice. I hollered to them, and told them to clear off the track; that the train was coming.

Q. Did they pay any attention to you? A. Sir?

Q. Did they act on your warning? A. Well, they were in the act of coming off the cars then; 10 they were coming off the cars.

Q. I mean when you hollered to the men what did they do? A. They flew in all directions; they got off the track; they cleared in all directions.

Q. Did you know William Ambrecht? Did you know him personally? A. No; I did not. He didn't belong to my gang.

Mr. Stallman: Cross-examine.

20 Cross-Examination by Mr. Simpson:

Q. Where was it you told your gang to stay on the train; that you were going to shovel more snow? A. When we loaded these seven gondola cars; I told them to remain there—

The Court: Where was that?

Q. Where was it? A. That was in the west end of Port Morris.

30 The Court: West end of Port Morris?

A. Port Morris yard.

Q. You told your gang to get back on the car? A. To stay where they were; not to get off the car.

Q. Where was your gang? A. They were in the gondola cars.

Q. Which gondolas? A. These seven empty gondola cars.

40 Q. And you went down the seven cars and told

your gang? A. I was right in front of them on the track when we finished unloading.

Q. In front of the seven, as you lifted up your voice and said, "Stay on the cars; we are going to get another load"? A. We were going back to the east end of the yard for another train of snow.

Q. And your purpose in that was that they would not be left; so that you would take them to the east end of the yard? A. East end of the yard. 10

Q. You told them to stay on for that purpose? A. For that purpose.

Q. And that was your own gang? A. That was my own gang.

Q. Ambrecht was not in your gang? A. No; he was not.

Q. Now, when you got down to this junction you knew there was danger when you heard "26's" whistle? A. I knew there was danger then; but I never knew she was coming, though. 20

Q. You didn't know that? A. No.

Q. Until you heard the whistle? A. No.

Q. I mean they had not told you she was coming? A. No; nobody ever told me.

Q. The first thing you knew was when you heard this whistle and you thought there was danger, and then you did whatever you could to stop your men; to get them off the track? A. To get them off the track. 30

Q. But you were not in time? I mean when you hollered they tried to get away? A. Yes; they tried to get up.

40

Re-Direct Examination by Mr. Stallman:

Q. Was any snow-shoveling done at Chester Junction? A. None whatever.

Q. You had unloaded your train before that? A. Yes.

10

Witness Excused.

John Ignatowitz, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Stallman:

(Through interpreter.)

20 Q. Mr. Ignatowitz, where do you live? A. 145 Provost street, Jersey City.

Q. What work do you do? A. On the Lackawanna Railroad Company, on the dock.

Q. Do you remember the accident to the snow-shovelers at Chester Junction on December 17th, 1915? A. I remember.

Q. What part of the train were you on when you got to Chester Junction? A. I was at the second car.

30 Q. Do you mean it was the second car from the covered cars? A. Yes, sir.

Q. Did you know William Ambrecht, a man that was working in that gang? A. I knew him, because I worked with him together; he worked on the same dock.

Q. Did you see William Ambrecht on the train a short time before the accident? A. I did not see him.

Q. What is that? A. I did not see him imme-
40 diately before the accident.

John Ignatowitz—Direct.

Q. Where was he the last time—where was Ambrecht the last time that you saw him? A. I saw him the last time when he was loading the snow into the cars.

Q. Do you remember when the snow train got to the place where the accident was? A. I remember.

Q. Do you know whether anything was said to the men about staying on the cars, or getting off the cars? A. Nobody gave any orders to leave the cars. The boss said to stay in the cars. 10

Q. Who was that boss? A. Simcox.

Q. Did you hear Simcox say that? A. Yes.

Q. How long before the accident happened did you hear Mr. Simcox tell the men to stay on the cars? A. It may be a half hour; it may be less; it was quite wet and cold.

Q. After you heard Mr. Simcox tell the men to stay on the cars did you tell anybody else to stay on the car? A. No, sir; I did not say anything. 20

Q. Did you see William Ambrecht after the accident? A. Yes, sir; I saw him after the accident. I also wanted to go over the covered cars. A great number of the men stepped off from the first and second and also from the third car, and I also was approaching the covered car, but I did not reach the car quite close enough.

Q. Did you see William Ambrecht get off that train? A. I could not count them all. 30

Q. After the accident where did you see Ambrecht's body with the reference to the caboose? A. Opposite the third car from the covered cars, the body was laying and was bleeding.

Q. Opposite the third car from the caboose? A. From the covered cars; from the covered cars it was the third car that caught him.

Q. And where was the body lying? A. Be- 40

tween the rails and some pieces—there were pieces of his body and pieces of his clothing laying there.

Q. Did you hear any whistles before the accident?

Mr. Simpson: Objected to as leading.

The Court: Well, I will overrule the objection.

10

Mr. Simpson: I ask for an objection.

The Court: You may have it.

Q. (Last question repeated by the interpreter.)

The Court: Does it take all that time to answer "yes" or "no"?

The Interpreter: Well, he is going into a long explanation. If I say all he said it would be a long—something about not until the car from the covered car.

20

Mr. Simpson: Well, that is the answer.

Q. Do you know where the whistle came from? A. From the engine that led the train, and right immediately when the whistle blew this happened.

Q. Do you know whether it was the whistle of the snow train or the whistle of some other train? A. Train from the right side.

Q. Can you tell whether it was a snow train or the train that was carrying passengers? A. No, not from the snow train; the other train.

30

Q. Do you know whether any snow was loaded or unloaded from these cars at the place of the accident? A. No one worked at that time. No snow was loaded. Everything was all finished up.

Q. Did they unload any snow at that place? A. Yes, sir; all started at the same time and all finished at the same time.

40

Q. Did they unload the snow before they got to the place of the accident, or after they got to that place? A. First we unloaded a little ways of that place, and then a place near that spot.

Mr. Stallman: Cross-examine.

Cross-Examination by Mr. Simpson: 10

Q. You got down off this train at the place of the accident, didn't you? A. No, sir; I was still on the train.

Q. Were you going down to go to the covered car? A. No, sir; I intended to go off, but I stepped over the covered car.

Q. You intended to go to the covered car, didn't you? A. Yes, sir.

Q. Why didn't you go? A. Because I did not accomplish—I did not conclude to go there. 20

Q. What stopped you? A. As I was about to step over, and I did step over the covered car, the whistle started to blow and I stopped.

Q. The whistle stopped you, did it? A. Yes, sir; as soon as the whistle sounded the train ran.

Q. Did the whistle stop you? A. As soon as the whistle sounded I stopped, and the train started to go ahead.

Q. And this train ran into these men at the same time you heard the whistle, didn't it? A. I stopped, but I could not see anything. 30

Q. Didn't the train run into the crowd of men the same time you heard the whistle? A. There were several men on the tracks, and others came there towards those few who were there.

Q. Did you see any of the men get into the covered car before the train killed and hurt these men? A. Yes, sir; there were several men were already in the car. 40

Q. In the crowded car? A. Yes, sir.

Q. And others were walking along the track? A. Some just as you wish it; some stepped over the cars, and others walked along the tracks.

Q. Some had got in the covered cars, and others were walking along the track; is that right? A. Yes, sir.

10 Q. Going towards the covered car? A. Yes; it was damp and cold and everybody wanted to get in.

Q. And then you heard the whistle? A. Yes, sir.

Mr. Stallman: Wait a minute. If the Court please, I think the witness ought to be permitted to answer him.

