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NOTICE OF APPEAL.

(Filed January 27, 1928.)

New Jersey Supreme Court.

MIDDLESEX COUNTY.

MICHAEL KAPROLI, by MATRONA KAPROLI, his next friend and MATRONA KAPROLI, individually,

Plaintiffs,

vs.

CENTRAL RAILROAD OF NEW JERSEY,

Defendants.

To: William A. Barkalow, Attorney of Defendants, or to whom it may concern:

Sir:

Please take notice that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit:

(1) Because the Supreme Court erred in giving judgment to the defendant instead of the plaintiff, in that

(a) The trial judge erred in non-suiting the plaintiff under the state of facts on grounds that the Laws of New Jersey did not support the complaint.

Respectfully yours,

NATHANIEL A. JACOBY,
Attorney of Plaintiffs.

SUMMONS.

THE STATE OF NEW JERSEY.

To:

CENTRAL RAILROAD OF NEW JERSEY:

You are summoned to answer the annexed complaint of MICHAEL KAPROLI, by Matrona Kaproli, his next friend and MATRONA KAPROLI, individually, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after the service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, this 13th day of February one thousand nine hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

NATHANIEL A. JACOBY,
Attorney for Plaintiffs.

JUDGMENT RECORD.

COMPLAINT—Filed February 20, 1926.

NEW JERSEY SUPREME COURT.

MICHAEL KAPROLI, by MATRONA KAPROLI, his next friend, and MATRONA KAPROLI, individually,

Plaintiffs,

vs.

THE CENTRAL RAILROAD (COMPANY) OF NEW JERSEY,

Defendant.

Judgment Record—Action at Law—On Postea.
Judgment of Non Suit.

WILLIAM A. BARKALOW,
Attorney.

The Central Railroad (Company) of New Jersey, the defendant in this cause was summoned to answer unto Michael Krapoli, by Matrona Kaproli, his next friend, and Matrona Kaproli, individually the plaintiffs therein, in an action at law upon the following complaint:

(Summons issued February 13, 1926)

The plaintiffs, Michael Kaproli, an infant, brings this action by leave of this court by Matrona Kaproli, his next friend, and Matrona

Complaint.

Kaproli, individually, of the Borough of Carteret, County of Middlesex and State of New Jersey, complains as follows:

First Count:

1. That on or about the fourth day of April, one thousand nine hundred and twenty-five, the defendant operated a railroad in the Borough of Carteret, County of Middlesex and State of New Jersey, said railroad being the one situated in the farthest east of the town and running between sections that is known as Carteret and Chrome, being the same track which extends to and joins tracks known as the side tracks situated at a point called Williams & Clarks and running southerly on a line parallel with the New Jersey Central Railroad track known as the Sound Shore Railroad and being situated about one hundred fifty yards more or less easterly from the said track known as the Sound Shore Railroad track and joining the said Sound Shore Railroad track in the southerly part of the Borough of Carteret at a point called Liebigs. It is believed that this track in question was formerly called the New Jersey Terminal Railroad.

2. That on the dayaforesaid, the plaintiff, Michael Krapoli, a minor age four years, was playing in front of his house, said tracks passing directly in front of the home wherein said plaintiff lived, at a point of about twenty-five yards distant from the front of the plaintiff's home.

Complaint.

3. While the minor child was thus playing, a freight train belonging to or operated by the Central Railroad of New Jersey passed on the said track and struck the minor child cutting off his left foot a few inches above his ankle all by reason of the negligence of the defendant company.

4. The defendant, the Central Railroad of New Jersey was negligent.

1. That by reason of the proximity of the said railroad track to the homes of small children and also that of the infant complainant, the aforesaid defendant should have anticipated the probability of small children being attracted by the moving cars of the defendant company and that they would therefore trespass upon the property of the said defendant company to their probable injury and therefore should have taken proper precautions and provided reasonable safe-guards for preventing trespass by children because of the aforesaid attraction. This, the railroad company negligently failed to do thereby causing the injury to the infant complainant.

2. The defendant railroad company, by its agents and servants had actual knowledge that children lived in close proximity to the aforesaid tracks of the railroad company and had also, by its agents and servants actual knowledge that children played near the aforesaid tracks and that children were attracted by moving cars and were impelled by the aforesaid attraction to trespass upon the aforesaid railroad prop-

erty and that children thus attracted indulged in the fun of boarding and riding the moving cars of the defendant company and although the railroad company, by its agents and servants had actual knowledge of the aforesaid facts and had reason to know of the probability of danger and the injurious outcome thereof yet it had negligently and carelessly failed to use proper precautions and create proper safeguards to prevent children from trespassing on the aforesaid railroad property by reason of the aforesaid attraction thereby causing the injury of the infant plaintiff.

3. The defendant railroad company was also negligent in that by reason of the proximity of the railroad track to the homes of children and that of the infant complainant and in that by the further reason that the railroad tracks of the defendant company, at a point situated directly in front of the plaintiffs home, run through a gulley thereby leaving a dangerous incline where children played and by further reason that the aforesaid defendant company had reasons to anticipate that children living in such close proximity to the aforesaid defendant railroad company would play upon the company's property and the defendant company, by its agents and servants actually knew that children were in the habit of playing on the property and also in the habit of sliding or running up and down the aforesaid dangerous incline yet the defendant company failed to take proper precaution and create reasonable safe-guards to prevent children from trespassing upon the aforesaid railroad property thereby resulting in

the injury of the aforesaid injured infant complainant.