20 Q. And then immediately the whistle blew the train struck these men, didn't it? A. The train come hastily, as soon as the whistle blew.

Q. Was it right after the whistle that the train hit these men? A. Yes, sir.

Q. Immediately? A. Yes, sir.

Q. Why were you going into the covered car?

Mr. Stallman: That is objected to as being—

Mr. Simpson: Cross-examination.

30 Mr. Stallman: —immaterial, why he was going to do anything.

Mr. Simpson: I want to show what his purpose was, and what he was doing. He is being examined as to his movements. He testified *in extenso* on direct that he was trying to go into the covered coach. I want to find out why he was going into the covered coach.

The Court: I will overrule the objection.

40 Mr. Stallman: Objection.

The Court: The objection will be noted.

A. Because it was freezing. It was cold and wet. I wanted to go in there.

Q. Had you ever ridden in a covered coach before while you were working on this job? A. From the depot we used to ride in those cars.

Q. What? A. From the depot.

Q. Now, you say that at Lake Hopatcong someone told your gang to stay on the car? A. The same boss said, "Do not get off, but remain in the car." 10

Q. Did he tell you why to remain in the car? A. He said, "I do not know why," but he said, "you will only remain here a few minutes."

Q. Now, he told you to stay in the car, but when you got to this junction you tried to get out of the car into the covered car, didn't you? A. Those who felt cold and miserable they wanted to get into the covered cars, and by degrees gradually got in there. 20

Q. But you say the boss told you to stay in the gondola car, but you were going in the covered car, weren't you? A. There were several cars covered, and there was another car alongside of it which was an uncovered car.

Q. Well, why did you start to go in the covered car if the boss told you to stay in the open car? A. The boss told us to remain where we worked, and the same length of cars; because the cars were uncovered and wet; it was very cold. 30

Q. Do you mean to say when the boss told you to stay in one place you went in another place? A. He told us to stay where the cars were; those open cars were uncovered.

Q. Well, why didn't you stay where they were uncovered if he told you? A. Because we did not do any work and it was too cold to remain there. 40

Q. Where was it the boss told you? Where was the train when he told you to stay in the open cars? A. Our train was on the left side, and the right side the cars were empty.

Q. Well, where was this train when the boss told you to stay on? Was it at Lake Hopatcong? A. It was my first appearance there. I am not 10 acquainted with the names; but I think it was called Port Mark.

Q. How long before the accident did he tell you to stay in the cars? A. At the time when he remained in the car. I smoked several cigarettes and the train remained standing.

Q. Did he tell you in English? A. In English.

Q. Then you tell us in English what he said. A. (Witness speaking in English) Boss says, "No come down; stay on the car."

20 Q. "No come down; stay on the car." That was at Port Morris? A. (Witness talks in foreign language to interpreter.)

Q. Oh, talk English. You can talk English. That was at Port Morris, wasn't it? A. I don't know Port Morris. May be name that place. (In English.)

Q. Well, why did you go out of the car then when the boss told you to stay in the car? Why did you start to go out of the car? A. (Through 30 the interpreter) I can not speak English.

Q. You still work for the Lackawanna Railroad, don't you? A. Yes.

Q. And you have been over this story before to-day, haven't you? A. What I see it is my duty to tell.

Q. Whom had you told this story to before to-day? Who was the first one you told about it? A. I could not tell to anybody what I had to say.

40 Q. Have you been called to the claim depart-

ment and gone over this story in the claim department? A. Several months ago I was questioned, and I told them the same as I do here.

Q. Where were you questioned? A. In Mr. Rose's office, at the depot at Mr. Rose's office.

Q. Mr. Rose is a claim agent, isn't he? A. I do not know. There were other people there, and there was a Polish interpreter there, and I told him through the Polish interpreter. 10

Q. What time of day did this accident happen? A. I had no watch with me, but I know it was some time before noon.

Q. Before noon or after noon? A. Before noon.

Q. And how many cars were there in this train? A. You mean those uncovered cars?

Q. Altogether. How many cars altogether? A. There were several covered cars and five or seven uncovered cars. 20

Q. Five or seven? Which was it, five or seven? A. May be six, may be seven. I didn't count them.

Q. Well, if you don't know the number, how do you know that all the snow was shovelled out? A. Because I looked around. I looked from one end to the other end; because I wanted to get in somewhere under cover.

Q. Well, was everybody trying to get in under cover? A. Yes, sir; all of them; because there were half of the people already in the cars. 30

Q. In the covered cars. Had you seen half of the people get down on the cars and go into the covered car? A. I noticed that from one car they were all off, and from the car that I was in they were also all off.

Q. Well, you were not off, were you? A. They were all off. I still remained there waiting.

Q. And you think that half of them had gotten 40

into the covered car before the accident, do you? A. I can not say whether one half; but I know it was a good number from the two cars.

Q. And the rest of them were mostly on the two cars, weren't they? A. Some who were at the distance would remain on the ground.

Q. And you heard no warning except the whistle, 10 did you? A. I could not give anybody any sign, because I did not see anything wrong. Well, you heard no warning, then, except the whistle? A. And immediately as soon as the whistle was given the train came running along.

Q. And that was all you saw, was it? A. That is all.

MR. SIMPSON: That is all.

20 RE-DIRECT EXAMINATION BY MR. STALLMAN:

Q. Didn't you hear Simcox tell the men not to get off the train?

MR. SIMPSON: I object to that as leading. It is one of the crucial parts of this case, and this is an ignorant witness, and counsel should not be allowed to lead him. He has already sworn all he heard was the whistle. Now, of course, if he knows what Mr. Stall-30 man wants there will be no difficulty in getting it.

THE COURT: Hasn't he testified to that before?

MR. STALLMAN: I think the witness is a little bit confused through Mr. Simpson's method of asking questions, and through the interpreter, and I want to straighten it out.

THE COURT: Do it, then, but do it by general questions. Do not suggest the answer 40 to him.

Q. When Mr. Simcox told the men not to get off the train was that before or after you heard the whistle? A. Before the whistle.

Mr. Stallman: That is all.

Re-Cross Examination by Mr. Simpson:

Q. That was at Lake Hopatcong or Port Morris, wasn't it? A. I remember that was the word used, "Port Morris." 10

Mr. Simpson: That is all.

Re-Direct Examination by Mr. Stallman:

Q. Well, did Simcox say anything at all to the men a short time before the accident happened?

Mr. Simpson: I object to that as a leading question. 20

Mr. Stallman: I want to get it straightened out.

Mr. Simpson: Of course, you do. I object to it as a leading question.

The Court: I will overrule the objection.

Mr. Simpson: Objection.

A. When they finished their work each one wanted to get under cover. He said, "No come down; stay on the car." That he said in English. 30

Q. Now, how long was it—how many minutes—before the accident that you saw Simcox? A. At that time when the accident happened? When I got to the covered car, when the whistle, I did not see Simcox any more.

Q. How many minutes before you tried to get off of the snow car was it that you saw Mr. Simcox? A. The time when they were all anxious to get under cover and they were told not to get off; that they must remain there. 40

Q. Was that at the place where the accident happened? A. Same place where the accident happened.

RE-CROSS EXAMINATION:

Q. And that was just at the time you heard the whistle and Simcox was on the ground? Is
10 that a fact? A. No; at that moment I did not see him.

Q. Well, how long before the accident was it you saw Simcox? Was it at "Port Mark"? A. I saw him when I was still on my car, I saw him; but when I stepped over to the other car I did not see him any more.

Q. But was it at "Port Mark"—is that the last time you saw Simcox? A. I do not know exactly
20 whether that is called Port Mark or not.

Q. Was it at the place of the accident and the time of the accident that you heard Simcox say, "Don't get down"? A. Same place.

Q. All right, then. At that time half of the men were on the ground, weren't they? A. A very few of them came offboard, but most of them went over the cars.

Q. But weren't half of the men on the ground when you heard Simcox say, "Don't get off the
30 car; stay on the car"? A. No, sir.

Q. How many were on the ground when you heard Simcox say that? A. Not very many were on the ground, but they were at that time crossing over the cars.

Q. Where was Simcox then? A. At that moment I did not see him.

Q. You could only hear his voice— A. I had already stepped over the car.

Q. You could hear his voice; is that right? A.
40

I heard his voice when he said, "Do not come down."

Q. Well, where was he then? Was he on the ground or was he on the caboose? A. He walked alongside of the cars.

Q. And that is the only time you heard him say "Don't come down", isn't it? A. Only once.

Mr. Simpson: That is all. 10

Mr. Stallman: That is all.

Witness Excused.

James P. Fernane, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Stallman: 20

Q. Where do you live, Mr. Fernane? A. Scranton.

Q. What is your business? A. Engineer.

Q. Locomotive engineer? A. On the Lackawanna; yes, sir.

Q. Lackawanna Railroad? A. Yes, sir.

Q. Were you the engineer of No. 26 on December 17th, 1915? A. I was.

Q. Do you remember giving any signals of any kind, Mr. Fernane, before you reached the snow train at Chester Junction? A. No, sir. 30

Q. You don't remember, or you didn't give any signals? A. You mean any whistle signals?

Q. Yes. A. Oh, yes; I gave a whistle signal. I thought you meant an interlocking signal.

Q. No, I mean did you give any signal? A. Whistle signal—well, I understand; whistle signal; yes, sir.

Q. Well, what kind of whistle was it? A. Well, 40

I gave one long whistle and I held the whistle open while I was passing the train. I opened the whistle before I saw a man on the track.

Q. You opened the whistle before you saw anybody on the track? A. Yes, sir.

Q. Now, what did you see that caused you to open your whistle? A. Well, because my view
10 was obstructed on that track with the steam blowing across from the work-train engine, and I generally open my whistle or give warning when passing a train; and when I discovered it was a work special I opened the whistle. My view was obstructed. Of course, a man naturally would do that in case there be somebody around the train.

Q. How far from the place of the accident were you when you opened your whistle? A.
20 Well, when I discovered it was a work special I think may be three or four hundred feet; may be four hundred feet.

Q. Did you notice any other whistle given at that time? A. Didn't hear any. It might have been blowing while I was blowing, but I don't know; I didn't hear any.

Q. Would the fact of your own engine blowing a whistle affect your hearing the whistle of some
30 other locomotive? A. Not unless it be right beside. My whistle is right off the cab, you know.

Q. I say would that affect your hearing the whistle of some other train? A. It probably would.

Q. What application of your brakes did you make at that time, Mr. Fernane? A. I made service application coming in Chester Junction, slowed the train down somewhat going over the cross-over, and when I saw the men, when I
40 broke through the steam, I throwed the brakes on the emergency.

Q. What kind of a stop did you make? A. Well, tried to stop. I made a stop as quick as I could with the train I had. I had a five-car train.

Cross Examination by Mr. Simpson:

Q. Did you know that you were going to pass a work train as you approached this curve? A. Not until I saw them. 10

Q. Had you been notified by your superiors that you were going to pass a work train at that curve? A. No, sir; it was not necessary.

Q. Hadn't any knowledge of it at all? The company hadn't notified you that you were going to pass a work train at this curve? A. We pass trains on that curve—

Q. Had you been notified? A. No, sir; no, sir. 20

Q. So that you came to this curve perfectly ignorant that there was a work train there, didn't you? A. Yes, sir.

Q. And the first you knew was when you saw this crowd of men in front of you? A. Yes, sir.

Q. You had no instruction from your company? A. No; the first I knew it was a work extra was when I saw the coaches on the track.

Q. And that was about three or four hundred feet away from the train? A. Yes. 30

Q. And you were, as some of these witnesses testify, going sixty miles an hour? A. Well, I was going over fifty.

Q. Over fifty? A. Yes.

Q. That would carry you three hundred feet in a very short while? A. Yes, it would.

Q. Now, if you had been notified by the company that you were going to pass a work train at this curve, in a position where you could not see the men until you got around the curve, 40

would you have taken any other precautions to protect their lives than the blowing of the whistle?

Mr. Stallman: That is objected to on the ground that it is not cross-examination. It is incompetent, immaterial and irrelevant, and there has been no basis for the question, or any such practice as is involved in the question.

10

The Court: How is that relevant, Mr. Simpson?

Mr. Simpson: Isn't it relevant if this company, if they run their road, had a work train around a curve where a man can not see it, knowing a man is late, and let him come around that curve without any knowledge?

20

The Court: The question is—

Mr. Simpson: Isn't it for the jury to say, if this man now says "yes, if this company had told me there were fifty men who might be on the track, I could not see them, why, I could have stopped"—the jury may say, "Well, he would have stopped." It is up to me to show what he could have done.

Q. (Last question repeated by the stenographer.)

30

Mr. Simpson: I will withdraw that question.

Q. As a matter of fact, you didn't know and you didn't do anything but blow a whistle; that is all that happened, isn't it?

Mr. Stallman: That is objected to on the same grounds. The only thing this witness testified is what he did under the circumstances.

40

The Court: That is what he is asked.

Q. (By the Court) In other words, you did not know it was there until you saw it, and what you did then was to blow the whistle.

The Court: Isn't that what the question is?

A. Yes. 10

Q. Is that all that happened? A. Why, I put on the brakes. I had the brakes on before I saw the men. There is a slight curve there, but if there was not a train there you could see around that curve.

Q. Now, who keeps you informed of the movement of trains that you are expected to pass or interfere with? Where do you get that information from? 20

Mr. Stallman: That is objected to on the ground that there is nothing in this case to show there is any relation whatsoever between a work train that is standing on a side track, and an express train that is on some other track. I object to it on the ground that it is incompetent, immaterial and irrelevant.

Mr. Simpson: I will withdraw that question and reframe it. 30

Q. On the day of this accident was there any system of work in this company whereby you, as engineer of this express, were informed of the position of trains that you would pass and which might interfere with your movement? A. No, sir; we were a first-class train. Other trains have to look out for us.

Q. You have no information? A. We have in case of obstructions, or of a work extra— 40

Q. In case there is danger, that you would not run into any train and not hurt your own train—do you then get any information?

MR. STALLMAN: That is objected to. There was nothing to obstruct "26" on the road as far as I know.

10 MR. SIMPSON: Only about fifty men; that is all.

THE COURT: Well, what do you say again, Mr. Simpson? Do you insist upon it?

MR. SIMPSON: No. I don't think it is—

(Last question withdrawn.)

Q. How far did you go before you did stop? A. Well, I must have been fifteen, may be eighteen or two thousand feet.

20 Q. How near were you to the nearest man that you struck when you first saw him? A. Well, I should judge not over two hundred feet. There was quite a number of them there.