5. As a direct, natural and proximate result of the negligence, the plaintiff, Michael Kaproli, was seriously injured making it necessary to immediately amputate his left foot a few inches above the ankle. As a result of the said injury, the said plaintiff has suffered great pain and torture of mind and body and was confined to the hospital for a long period of time and for a long time thereafter was confined to his bed. The said injury is also of permanent nature, the said plaintiff having lost his left foot as heretofore described.

The plaintiff, Michael Kaproli, demands damages in the sum of fifty thousand ($50,000.) dollars.

Second Count:

1. Plaintiff, Matrona Kaproli, repeats paragraphs 1, 2, 3, 4 and 5 of the first count.

2. The plaintiff, Matrona Kaproli, is the widowed mother of the plaintiff, Michael Kaproli, and as a result of the injuries sustained by the said Michael Kaproli as a result of the negligence of the defendant the plaintiff, Matrona Kaproli, has been obliged and will in the future incur great expenses in endeavoring to have the plaintiff, Machael Kaproli, cured and healed of his said injuries. The plaintiff, Matrona Kaproli, will also be deprived of the earnings of the said Michael Kaproli to which she would be entitled until he, Michael Kaproli, becomes twenty-one years of age.

The plaintiff, Matrona Kaproli, demands ten thousand ($10,000.) dollars damages on the second count.

NATHANIEL A. JACOBY,
Attorney of Plaintiffs.

(Filed February 20, 1926)

ANSWER—Filed Nov. 4, 1926.

The answer of The Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having it principal office for the transaction of business in the City of Jersey City, County of Hudson and State of New Jersey, says that:

First Count:

I. It admits paragraph 1.

II. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 2.

III. It denies paragraphs 3, 4 and 5.

As a separate defense, it alleges that the plaintiff Michael Kaproli was guilty of contributory negligence, barring a recovery by the plaintiffs or either of them in this action.

As a second separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was a tres-

passer upon the cars or private property of the defendant.

As a third separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was a mere license upon the cars or private property of the defendant.

As a fourth separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was walking, standing or playing upon the defendant's railroad.

As a fifth separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was jumping on or off a car while in motion of the defendant's railroad.

As a sixth separate defense, the defendant will object at, on or before the trial of this action that the allegations contained in the complaint are insufficient in law to constitute a cause af action against the defendant and in favor of the plaintiffs or either of them, upon the ground that such allegations fail to disclose either the existence or breach of any duty owing from the defendant to the plaintiff Michael Kaproli.

Seond Count:

I. It repeats its answers to paragraphs 1, 2, 3, 4 and 5 of the First Count.

II. It denies paragraph 2.

As a separate defense, it alleges that the plaintiff Michael Kaproli was guilty of contribu-

Answer.

tory negligence, barring a recovery by the plaintiffs or either of them in this action.

As a second separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was a trespasser upon the cars or private property of the defendant.

As a third separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was a mere licensee upon the cars or private property of the defendant.

As a fourth separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was walking, standing or playing upon the defendant's railroad.

As a fifth separate defense, it alleges that at the time of the accident mentioned in the complaint, the plaintiff Michael Kaproli was jumping on or off a car while in motion of the defendant's railroad.

As a sixth separate defense, the defendant will object at, on or before the trial of this action that the allegations contained in th complaint are insufficient in law to constitute a cause of action against the defendant and in favor of the plaintiffs or either of them, upon the ground that such allegations fail to disclose either the existence or breach of any duty owing from the defendant to the plaintiff Michael Kaproli.

Wm. A. BARKALOW,
Attorney for Defendant.

(Filed March 4, 1926.)

REPLY—Filed March 29, 1926.

The reply of Michael Kaproli by Matrona Kaproli, his next friend and Matrona Kaproli, individually of the Borough of Carteret, County of Middlesex and State of New Jersey, is as follows:

First Count:

1. The plaintiffs deny paragraph two in defendants answer in the first count and allege that defendant had knowledge and information sufficient to form a belief as to the allegations contained in paragraph two of the complaint.

2. The plaintiffs deny the defendants first separate defense in the first cornt and allege that the plaintiff, Michael Kaproli, was not guilty of contributory negligence which would bar a recovery by the plaintiffs or either of them in this action.

3. The plaintiffs deny the defendant's second separate defense in the first count.

4. The plaintiffs deny the defendant's third separate defense in the first count.

5. The plaintiffs neither admit nor deny defendant's fourth separate defense in first count.

6. The plaintiffs neither admit nor deny the defendant's fifth separate defense in the first count.

7. The plaintiffs deny the sixth separate defense of defendant's answer in the first count.

Reply.

Second Count:

1. The plaintiffs deny the first separate defense in defendant's answer in the second count.

2. The plaintiffs deny the second separate defense in defendant's answer in the second count.

3. The plaintiffs deny the third separate defense in defendant's answer in the second count.

4. The plaintiffs neither admit nor deny the fourth separate defense in defendant's answer in the second count.

5. The plaintiffs neither admit nor deny the fifth separate defense in defendant's answer in the second count.

6. The plaintiffs deny the sixth separate defense in defendant's answer in the second count.

NATHANIEL A. JACOBY,
Attorney for Plaintiffs.

(Filed March 24, 1926.)

This action was tried at the Middlesex County Circuit Court, in New Brunswick, New Jersey, before Honorable Peter F. Daly, Judge of the Circuit Court, and a jury, on January 28th and 31st, 1927.

Reply.