Q. Was there a crowd on the track— A. Yes, sir.

Q. Looked like a swarm on the track, and did this snow train obstruct your vision as you came towards the curve? A. Yes; the steam was blowing across my track; that was the reason I blew my whistle.

30 MR. SIMPSON: I think that is all.

WITNESS EXCUSED.

40

John J. Sexton, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Stallman:

Q. What is your business, Mr. Sexton? A. Locomotive engineer.

Q. On December 17th, 1915, where were you working? A. Port Morris; west end. 10

Q. Were you the engineer of this snow train? A. Yes, sir.

Q. Work extra? A. Yes, sir.

Q. Do you know of any whistle signal being given at the time No. 26 approached your train? A. Well, we backed down. When we backed down on track No. 4 we stopped there for the conductor to go and instruct the towerman the move to make, and I turned around and went to the box 20 and I got a sandwich out of my lunch; and I looked up and seen "26" coming, and as soon as I did I grabbed the whistle and started to toot it. When I saw it he might have been about a quarter of a mile away.

Q. You started to toot? A. I tooted the whistle as soon as I seen him; as soon as I seen "26" I grabbed the whistle and started to toot.

Q. How long did you continue to toot? A. Well, I might have blowed twenty times; maybe 30 not that many. I didn't count them. As soon as I see him, why, I suspected the men might be getting off these gondolas and I grabbed the cord and started to blow. I might have blowed a dozen times.

Q. Do you know whether the men were going to do any work down there? A. We were not going to do any work; we were instructed to go down there and cross over, because the east end of the Port Morris yard—we couldn't cross there 40

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on account of a freight train and "26" behind this freight train.

Q. This tooting you did, was that done before "26" whistled or afterward? A. Oh, that was before. As soon as I seen him he started to blow. I heard him after I started to blow. Then he blowed one long blow.

10 Q. Which one of your whistles was the last of the whistles, yours or his? A. Well, his was after mine; yes.

Cross Examination by Mr. Simpson:

Q. Anyone tell you to blow? Was that your instruction? A. No, no; nobody instructed me. I just suspected the men might be getting off these cars.

20 Q. You thought they might be getting in out of the weather? A. Yes; it was a bad day.

Q. And when you saw this "26" come sizzling along you started to blow your whistle? A. I started to toot.

Q. She was then about a quarter of a mile away, going at fifty miles an hour? A. Well, I don't know how fast he was going.

Q. Well, that is what he says. A. Well, he should know, because he was on that train.

30 Q. So it was not very long after you started to blow before that accident happened? A. No, it was shortly.

Mr. Simpson: That is all.

Witness Excused.

40

Gerald W. Eckerson, a witness sworn on behalf of the defendant, testified as follows:

Direct Examination by Mr. Stallman:

Q. What is your business, Mr. Eckerson? A. Trainman.

Q. Were you on the snow train at Chester Junction, December 17th, 1915? A. Yes, sir. 10

Q. And where were you stationed? A. At the east end—at the east car, going east; the last car.

Q. The last snow car? A. The last gondola; yes, sir.

Q. Do you know if anybody did anything to warn the men on the snow train of the coming of "26"? A. No, sir.

Q. Did you do anything? A. I told them to look out; yes, sir. 20

Q. Well, aren't you somebody? A. The ones that were in my car there.

Q. Which car was your car? A. The last car.

Q. You were on the east end of this train? A. I was on the east end of this train; yes.

Q. What did you do? A. I told them to look out for "26".

Q. Well, did you go and whisper it in their ear in a conversational voice? A. No, sir; I hollered at them. 30

Q. You did what? A. Hollered to them.

Q. Where was "26" at the time? A. I didn't see her at the time.

Q. Well, had she gotten there yet, or gone by? A. No, sir; she had not gotten there yet.

Q. How many men were on your car? A. Five or six, I should judge.

Q. Did they pay any attention to you that you know of? A. Yes, sir.

Q. What is that? A. Yes, sir. 40

Q. How long was it from the time you gave this warning until No. 26 got there? A. A few minutes.

Q. What is that? A. A few minutes.

Q. Well, how many? Five? A. Five or six; something like that.

Q. Where were you at the time? A. In the
10 gondola.

Q. You were in the gondola? A. Yes, sir.

Q. Did you get down on the ground? A. No, sir.

Q. Did you see anybody get off the car? A. I did; yes, sir.

Q. Did you say anything to them? A. I hollered; yes, sir.

Q. What cars did they get off of? A. Up near the coach; coaches.

20 Q. Up near the coaches? A. Yes, sir.

Q. Well, how many gondolas were there, do you know? A. Seven, I believe.

Q. Now, counting from the caboose, say that the gondola next to the caboose is the first gondola, which gondolas were they that the men got out of that you saw? A. Well, all of them up ahead.

Q. Well, the first one, second and third? A. I should—I don't know.

30 Q. What is that? A. I don't know which ones they got out of.

Q. Well, you say it was up ahead. A. Up ahead; yes, sir.

Q. Well, do you mean the first, second, third or fourth from the caboose, or from your end? A. Well, they were up near the third and fourth one.

Q. From the caboose? A. Yes, sir.

40 Mr. Stallman: Cross examine.

CROSS EXAMINATION BY MR. SIMPSON:

Q. You told the men in your car to look out for "26", did you? A. Yes, sir.

Q. And they did look out? A. Yes, sir.

Q. And they were not hurt because you warned them? A. Yes, sir.

Q. They stayed with you? A. Yes, sir. 10

MR. SIMPSON: That is all.

RE-DIRECT EXAMINATION BY MR. STALLMAN:

Q. Did you notice anybody in the car next to yours, in the gondolas next to yours? A. I didn't take any notice; no, sir.

Q. Don't know whether they got out or not? A. No, sir.

20

WITNESS EXCUSED.

MR. STALLMAN: We rest.

MR. SIMPSON: No rebuttal.

MR. STALLMAN: Now, if the Court please, I would like to make a motion for a direction of a verdict at this time on the ground that there has been no negligence shown on the part of the defendant; that the plaintiff has failed to show that at the time of this accident the plaintiff's intestate was engaged in interstate commerce. I take it that the case of *Shanks vs. the D. L. & W.*, in 239 U. S. holds that the test of employment is the character of the work that the man is doing, and the proof in this case, without any contradiction, is that the men were not engaged in doing any work, but plaintiff's intestate was probably doing something for his own convenience. 30 40

THE COURT: But haven't we before us also the testimony that this train was being moved from Port Morris, or out of the east end of the yard, to this point, and from there to be moved back to the yard again, for the purpose of undertaking the continuing of the work of shoveling snow?

MR. STALLMAN: Yes; but I say at the time of the accident they were not doing any work; and in the case of *Connell vs. New York Central Railroad*—it is a case very similar to this in some respects, where a gateman, a man who was on duty, had left his gate and went some ten or fifteen feet away, I think to urinate; and the Court held in that case (it is in 144 Appellate Division; it is also brought under the Federal statute)—the Court said although the relation of master and servant was suspended at this time, the servant was not in his employer's work, and, therefore, this case differs from cases where a servant went to a place to drink or a place to eat a meal, or some other such object. In this case the servant had left his place and sought a place on the premises of his master for his own personal convenience or interest. There is no proof that the master had indicated this place or that the master knew or should have known that it would be used, or that it was necessary it should be so used; and on consideration of the facts in that case, which is the only case I could find that bears remotely on the one at bar, the Court held that the deceased was not engaged in any work which would bring him within the

THE COURT: Where was that decided?

statute.