After the plaintiffs had submitted their evidence the trial court, upon the application of the defendant, ordered a judgment of non suit.

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed, and that the defendant The Central Railroad (Company) of New Jersey, do recover of the said plaintiffs, Michael Kaproli, by Matrona Kaproli, his next friend, and Matrona Kaproli, individually, its costs, which have been taxed at the sum of forty dollars and ten cents.

Costs $40.10

Judgment entered February 3, 1927.

WM. S. GUMMERE,
C. J.

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

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fifteenth day of March, A. D. nineteen hundred and twenty-eight.

EDWARD J. KELLEHER,
Clerk.

(Seal)

NOTICE OF ARGUMENT—(Filed April 7, 1928).

NEW JERSEY
COURT OF ERRORS AND APPEALS.

MICHAEL KAPROLI, by MATRONA KAPROLI, his next friend, and MATRONA KAPROLI, individually,

Plaintiff-Appellant,

VS.

CENTRAL RAILROAD OF NEW JERSEY,

Defendant-Respondent.

To:

WILLIAM A. BARKALOW, Esq.,
Attorney for the Defendant-Appellee.

TAKE NOTICE of the argument of the issue to be joined in this cause before the New Jersey Court of Errors and Appeals to be held at the State House, in the City of Trenton, State of New Jersey, on the third Tuesday of May, next, at 10 o'clock in the forenoon or as soon thereafter as the said Court can attend to the same.

Dated: March 28th, 1928,
Carteret, N. J.

Yours respectfully,

NATHANIEL A. JACOBY,
Attorney for Plaintiff-Appellant.

Sat Below—HON. PETER F. DALY.

Service of a copy of within Notice of Argument is hereby acknowledged to have been received this 30th day of March, 1928.

WILLIAM A. BARKALOW,
Atty. for Defendant-Respondent.

TESTIMONY.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT,

DECEMBER TERM 1926.

MICHAEL KAPROLI, by Matrona Kaproli, and MATRONA KAPROLI,

VS.

CENTRAL RAILROAD OF NEW JERSEY.

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. Peter F. Daly, Circuit Court Judge, and a Jury, at the Middlesex County Court House, in the city of New Brunswick, New Jersey, on the twenty-eighth day of January, A. D. 1927, at 2:45 P. M.

Appearances:

NATHANIEL A. JACOBY, Esq., Attorney for the plaintiffs.

WILLIAM A. BARKALOW, Esq., DEVOE TOMLINSON, Esq., (Present) Attorneys for the defendant.

A jury empaneled and found satisfactory, they were sworn.

Mr. Jacoby opens the case for the plaintiffs.

Mr. Tomlinson: It seems to me it is my duty, upon the opening made by Mr. Jacoby, to move for a nonsuit. His theory, as stated in his opening to the jury and to your Honor, is that this little boy sustained the injuries which constitute the basis of this suit, by reason of trying to board a train. He makes no contention that that railroad was located on a public street; he admits in his opening that the track was situated upon the private property of the railroad company; and his sole charge of negligence is that for many years, according to his statement, the children have played in the vacant lot adjoining the railroad; that during those years freight trains have committed the unpardonable sin of stopping, and that children, attracted by the railroad train, have gone over and tried to get on them and play, and that this boy, while pursuing that custom, met with these injuries. Under those circumstances it seems to me to be quite clear that the defendant is not liable in this suit, because it has been settled by the Supreme Court of this state, and by the Supreme Court of the United States, that under those circumstances a child is barred from recovery, because he is following Section 55 of the General Railroad Act, which provides that any person while getting off or getting on a moving train—I had better read the statute to your Honor.

The Court: I think, Mr. Tomlinson, that we will go on with the evidence, as long as the pleadings themselves, on their face, present a reasonable question. Of course if the evidence develops what you say, if that is the kind of a case he has, I already agree with you.

Mr. Tomlinson: Of course your Honor will appreciate that the pleadings do present the exact situation Mr. Jacoby has presented in his opening. He does not charge a bit of negligence, except our failure to put up structures, or do something to prevent these children from trespassing.

The Court: Well, what is your motion?

Mr. Tomlinson: My motion is for a nonsuit upon the opening.

The Court: That will be denied, Mr. Tomlinson, and you may take an exception. The motion, of course, you have a right to renew as we go along, if you do so determine.

Mr. Tomlinson opens the case for the defendant.

MICHAEL KAPROLI, one of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Jacoby:

The Court: How old is this child?

Mr. Jacoby: This child is six years of age now. He was four at the time of the accident. He is very—he just remembers slightly certain oustanding events, and I would like the Court to have him testify. He could not testify to any details of the accident. He does know a few things, if the Court would care to have him sworn and testify.

Mr. Tomlinson: I have a suggestion to make, I do not know how acceptable it will be to Mr. Jacoby. I am perfectly satisfied that your Honor interrogate this child.

By the Court:

Q. What is your name? A. Michael Kaproli.

Q. How old are you, Michael? A. Six years.

Q. When were you six? When was your birthday, or when will be your birthday? Do you have a birthday, Mike? A. No.

Q. You don't have a birthday? You don't have cake with candles on it, Mike? A. No.

Q. Do you go to school? A. Yes.

Q. What class are you in? A. First grade.

Q. What school do you go to? A. New school.

Q. Down in Carteret is it, Mike? A. No.

Q. Where do you live, Mike? What is the name of the place where you live? What is that book there, Mike, that black book? What book is that? Do you know the name of that book? A. No.