Mr. Stallman: In the Appellate Division, New York.

The Court: And where did the employee go?

Mr. Stallman: He walked down the track. He was between the track and the retaining wall. He was killed, but the assumption was that he left his gate shanty to urinate. He was a distance of five or ten feet down below the street. 10

The Court: Well, off the premises of the company?

Mr. Stallman: No; he was on the right of way, between the nearest track and the retaining wall which marked the right-of-way boundary. That was a very-well-considered case and the opinion was written by Justice Jenks. 20

I also submit in this case that there can be no negligence charged for the failure to take any steps or give any other warning to protect these men from doing something which was in violation of their instructions. It seems to me the proof is very clear that these men were instructed before the train went to Chester Junction, and after the train arrived at Chester Junction, to stay on the train and notwithstanding those instructions they got off. I think that the question of negligence on the part of the defendant must depend in very large measure upon what the master might expect of his men. If he tells them to do something, he has a right to expect that they will do it. But outside of that question, violation of duty, the proof is that even after they got there they were warned—warned on the one hand by Mr. 30 40

Simcox, and on the other hand by the trainman, to stay on the train; and I take it that that answers the allegations of negligence.

Furthermore, as I advanced on the motion to non-suit, the fact that this man was working on a train, a train which was being moved from place to place over railroad tracks, or
10 alongside railroad tracks—in getting off of the train and walking on the track he assumed the risk of injury from a train running on that track. The Court will remember that the Federal Act provides that the employee shall not be deemed to assume a risk resulting from the violation of any safety appliance act, and the United State Supreme Court in the case of *Hoover,* I think it is, *vs. the Illinois Central,* has held that every other
20 risk is assumed by the employee under the language of the statute excepting the risks which necessarily result from the violation of the safety appliance acts.

On those grounds: that there is no negligence; that there is no proof that the man was engaged in interstate commerce; that he assumed the risk, and that he was doing something in violation of his duty, I ask that the case be taken from the jury.

30 THE COURT: If I follow you correctly, then there never could be a case but what the employee assumed the risk, unless it were brought under the safety appliance act. If I understand you correctly, you say it has been held in the Hoover case that the assumption is that every employee assumes the risk, except under the safety appliance act.

MR. STALLMAN: When Congress says that
40 he does not assume the risk of the violation of the safety appliance act, that means that

he assumes every other risk; and that opinion says, in so many words, that that includes negligence of the company, negligence of a fellow-servant, or negligence in any other respect. It is a very broad case, and that is just exactly what it holds—that the risks assumed include every risk, excepting those which result from the failure to provide automatic couplers, draw-bars, and other safety appliances. 10

THE COURT: Then I am right in my assumption of what you said.

MR. STALLMAN: Yes.

THE COURT: That aside from negligence charged for failure to provide under the safety appliance act, there could be no escape on the part of an employee of the assumption of risk. 20

MR. STALLMAN: Yes, provided that the injury resulted from something which he reasonably might anticipate, in other words, that a man in the railroad service he was in, when he walks up a railroad track, is bound to assume that that track is used for running trains. Our Court of Errors has gone so far, and so have the Federal Courts: that a person on a highway approaching a railroad crossing is bound to know what the railroad tracks are for. Now, how much more is an employee of a railroad bound to know what those tracks are for? 30

THE COURT: But the burden of proof upon you as to the assumption of risk is the same as is the burden of contributory negligence upon you, is it not?

MR. STALLMAN: I take it it is to be gathered from the evidence—there is no direct proof that he was struck on the main track 40

next to the track upon which this work train was standing. Now, we say that he must have known that that was a track that he was walking on.

THE COURT: Well, is that a situation as I may control as a matter of law and say he was chargeable immediately with the as-
10 sumption of risk; that, therefore, there can not be a recovery; or is that a matter for the jury to pass upon?

MR. STALLMAN: No; I think the Court has got to rule that this man in walking on a railroad track knew he was walking on a railroad track; and if he knew he was walking on a railroad track, I say it is for the Court to say as a matter of law that he was walking on a railroad track and that it was
20 used as a railroad track.

(After discussion between counsel and Court off the record, it was agreed by Mr. Stallman that the Court withhold his ruling until he could look at the authorities cited and if the Court then ruled adversely to him, he asked that he be allowed an objection for appeal to which the Court consented.)

Mr. Stallman summed up to the jury.

Mr. Simpson summed up to the jury.
30

40

January 3, 1917.

TRIAL CONTINUED.

THE COURT: At the close of the case yesterday a motion to direct a verdict was made, and my ruling upon that motion by consent of counsel was deferred. Counsel proceeded to sum up. I will now pass upon that motion and decline to direct a verdict. It was requested at the time that if my ruling were of the character I now indicate, that counsel for the defendant should have an objection formally entered upon the record to my ruling in that manner. You still desire it, Mr. Scott?

10

MR. SCOTT: I do.

THE COURT: And the record will stand in that condition.

20

Court's Charge to the Jury.

Gentlemen of the Jury:

This is an action brought and being maintained by Augusta Ambrecht as administratrix of the estate of William Ambrecht, deceased, against the Delaware Lackawanna & Western Railroad Company. It is brought for the purpose of recovering damages under what we know as the death act, for the death of William Ambrecht, which it is alleged was caused by the negligence of the defendant company. The action is brought under what we commonly in law speak of as the Federal Employers' Act. That part of the act in question which may be of value or service to you is this (and I am not reading any section in its entirety; nor am I giving you the exact language of the particular section; but I am giv-

30

40

ing you such parts of it as in my judgment it will be necessary for you to have). That act provides that every common carrier by railroad (and the defendant in this case is a common carrier by railroad) engaged in interstate commerce (that is, commerce between the several states of the Union, and, in this case, a railroad 10 which was carrying on business between New Jersey and New York, or New Jersey and Pennsylvania or any sister-state would be a common carrier engaged in interstate commerce) shall be liable in damages to any person suffering injury while he is employed by such carrier in any of such jurisdictions; or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee result-20 ing (in this case, of course, we are only concerned with death, not with other injuries) in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

In actions of this character, and in this action, gentlemen of the jury, there are several matters 30 which require your attention and your determination under the evidence as you find it, and under the law as it is applicable to the issues as raised in this case. I shall endeavor to give them to you in what appears to me to be the order in which you would naturally consider and determine them. However, you will understand that just because of the fact that I give you, or place before you, the several issues in a certain order or in a 40 certain manner so far as one relates to the other,

is no reason, of course, why you should consider them in that manner, if a consideration of them in another order is more satisfactory to you and satisfies your convenience better. All I can do is to do that which in my judgment would best lay before you, and most clearly lay before you the issues which you will have to determine.

First and foremost, it is necessary that the plaintiff has established, and must have established by a fair preponderance of the evidence those facts and conditions which give her the right of an action under the statute in question; because she is suing and maintaining her action entirely upon a right which she alleges her intestate, her husband, had, and she in turn as his administratrix has, under this Federal Act. Therefore, I say it is necessary and important for you to determine whether or not the plaintiff has by a fair preponderance of the evidence established a right to the use of this act in question.