Q. Do you go to church or Sunday school, Mike? A. No

Q. Do you always tell the truth? Suppose you should tell a lie, Mike, what would happen to you? Who is God, Mike? Where is God? A. Up in Heaven.

Q. Who told you that, Mike? A. Nobody.

Q. Suppose you should tell those ladies and gentlemen over there a lie what would God do to you, Mike? (No answer.)

The Court: How old is this boy?

The Mother: He is six.

The Court: When was he six?

The Mother: I am not remember the month. He is past six.

The Court: Why doesn't the little boy go to Sunday school or church?

The Mother: He just started this year. I didn't send him to Sunday school yet.

The Court: You go to church, don't you?

The Mother: Sure I do go sometimes.

The Court: You never took that little boy with you?

The Mother: I didn't bother with a little kid like that.

The Court: You regard him as being a kid and that he would not know anything about it, is that the idea? You would not bother with a little kid like that, to bring him to church, because you think his mind is not big enough yet to understand anything about church, do you?

(No answer).

The Court: Don't you know the way to make him know about a church is to take him, even before they understand, so that it becomes second nature to them, and they know that there is a God?

However, the law fixes no precise age at which children are absolutely excluded from giving evidence. It is within the discretion of the Court. To permit such a youngster as this, in view of the examination not only of the child, but of the child's mother, to testify, would not be the exercise of discretion, but would

rather be a woeful abuse of discretion that is given to the Court in such cases as this.

The Court holds that the child is not competent to testify because the child has no appreciation of the character of testimony or the nature of an oath.

MATRONA KAPROLI, one of the plaintiffs, being duly sworn according to law, on her oath, saith:

Direct Examination by Mr. Jacoby:

Q. Mrs. Kaproli, where do you live? A. Roosevelt avenue, 558.

Q. What town? Do you live in Perth Amboy? A. Carteret.

Q. On April 4, 1925, where were you living? A. Carteret, Lafayette street, No. 7.

Q. No 7 Lafayette street? A. Yes.

Q. Do you recall an accident occurring to your boy on April 4, 1925? Do you remember an accident to your boy on April 4, 1925? A. Yes, I am remember.

Q. You are the mother of Michael Kaproli, are you not? A. Yes.

Q. Is his father living? A. No.

Q. He has a step-father now, has he not? A. He got a stepfather, yes.

Q. What is his step-father's name? A. Roman Chuby.

Q. Tell us just what you know, just what you saw? A. Well, I just know—

Q. On April 4, 1925, concerning this accident. A. Well, I just know that on April 4, 1925, the child was ask me to go out—

Mr. Tomlinson: I object to anything that the child said to this witness.

The Court: You are asked simply what you saw about this accident.

Q. Just tell what you saw? Don't testify to what anybody told you or what was said. Just what you know and what you saw. A. Well, I just see that when he was—when the train, the railroad cars was standing up there, and the child was standing up there, and I look out through the window, and he was standing by the people, by the kids, and I holler on him he should come back on the porch; and he saw me; I hollering him, so he went back, he say, all right, mama, I won't go back there no more; so I holler on him he should not go there. Then I close the window and I was in the house cooking, and then after that I was in the house cooking, and after that child come on, the other one, and he say, mamma, come down because my little brother got a leg off.

Mr. Tomlinson: I object. I object to these conversations. I do not want to interrupt all the time. I do not think they are proper evidence.

The Court: No.

Q. Remember, Mrs. Kaproli, don't mention anything your boy said to you. Just what you saw? A. Well, that is all what I saw. When I

called him out through the window he was stand up there and he see me, I called him up, he say all right, mamma, I come; I see him come back on the porch, he stay over there and I close the window and went back in the house.

Q. Then what was the next thing you saw? A. The next I didn't saw when they went on down there, and I went down and took him when he was on the ground there by the sand bank.

Q. You found him on the ground? A. On the ground.

Q. What was the matter with him? A. He was without a leg already.

Q. How far from the railroad track was he? Was it near the railroad track?

Mr. Tomlinson: I object as leading.

A. No. He was going on his knees already himself.

Q. He was crawling along on his knees? A. On his knees, yes.

Q. With relation to your house can you tell us just where you found him? How many feet in front of your house was it that you found him? A. I couldn't tell you how many feet. I couldn't know that.

Q. Was it very far? A. It is not so far.

Q. Then what happened to your boy after you found him in this condition with his leg off? What did you do with him? A. Well, I brought him in the house and then I don't know nothing that time. I just saw when Dr. Reason was coming in the house and I am not remember nothing.

Q. Did he remain in the house? A. Yes.

Q. Do you understand my question? Did the boy stay in the house after that? A. No. He was staying just for a while before the time they took him to the hospital.

Q. What hospital? A. Perth Amboy City Hospital.

Q. Do you live near any railroad? At the time on April 4, 1925, at the time your boy had his leg cut off, were you living near railroad, a railroad track? A. Oh, I was there living, sure.

Q. How far was this railroad track from your house? A. It is not too far. I don't know. I can't tell you how far.

Q. Not very far?

Mr. Tomlinson: I do not want to interrupt counsel's orderly case, but I have a map here, and if you desire to put that map in to show the situation I would be very glad to have it done. I think it might help the jury.

The Court: Certainly.

(Map entered in evidence and marked Exhibit A).

Mr. Tomlinson: If that map is drawn to a square I suggest that I be permitted, or Mr. Jacoby, I do not care which, to examine Mr. Pach to show the distances.

The Court: Yes.