Under this act, and in order to have the benefit of an action under this act, it must appear that the defendant company at the time complained of was engaged in interstate commerce; and it likewise is necessary that it appear, by the same degree of evidence, that the intestate himself was at the time of the occurrence complained of engaged in interstate commerce; and unless both of those things appear and are shown you by the plaintiff by a fair preponderance of the evidence, then the plaintiff has no right of action at all under the act in question. So for that reason, gentlemen, I am first presenting that point to your for your consideration; because if you find she has not established those things which she must establish in order to have the benefit of that statute, why, of course, you need not go any

further with your deliberations, and the case must end, and end there.

This seems to be the situation as far as the defendant company is concerned: that it was generally engaged in interstate commerce, and it may appear from the testimony, for aught I remember now, that it was also engaged at times in intrastate commerce; that is, commerce entirely within the State of New Jersey; but it does appear that it was engaged in interstate commerce: that is, commerce between the several states of the Union.

It also appears by the answers to certain interrogatories which have been read to you that the train in question, being No. 26, I believe, was a passenger train, and that that train at the time of the happening in question was engaged in interstate commerce: that is, it was a train being moved from outside of the State of New Jersey into the State of New Jersey, or from and through New Jersey out of the State of New Jersey into another state. It likewise appears by stipulation in the action that the tracks from which these men, known as the snow gang, I think, had been removing snow were tracks of the defendant company that were promiscuously and interchangeably used for both classes of traffic that is, interstate traffic as well as intrastate traffic.

As to the intestate himself and those associated with him, the testimony is that they had been engaged prior to the time of the happening of the accident in removing snow from these tracks of the defendant company. By "these tracks" I mean those tracks I have lately referred to, which it is stipulated in this case were tracks used by the defendant company for both classes of traffic. It seems that directly prior to the happening of the

accident these men had been engaged in the yards, I think at Port Morris. The train had been moved from Port Morris to the point where the accident happened, and I think it stands uncontroverted that the purpose of that movement was so that the train and the men might arrive at another portion of the Port Morris yard; that there was a necessity for taking this particular route in order to avoid or get away from, a freight train which was either then due or about due, and also to avoid and get away from this passenger train No. 26. There is a dispute or conflict in the evidence as to just exactly what was done when this snow train arrived at the point which I think was Chester Junction. If I remember the testimony correctly (and at this point let me say to you that if I narrate to you that which purports to be the testimony, and my narration as measured by your recollection of the testimony is incorrect, then, of course, you will absolutely disregard what I have to say upon the testimony and go back to your recollection of what it was)—but as I recall the testimony, there is a conflict as to just exactly what was done by these men, if anything, with regard to handling snow at the time or after the time that this train arrived at Chester Junction. My recollection is that there is some testimony that upon its arrival there there was snow in some of the cars, and that that snow was removed from the cars. There is other testimony which is to the effect that after arriving at Chester Junction there was nothing done in the way of removing any snow from the cars in question.

As I have suggested to you, gentlemen, the first and important question for your decision is whether or not the plaintiff has satisfied you

by a fair preponderance of the evidence that at the time of the happening of this accident the defendant company was engaged in interstate commerce. From the facts which appear indisputably in this action it was so engaged.

So that brings you down to, and narrows down your inquiry to the question as to whether or not 10 the intestate, the husband of the plaintiff in this action, at the time of the happening was engaged in interstate commerce. It is said also that this was the situation; that when this train left—I think it was Port Morris or near Hopatcong, an order was given to the men, some of whom were in the open gondola cars, that they were to remain in the cars, as there was further shoveling or removing to be done; that when the train ar- 20 rived at Chester Junction—I have said the testimony seems to be in dispute as to whether at that time there was any shoveling of snow from the cars or not, there being some testimony which is to the effect that there was shoveling of snow from some or all of the cars; there is other evidence which is to the contrary, that there was no shoveling of snow from any of the cars. The contention is that when this train arrived at Chester Junction, contrary to the expressed orders 30 and directions of the foremen or servants and agents of the defendant company who were in charge of these men, this deceased party, this intestate of the plaintiff, left the car in which he was and went upon the tracks of the defendant company, and there met his death. The question for you to determine as to his position is this, gentlemen: From all the facts and all the circumstances in this case at the time of the happening in question, was the intestate engaged in 40 and about a duty which he owed to his master,

the defendant company, with respect to interstate commerce, or had he removed himself from that employment? Had he taken himself out of that relation that had existed as between himself and the defendant railroad company, so that he was not at the time of the happening in question engaged in any act which he was called upon, as the servant of the defendant company, to perform in relation to and with respect to the interstate commerce of the defendant company? 10

Of course, gentlemen, if you find the fact to be that this intestate had a direction or order that he should remain in the gondola car in which he was and he transgressed, and in the face of such order left the car and went on the tracks of the defendant company, then concededly it can not be said that that relationship existed between him and the defendant company as would give his administratrix the right of an action under this statute; and it is only when you find from the evidence and under the rules which I have given you that at the time of the happening the defendant company was engaged in interstate commerce, and that the intestate of this plaintiff was likewise engaged in interstate commerce, that she has a right of action under this statute. If that has not been shown to you by a fair preponderance of the evidence on the part of the plaintiff, then you need not go any further with your deliberations, because then the case must end and your verdict must be for the defendant. 20 30

If you find that, gentlemen, which gives her the right of an action under the rules which I have given you, and under the evidence, then your consideration of the issues does not stop, 40

because then the other question immediately presents itself to you, and that is, did the death of the plaintiff's intestate happen, and was it caused, as a proximate result of any negligent conduct upon the part of the defendant railroad company, as charged by the plaintiff in her complaint?

Now, the rule, gentlemen, in relation to that
10 question is this: That a company such as this defendant railroad company is under an obligation in law to use reasonable care to keep and maintain and provide a place where its servants and employes may work, and which shall be reasonably safe. Now, you will mark, gentlemen, what I have said, and the terms and the words which I have used—the qualifying words: The obligation in law upon a company such as this
20 is, is that it must use reasonable care to provide, maintain and keep the place or places in which its servants and employes are to perform their work and execute their duties for and toward it as servants of the defendant in a reasonably safe condition. If it has done that, if the defendant company has performed its legal duty to its employes, then there can not be a recovery; and it is only when the plaintiff has shown you by a fair preponderance of the evidence that the de-
30 fendant company has been negligent with respect to that duty which I have just stated to you, and that because of such negligence—or, rather, putting it another way, that that negligence was the proximate cause of the happening, that there can be a recovery.

Now, what does the plaintiff charge as negligence upon the part of the defendant company? It says, first, that it did not use reasonable care
40 to maintain a system toward employes working

upon the tracks to protect them against the approach of trains; second, it did not use reasonable care to give any warning of the approach of said train; and, third, it did not use reasonable care to propel the said train at a safe rate of speed, but propelled the same at an excessive rate of speed.

Now, as to the latter charge, as to the excessive rate of speed of the train in question, being train No. 26, I have this to say: That that, standing alone, does not present a question of negligence. The defendant company had a right to operate its trains upon its road at such a rate of speed as in its judgment was proper and necessary for the proper carrying on of the business and the traffic of the railroad company. Just because this train was going at whatever speed it was going, whether it was fifty miles an hour or sixty miles an hour, is not negligence and was not negligence on the part of the defendant company; because, as I have said to you, the law concedes, and gives to the company the right to exercise that sort of judgment. But it is a matter which you may take into consideration, gentlemen of the jury, in considering the other charges of negligence which I have indicated to you are the charges which the plaintiff makes as against the defendant company. Upon this point, gentlemen, as I have already indicated to you, the burden is still upon the plaintiff. She must satisfy you by a fair preponderance of the evidence that in the particulars charged, or some of them, this defendant company was negligent, and did not live up to and did not obey that rule of law which I have just recently given you; that is, that it must use reasonable care to provide, maintain and keep the

place provided by it for the use of its employes as a working place, in a reasonably safe condition. The question before you upon that issue is: Has the plaintiff established by a fair preponderance of the evidence that the defendant company was in some of the particulars as charged, negligent, as matched up with and measured by that
10 rule which I have given you, and if so, was that negligence the proximate cause of this happening? If she has not satisfied you of that, then again she is not entitled to a verdict at your hands. If she has, then she is entitled to a verdict at your hands, subject to these other matters which I am about bringing to your attention.

Now, if she is entitled to a verdict then it will be necessary for you to know for what she is en-
20 titled to recover. As I indicated to you at the opening of my charge, this is an action brought under the Death Act. It is not necessary for me, gentlemen, to read to you this statute, but let it suffice for me to say to you that without that statute which I have indicated and called the Death Act there could not be any recovery for death, in the State of New Jersey. So, therefore, you are guided, and must be entirely guided, and explicitly guided in the determination of the
30 amount of any verdict, if there is to be one for the plaintiff, by what that act says a verdict may be had for; and I trust, gentlemen, that to what I am about to read and say to you, you will give your very best attention, because it is important that you should have this rule of the statute, as well as what our courts have said upon it, firmly impressed in your minds.

The statute says the amount recovered in every
40 such action shall be for the exclusive benefit of the widow and next of kin of such deceased per-

son, and shall be distributed between such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person.

I will re-read that, because that is what the statute says a verdict in a case of this character shall be based upon and be for.

> "In every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person."

And then our courts have said, construing that statute:

"What the plaintiff is entitled to recover is a capital fund which shall represent the present value of the pecuniary loss" (money loss) "which falls upon the widow and next of kin by the premature taking-off of the intestate" (that is, the husband and father in this case). "That fund is ascertained by taking into account all the possibilities. The intestate" (that is, the husband and father in this case) "might have died by the course of nature shortly after the accident." (That is, had the accident not happened and had he lived, he might have been taken down by disease or some other casualty might have overtaken him and he might have died.) "He might, had he lived, have suffered financial reverses." (He might have been out of employment; he might not, because of other conditions, have been able

to earn as much as he had been earning. Again, his position in a business sense might have increased or bettered: he might have earned more, and had ability to earn more.) "The wife, had the husband lived, might have died before he did; likewise the next of kin" (who are the children in this case. It might have been that had this
10 accident not happened to the father and to the husband, and had he lived, yet the wife might have died before he would; likewise so might both of the children have died. Of course, upon their death the contribution, or the right of contribution would have ceased.) "Nothing is to be added for loss of society or wounded feelings, or anything else which can not be measured by money and satisfied by pecuniary recompense. The damages are to be determined by reference to the
20 pecuniary injury resulting to the widow and next of kin of the deceased by his death. The injury to be thus recovered for has been defined to be the deprivation of a reasonable expectation of pecuniary advantage which would have resulted by a continuance of the life of the deceased. Compensation for such deprivation, is therefore, the sole measure of damages."

In other words, what the plaintiff says in this
30 case is that: That had not this casualty taken place, had not my intestate met his death in the manner in which he did, but had he lived during my lifetime and during the lifetime of my children, he would in reasonable probability have earned money, and in like reasonable probability he would have contributed from his earnings to my support and my benefit, and to those of my children; but because of this happening he met his death, and, therefore, his ability to earn, and
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likewise his ability to contribute to myself as his wife, now his widow, and to his children, has been cut off.

What she is entitled to have and what the law says the widow and next of kin are entitled to have in such a situation is that sum of money which represents in reasonable probability those sums which the father, had he lived, would during his lifetime and that of the widow and the children have contributed to their support and maintenance and for their benefit—not the gross sum that you would find, if any, that he would have so contributed had he lived, and during their periods of life, but that gross sum that you would find, capitalized, as the courts have said, or reduced to its present worth, that lesser sum than the whole loss which is the present worth of the total loss; because, you see, gentlemen, the reason for that is this— that had the intestate continued to live and continued to earn, and continued to contribute to his wife and family, he would have earned week by week, or month by month, as the manner of payment of wages was, and he would naturally have contributed as he earned; so that had he lived during the lifetime of his widow and his children, whatever contributions, if any, were made by him, would have been made in those periodical payments or contributions running over the entire period when the contribution would have continued.

Now, by your verdict you are satisfying for all loss, both that which has accrued as well as that which in reasonable probability under the evidence would have accrued at this time; and, therefore, they should not have the total sum, but that lesser sum which is the present worth of the total loss.

Now, in this case it appears uncontroverted that the intestate was at the time of his death forty-eight years of age. His widow was forty-two, and the children respectively five years and three years. You are to take those things into consideration, gentlemen. You are to determine in reasonable probability the expectancy of life of
10 the intestate; that is, how long in reasonable probability he would have lived had not this accident befallen him; because, you see, that is one of the terms which mark the time of contribution. At his death his contributions would have ceased, of course, you are also to determine the same thing with respect to the widow, who was forty-two; because, even though her husband had lived, but had she died before his death, of course, the contributions to her and her right of recovery would
20 have ceased. Likewise as to her children by him.

It appears in the case that at the time of the intestate's death he was earning form sixty-five to seventy dollars per month; that he had been earning from twenty to twenty-five dollars per week in some previous employment that he had upon the docks in Hoboken. Of course, gentlemen, it is for you to determine from the evidence that is before you what the earnings of the in-
30 testate were, and what in reasonable probability, under all the circumstances, they would have been in the future had he continued to live.

Again, it has been testified that all of his earnings were turned over as they were earned to his wife, but that out of that sum so turned over he received his maintenance; that is, his board, as it would be commonly called, and his clothing and his shoes, and his other necessities, so that from his total earnings there must at least be de-
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ducted that sum of money which you find was spent upon himself; or, putting it the other way, which is the more accurate way, gentlemen, from the evidence (and the burden is upon the plaintiff to satisfy you thereof) you must determine what sum of money, in reasonable probability, considering the amount of his earnings, he would have contributed to his wife and two children had **10** he continued to live and earn wages and money; because it is for that, reduced to its present worth, that the plaintiff is entitled to a verdict, if she is entitled to any verdict.

But that is not all, gentlemen. I have given you the rule of a measurement of damages as if the plaintiff were entitled thereto, without any deduction. In this action the defendant raises as one of its defenses the defense of contributory **20** negligence; that is, the defendant says that even though you gentlemen of the jury find from the facts and under the law that the intestate met his death as the proximate result of some negligence upon the part of the defendant company, yet he, the intestate himself, was guilty of negligence which contributed to the thing which happened to him. Now, the burden of satisfying you of that gentlemen, rests upon the defendant, because it is a defense urged by it, and it must **30** satisfy you from all of the evidence of such facts as constitute a fair preponderance of all the evidence that he, the intestate himself, was guilty of negligence which contributed to the happening.