Mr. Tomlinson: Mr. Pach made the map.

Q. Now, Mrs. Kaproli, will you show us on this map where No. 7 Lafayette street is, the house that you live in?

Mr. Tomlinson: I did not hear what Mr. Jacoby thought of my suggestion that Mr. Pach explain that map according to the scale and showing the distances. Have you any objection?

Mr. Jacoby: Not a bit.

STEWART L. PACH, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Tomlinson:

Q. Mr. Pach, you live, I believe, in Plainfield? A. Yes, sir.

Q. What is your occupation and profession? A. Civil engineer.

Q. How long have you been a civil engineer? A. Seventeen years.

Q. You are connected with the railroad company, Mr. Pach? A. Yes, sir.

Q. You are in the office of the Chief Engineer, I believe, are you not? A. Yes, sir.

Q. Did you make this map that has just been marked Exhibit A? You made this map as a result of a survey you made on the ground? A. Yes, sir.

Q. For how long a period of time, Mr. Pach, have you been familiar with the layout of the tracks, the railorad tracks through Carteret, including the portion opposite Lafayette street? A. Since about 1912.

Q. Does this map accurately represent the conditions as you found them on the date of your survey? A. Yes, sir.

Q. What was the date of your survey? A. Survey was on the seventeenth of June, 1926.

Q. Were the conditins at that time substantially the same as on April 4, 1925? A. Yes, sir.

Q. Referring to this map, Mr. Pach, to the right of the map is in what direction? A. To the right of the map is toward Roosevelt avenue, generally northeast.

Q. And where do those tracks lead if you just follow them out? A. Eventually to Jersey City.

Q. And to the left of the map is in what direction? A. To the left of the map is southwest and leads to Chrome.

Q. There is just one track running through there? A. Yes, sir; single track.

Q. You have indicated that by the words "N. J. Terminal Track", is that correct? A. Yes, sir.

Q. You have indicated Randolph street approaching the railroad tracks at almost a right angle, is that correct? A. Yes, sir.

Q. Does Randolph street actually cross the tracks? A. No, sir. It terminates at the corner of Lafayette street.

Q. You have indicated Lafayette street running diagonally away from the railroad tracks, that is looking towards the right of the map, is that right? A. Yes, sir.

Q. Does Lafayette street actually cross the railroad tracks? A. No, sir, it does not.

Q. You have shown on the map certain rectangles Nos 1, 5, 7, 9, 11, 13; what are they intended to represent? A. They represent the dwellings along that westerly side of Lafayette street and those are the house numbers on them.

Q. Farther to the right of the map you have shown a street as Sharot street; does that street go to the railroad tracks? A. No, sir, it does not.

Q. To the extreme right of the map you have shown a rectangle with the number 25 in it; does that represent a dwelling? A. Yes, sir.

Q. 25 Lafayette street? A. Lafayette street.

Q. On the bottom of the map you have shown an enclosure, enclosed with first a dot and then a long black line; what is that intended to represent, that series of tracings? A. The line represents a fence erected on the property line between the Central Railroad of New Jersey and the Wheeler Condenser and Engineering Company's plant.

Q. Do you know how wide the right-of-way of the Central Railroad Company is through this locality, Mr. Pach? A. Yes, sir. At a point opposite Randolph street the width is forty feet, and then towards Roosevelt avenue it extends to a width of sixty feet at this fence corner.

Q. By the right-of-way I assume of course you mean the property owned by the railroad company over which it runs its tracks, is that right? A. Yes, sir.

Q. Are the tracks laid in the middle of the right-of-way throughout? A. Not exactly, no, sir.

Q. What is the distance from No. 7 Lafayette street to the nearest rail of the railroad track looking straight across? A. From the front of No. 7 Lafayette street to the nearest point is 105 feet.

Q. Taking a straight line right from the front of No. 7 right across to the tracks, what is that distance? A. That is 130 feet.

Q. What is the distance from No. 7 Lafayette street to the sidewalk, that is the sidewalk of Lafayette street? A. Fifty-five feet.

Q. And what is the distance from Lafayette street to the tracks, that is, going right across from the house in a straight line? A. In a straight line, seventy-five feet.

Q. What is the distance from the nearest point of the sidewalk to the nearest rail? A. The nearest point of the sidewalk on Lafayette street to the nearest rail of the railroad track is eighteen feet

By the Court:

Q. How near is the right-of-way to the sidewalk? A. The right-of-way line is only about a foot away from the sidewalk on the southwesterly side.

Q. You have not marked right-of-way line? A. No, sir; but there is a black cross representing a monument on the ground and that is the property corner and it runs in a circular course.

Q. Are all these monuments? A. No. That is one monument. And then it runs on a circular course parallel to the track to this monument above the word "Roosevelt", and from there to the fence corner marked "fence" on the map.

By Mr. Tomlinson:

Q. What are these round circles? A. The round circles marked 107, 108, 109, and so forth, represent telegraph poles of the Central Railroad.

Q. Are they on or off the property of the railroad company? A. On the property.

Q. I show you these species of triangle here bounded by the tracks of the railroad company on the east, by the fence of the Wheeler Company on the north, and by the sidewalk on the west, and ask you if that is where the lot is in that triangle. A. Yes, sir; that is a vacant lot in that triangle.

By Mr. Jacoby:

Q. You say you have knowledge of all the land the Central Railroad Company owns? A. Yes, sir.

Q. Just how wide is their right-of-way on which their tracks are built? A. At the Wheeler Condenser Engineering corner south of Randolph street the width is forty feet; that is from the monument shown on the map to the fence corner just forty feet. At the fence at the right-hand edge of the map the total width is sixty feet.

Q. Does it graduate? A. Yes, it graduates. It is nothing at this corner and twenty feet on this corner.

Q. The track runs in the center of this? A. Not exactly the center, no, sir.

Q. About how many feet would the land of the Central Railroad Company extend into this triangular lot, this lot here (indicating)? A. Well, at the fence corner it extends over to—the distance from the rail to the fence corner is thirty feet, that is the right-hand edge of the map.

Q. Then it graduates down? A. Twenty foot at the point opposite the Wheeler Condenser Engineering fence.

Q. It graduates from a distance thirty feet here to one foot at this point here at Randolph street? A. No.

Q. One foot from the sidewalk? A. Yes, one foot from the sidewalk. Approximately one foot.

Q. To your knowledge this land in here, with the exception of a graduation of thirty feet to one foot, that is private property, the land that does not belong to the Central Railroad Company? A. The land without that distance does not belong to the Central Railroad Company.

Q. Beyond that distance does not belong to the Central Railroad Company.

By the Court:

Q. If you drew a line from the fence to a point nearer the sidewalk you would then have a map that would show what the area of this lot did not belong to the railroad, wouldn't you? A. Yes, sir.

The Court: Suppose you do that.

A. That is the approximate right-of-way although it is on a slight curve.

By Mr. Jacoby:

Q. How about those railroad tracks? Your survey does not show whether it runs on a level with that land or whether or not it runs through a slope. A. The figures on the track, for instance at Station 14, 28.37 represents the elevation of the track, the track rises in every one hundred feet. The next one hundred feet the

elevation is 30.09, about one half per cent. grade, one and one-half foot rise in 100 approximately out there at Roosevelt avenue.

Q. You mean that the railroad track itself is running on an uphill grade? A. Upgrade.

Q. Up to Roosevelt avenue. The question I ask however is this: Are the tracks on a level with this land? A. No. The tracks are below the level of the land.

Q. How much below? A. The railroad tracks are at elevation 32, and the land is 35 at the top of the slope there, three feet above the tracks, and gradually increase until they get to an elevation of forty, which is eight feet above the tracks.

Q. The fact is then those tracks run through a deep ravine, do they not? A. They run through a cut, yes.

Q. A deep cut? A. It is three feet at the point I have indicated.

Q. How far in feet,—I don't understand elevation in point of degrees, but I mean in feet just how far would the bottom of these tracks be, that is, if you took a perpendicular from the level of that slope, the summit of that slope? A. At what point?

Q. Does it graduate too? A. Yes.

Q. Well, say an average height starting from here down to the corner of Randolph street and Lafayette street. A. Well, at the fence I will mark "X" on the map, the ground is eight feet above the top of rail, and at the corner of Lafayette street and Randolph street the sidewalk is two feet, two and one-half feet above the top of the rail.

By the Court:

Q. Right at the rail what is the difference between the grade of the rail and the earth which immediately abuts the rail itself? A. Well, the earth is about a foot below the rail, just forming a small ditch next to the ties. And then from that point—

Q. Next to the ditch what is the difference between the surface of the earth, the lay of the land? A. Well, at the street corner it is two and one-half feet above the rail, and at the far fence corner it is eight feet above the top of the rail.

Q. What I am trying to get at is, when you walk along there to get on the track you would have to step down how much? A. You would have to step down eight feet at the highest point.

Q. I know, but right next to the track? A. Right next to the track there is a ditch just below the track, a sort of a drainage ditch.

The Court: I understand. Well, how far would you have to step down from the earth to reach the top of the ditch which abuts the rail?

Mr. Tomlinson: May I interrupt just a minute, your Honor? I do not think the witness knows at which point you mean. My understanding is that the ground is irregular. At one point it will be higher from the rail than at another point.

The Court: I think he said—he said yes to a question that there was a deep ravine.

Mr. Tomlinson: Yes. That is quite true but my understanding is, in fact, all the photographs here that show it, that at one space in this triangle the cut is higher—I think it is highest down here and as you come along here the elevation gets lower. I think that is why the witness was apparently confused.

The Court: All right. Go on.

By Mr. Jacoby:

Q. You show a fence on this map running, you say that would be east of your railroad track, is it not? A. Yes, sir.

Q. And along property known as the Wheeler property. A. Yes, sir.

Q. That fence extends so that it is opposite all this land, it is extended out in the direction of Roosevelt avenue? A. Yes.

Q. On whose land is that fence built, is it built on Central Railroad property or is it built on Wheeler property? A. Why, I think it is all on the Wheeler property.

Q. Now that you know which land you are, and know as to the ownership of the land of the Central Railroad Company, what land the Central Railroad Company owns, can you tell us whether that fence belongs to the Central Railroad Company or to Wheelers? A. Wheeler Condenser and Engineering fence.

By Mr. Tomlinson:

Q. Mr. Pach, what is the right-of-way, how wide is the right-of-way at a point directly opposite No. 7 Lafayette street? A. Approximately fifty-six feet wide.

Q. And is the track laid in the middle of the right-of-way at that point or not? A. Not precisely but very near the middle.

Q. You have spoken about the track running through a ravine; you mean by that I suppose the same thing as a cut? A. The other counsel used the word "ravine" and I corrected him and said a cut.