Now, there is a rule of law which applies and did apply to this intestate, and that is that he was bound to use that care which a reasonably prudent person would or should have used and exercised, time, place, circumstances and conditions **40**

considered, so that he would not bring harm to himself. Concededly, gentlemen, it is a well-known fact that railroad tracks are places of danger. This intestate had before him the fact that he was upon or in close proximity to a railroad track, and the rule of law was, as I have given it to you, that he was obliged to use that
10 care which a reasonably prudent person would or should have used, time, place, circumstances and conditions considered, so that he would not bring harm to himself; and if he transgressed that rule, if the defendant has shown you by a fair preponderance of the evidence that he did, then he was guilty of contributory negligence, and then this very act under which they seek to recover says that in all actions hereafter brought
20 against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

The Courts of the United States have said upon
30 that point this: "It means, and can only mean, as this Court has held, that where the casual negligence is attributable partly to the carrier" (the defendant in this action), "and partly to the injured employe" (the intestate of the plaintiff in this action), "he shall not recover full damages" (that is, this plaintiff shall not recover full damages), "but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence
40 attributable to both, the purpose being to

exclude from the recovery a proportional part of the damages corresponding to the employe's contribution to the total negligence."

So that, gentlemen, if you find that it is established that the intestate himself was negligent, and that negligence contributed to what happened to him, then if you find that the plaintiff is entitled to any verdict, that verdict or that sum which you find has been and does mark her loss shall be reduced in the manner which the statute says, and in the manner in which the courts of the United States, passing upon that statute, have said it must be reduced. 10

Now, I do not know, gentlemen, of any other thing which I can bring to your attention which would aid or assist you, except that I had in mind this fact: that it is your first service on a jury—at least, during this present term of service, and it is proper undoubtedly that I should endeavor to explain to you as concisely as I can, and in as simple language as I can, what is meant by fair preponderance of evidence; because, you will remember that I have used that term on several occasions during my charge. In some circumstances I have said that the burden rests upon the plaintiff to satisfy you of a certain allegation by a fair preponderance of the evidence, and in some other circumstances, or in one circumstance, at least, I have said to you that that burden rests upon the defendant. What is meant by it is this: Where the one party asserts or alleges a thing as a fact, the law places a burden upon the party so asserting to establish that fact by what we call a fair preponderance of the evidence. The way to reach that and determine it is in this manner: you are to take all of the evi- 20 30 40

dence which you find in the case which stands in favor of the proposition or the assertion made, and you are to take all of the evidence that you find in the case which goes to pull down the truthfulness of that assertion, or which goes against the truth of that assertion or allegation, and you are to weigh them up practically as if you
10 were weighing them in a scale. If the two amounts of evidence weigh equally, then, of course, there is no preponderance, and the party upon whom the burden rests to present a preponderance has not met the burden the law places upon him. If you find that the evidence in favor of the proposition outweighs that which appears against it, then and then only is there a preponderance, and then and then only has the party upon whom the
20 burden rests to furnish that preponderance met that burden. That, gentlemen, is as nearly as I can, and in as common language as I can employ, give you a definition of what is indicated and meant by fair preponderance of the evidence.

With that, gentlemen, you may take the case.

THE JURY RETIRED.

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30 THE COURT: The requests to charge I am declining to charge, except in the language in which I have already charged upon the subjects to which each of the requests respectively refer; and defendant's request to submit to the jury certain questions I also decline to accede to.

MR. SCOTT: I desire to take exception to certain portions of your Honor's charge, and the first exception I desire to take with respect to your Honor's charge is in the allowing of the
40 jury to ascertain whether the decedent was en-

gaged in interstate commerce, in view of the fact that the defendant conceives there was no evidence that the deceased was working at the time, the working theory being the theory of the interstate character of the decedent's business as pointed out in the case of *Shanks vs. The D. L. & W.*

Then I desire to take exception to that portion of the Court's charge with respect to the allowance of the taking into consideration by the jury of the speed of No. 26 in consideration with the other circumstances of the case.

Third, I desire to take exception to the Court's omission to fully explain the Federal Employers' Liability Act to the jury, with special reference to that feature of the act which deals with the assumption of the risk.

I desire to take exception to the refusal of the Court to charge the requests to charge in the specific language of the requests requested.

Defendant's Requests to Charge.

1. If you find that the deceased left the gondola car on which he was standing, and got down on the track to walk toward the coach, without an order or direction to that effect, and not for the purpose of performing any work assigned to him, in that case he assumed the risk of injury from trains passing on that track.

2. If you find that the deceased got off of the gondola car without any direction or order so to do, the defendant is not guilty of negligence in failing to prevent his getting off the car.

3. If you find that whistles were blown or other warnings given as soon as the men were

discovered in the track and that the express train was approaching, no negligence can be imputed to the defendant.

4. Risks which are incidental to the employment, risks which are obvious and those created by the want of reasonable care in the exercise by the servant of his employment are all assumed
10 by the servant when he enters or continues in the service and there can not in reason be any legal duty resting upon the master to establish rules and regulations to protect the servant from such risks.

4-a. No negligence can be predicated upon the fact that the defendant company did not notify the enginemen of the passenger train that it would pass the work train in question standing upon a
20 parallel track, standing partly on a curve of said track.

5. If you believe that the deceased, of his own knowledge and volition, and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of personal convenience, he became at most a licensee to whom the defendant had no duty except to abstain from willful injury, and in this case there is no proof at all of wan-
30 ton injury having been inflicted upon the deceased.

6. If you believe that the deceased did not take his position on the main track where he was killed in obedience to any request from any agent of the defendant company, or that his duty did not require him to be where he was at the time he was struck, then your verdict must be for the defendant company.

7. Where a servant goes to some other part of
40 the master's premises for his own convenience

and accommodation, the general rule is that he is regarded as a licensee.

8. And if you believe that the deceased had left his position in the car in which he was just prior to the accident in question to him, and had gone upon the main eastbound track of the defendant railroad company for his own personal convenience or necessity, then I charge you that there can be no recovery, because there is no proof that the railroad company by and through its agents had indicated the track upon which the deceased was struck, as one to be used by the deceased, prior to or at the time he was injured, or that the railroad company through its servants or agents knew or should have known that it would be so used or that necessarily it could be used for the purpose for which the deceased was using it just prior to and at the time he was injured.

9. If the plaintiff's contributory negligence was as great as the negligence of the defendant, there is an equality of negligence and, therefore, under the statute by virtue of which the plaintiff maintains her action, no substantial recovery of any amount of damages could be given her.

10. If you should determine that the railroad company is liable and not until then can you take up the question of damages, in the consideration of which you then come to the question of the deceased's contributory negligence with respect to the application of which, if you find the deceased was guilty of contributory negligence, I charge you as follows:

The statute directs that if the deceased was guilty of contributory negligence, the verdict must be reduced or diminished in proportion to

the amount of negligence attributable to such employe.

And I further charge you if the contributory negligence of the deceased was such as to have been the sole, absolute and only cause of the injury to the deceased, notwithstanding the negligence of the defendant, then your verdict must be for nominal damages only.

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Defendant's Requests for Special Findings.

1. What was William Ambrecht doing at the time he was killed?

2. Was any order given him to get off the gondola and go into the coach?

3. Why did he get off of the gondola car?

4. What efforts were made to warn him of the approach of the express train?

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5. What effort did William Ambrecht make to avoid or escape injury?

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