Q. Is that cut the same height from the adjoining land all the way along here, or does that height vary? A. The height varies. The maximum height is at the fence corner shown on the right-hand edge of the map where the cut is about eight feet deep.

Q. As I understand it, the ditch that you have spoken of is between the railroad tracks and the embankment, is that right? A. Yes, sir.

Q. Were you present when these photographs were taken? A. No, sir.

Mr. Tomlinson: I would just like to have the witness identify them, and if counsel does not want them to go in I do not suppose I have any right. Will you just look them over and see if they represent the situation as you found it?

A. This one does; yes, sir.

Q. Just look them all over and give us a blanket answer, or else pick out those that do not. A. Yes, sir; they are all correct.

Mr. Tomlinson: I have the photographer here. They were taken by Underwood & Underwood.

Mr. Jacoby: I consent to them going in.

Mr. Tomlinson: By consent we will put in five photographs. I may say that each of them has a paster attached to it showing the direction in which the camera was pointed.

(Photograph entered in evidence and marked Exhibit B).

(Photograph entered in evidence and marked Exhibit C).

(Photograph entered in evidence and marked Exhibit D).

(Photograph entered in evidence and marked Exhibit E).

(Photograph entered in evidence and marked Exhibit F).

By Mr. Jacoby:

Q. Your survey does not show any slope. The point I was trying to get at is this: This is the ravine that I meant, that is just how the railroad track runs, it runs through a gulley, does it not? A. Yes, sir.

Q. When you say at the fence do you mean that fence there (indicating)?

Mr. Tomlinson: Showing the witness what exhibit?

Mr. Jacoby: Exhibit B.

Q. Is that the fence you are referring to? A. Yes, the fence to the left of the railroad track in this picture.

Q. That corresponds with the point you marked fence? A. "X" yes, sir.

Q. This slope graduates from a distance eight feet in height, that is, if a perpendicular—if a stick was laid perpendicular on that track it would be eight feet in order to be on a level with the summit of that slope? A. Yes, sir.

Q. You say it graduates down to a distance of two feet where the summit of the slope is only two feet from the level of the sidewalk down at Randolph street, corner of Randolph and Lafayette, is that right? A. Yes, sir.

Q. Is it a gradual slope? A. Yes, sir.

Q. Graduates gradually? A. Yes, sir.

Q. You would not say as a matter of fact that right at the corner of Lafayette and Randolph street it takes a sudden drop, would you, that is the elevation of that slope takes a sudden drop, the tracks have got nothing to do with it, it is just the thing drops suddenly? A. I can't tell you how suddenly it drops? The difference is two and one half feet from the top of the rail to the sidewalk. What I am referring to is this: You said that it is a gradual decline, that the slope, the summit of that slope from the railroad track gradually decreases in height from the railroad track, from the level of the railroad track? A. Yes.

Q. And you deny that at the point of Randolph and Lafayette street the reason why it is only two feet—that the summit of that slope is only two feet from the level of the track is because it takes a sudden drop? A. I don't know what you mean by a sudden drop.

Q. Well, the elevation, the land above the railroad takes a sudden drop so that it comes nearer to the level of the railroad. A. Yes, that is true.

Q. It takes a sudden drop, does it not? A. I

can't use the word "sudden". It is a natural drop.

Q. It is not true that it is just a gradual decline as far as the land above the railroad track is concerned, is it? A. Oh, yes, it is gradual.

By Mr. Tomlinson:

Q. This photograph Exhibit B that counsel showed you is looking up towards Roosevelt avenue and Elizabeth Port, isn't it? A. Yes, sir.

Q. He indicated to you a fence which I understood you to say was on the left-hand side of the picture. You mean the right-hand side, don't you? A. No, sir. The fence he was speaking about is on the left-hand side of the picture marked "X" on the map.

Q. I show you photograph marked Exhibit E and ask you if that shows the corner of Lafayette and Randolph street and the height of the embankment at that point? A. Yes, sir, it does.

Mr. Tomlinson: That is all.

(Photograph entered in evidence and marked Exhibit G.)

MATRONA KAPROLI, recalled.

Direct Examination (continued) by Mr. Jacoby:

Q. Mrs. Kaproli, will you show us with reference to this map the location of the house that you lived in on the day of the accident?

Mr. Tomlinson: We admit it is No. 7 shown on that map.

Q. Show us just where you found Mike with reference to that map when you came out and found him. A. About that place in here (Indicating).

Mr. Tomlinson: What do yor mark that? Why not put an initial on there? Counsel marks the map "M. K." with an "X".

Q. When you found him he was creeping, you say? A. When I found him he was going on his knees, yes.

Q. In what direction was he creeping? You say he was going on his knees? A. Well, then I take him and bring him home upstairs.

Q. Well, what direction was he facing when he was going on his knees? Was he facing the railroad track? A. From the railroad track.

Q. He was going from the railroad track? A. From the railroad track.

Q. You say you had seen Michael near the tracks that day? A. Did I see him?

Mr. Tomlinson: I did not understand that she said any such thing. She said she saw him out in the lot.

Q. How long had you been living at No. 7 Lafayette street, Mrs. Kaproli? A. About three months.

Q. During the three months that you lived at No. 7 Lafayette street did you see Michael

playing near the tracks? A. I didn't see him if he was playing on the tracks because I used to holler at him all the time and watch him all the time because he shouldn't go there.

Q. Did you see any other little boys playing near the tracks?

Mr. Tomlinson: I object to that as irrelevant, incompetent and immaterial.

A. I didn't see it on the—

The Court: She says she did not see him.

Q. Never saw any boys playing near the tracks?

Mr. Tomlinson: I object.

A. I didn't see if they was playing on the tracks. They was playing on the sand there sometime.

Q. Did you, at any time, see children at play near your house? A. They was playing sometime.

Q. Yes. Is there any particular place where the children played? A. They was.

Q. You don't undersand the question. You say that Michael was taken to the Perth Amboy City Hospital. How long was he in the hospital? A. About three months.

Q. Did you get a bill? A. No.

Q. Do you know who the doctor was who took care of Michael? A. No, I don't know the doctor.

Q. Was Michael taken under the name of—at the time that the accident happened had you married again? Were you still a widow? A. What?

Q. At the time the accident happened were you still a widow? A. No. I was married.

Q. What was your second husband's name? A. The second Roman Chuby.

Q. Was Michael taken to the hospital under the name of Kaproli or Chuby? A. They put first name Chuby because they don't know how.

Mr. Jacoby: That is all.

Cross-Examination by Mr. Tomlinson:

Q. Your name is Mrs. Chuby? A. The second name.

Q. I say your name now is Mrs. Chuby? A. Yes.

Q. And not Mrs. Kaproli, of course? A. Yes.

Mr. Tomlinson: That is all.

Mr. Jacoby: This is another minor. I believe she will qualify as a witness.

FRANCES FERENC, a witness produced on behalf of the plaintiff, being duly sworn according to law, on her oath, saith:

By the Court:

Q. Frances, how old are you? A. I am eleven.

Q. Eleven? A. Yes.

Q. What did you just do then when you had your hand on the book? What did you do? What is that book? A. Bible.

Q. What is a bible? Now, you know. What is it? What is in the bible? A. Ged.

Q. The word of God, isn't it? Where is God? A. Up in Heaven.

Q. When you put your hand on that book you promised those ladies and gentlemen that you were going to tell them the truth, didn't you? A. Yes, sir.

Q. Well, now, if you don't tell them the truth what will God do? A. I don't know.

Q. Well, if a little girl like you lies, when it means a lot, if you lie it might hurt somebody very very much if you lie, how does God feel about that, Frances? A. He feels bad.

Q. If you died after telling a lie where would you go if you told a bad lie? A. Down in the ground.

Q. Where is God? A. Up in Heaven.

Q. Where do good girls go who die? A. Up in Heaven.

Q. Where do they go if they are bad, real bad? A. Down in the ground.

Q. You know it is a terrible thing if you tell a lie; you must tell the truth, and tell all you know, but don't tell anything except what you know to be true, because you promised God who is in Heaven that you would.

Direct Examination by Mr. Jacoby:

Q. Frances, do you know Michael Kaproli? A. Yes, sir.

Q. Do you remember Michael Kaproli meeting with an accident some time back? A. Yes, sir.

Q. How far back was that, do you know? A. No.

Q. Well, was it a month? (No answer).

Q. Well, when you saw Michael meet with an accident just what kind of an accident did you see him meet with? Just what happened? A. When I saw him he fall down.

Q. He fell down. Fell down where? A. On the ground.

Q. Did he fall from any particular place? What did he fall from? A. I don't know.

Q. Did you see him fall from any place? A. No.

Q. What was the matter with Michael when he fell? A. He got his toes cut off.

Q. His toes cut off? A. Yes.

Q. Where were you standing? A. I was standing on the porch.

Q. On the porch? A. Yes, sir.

Q. And where was Michael when he fell down? What place was he at? A. At the tracks.

Q. By the railroad tracks? A. Yes.

Q. Were these tracks far from Michael's house? A. Not very far.

Q. Do you know where Michael lived at that time? A. Yes, sir.

Q. Where did he live? A. He lived in 7 Lafayette street upstairs and I lived downstairs.

Q. You say you saw Michael fall? A. Yes, sir.

Q. And you can't tell us what he fell from? A. No.

Q. Was there anything on the tracks? A. There was a train.

Q. There was a train on the tracks? A. Yes.

Q. Did you see Michael before he fell? A. No.

Q. You didn't see Michael at all before he fell? You didn't see what Michael was doing before he fell? (No answer).

Q. (Repeated) You didn't see Michael at all before he fell? A. No.

Q. (Repeated) You didn't see what Michael was doing before he fell? (No answer.)

Q. What do you mean when you say that Michael fell to the ground? Just tell us, what do you mean by that? A. He fell down.

Q. Did he hurt himself because he fell down? A. Yes, he got his toes cut off.

Q. Did you see what cut his toes off? A. No.

Q. You didn't see that? A. No.

Q. The first you saw of Michael he was on the ground, is that right? A. Yes, sir.

Q. And he was near the railroad track? A. Yes, sir.

Q. You didn't see Michael on the cars? A. No.

Q. Do you recognize that map?

The Court: Do you know that map?

Q. Do you know that map? Could you show me just where your house is? A. Yes.

Q. Show me where your house is on that map. A. Over here (indicating).

Q. When you saw Michael fall to the ground where was he, show us on that map where he was? Could you do that? A. Over here (indicating).

Q. Not very far from the track? A. No.

Q. Where were you standing when you saw

him fall down? A. I was standing on the porch of our house.

Q. On the porch of No. 7? A. Yes.

Q. How long have you been living at No. 7 Lafayette street? A. Four years.

Q. Have you seen children play around the track during the four years you were living there? A. Only a little boy, they called him Ambrose, he always used to play on the tracks.

Q. Did you ever see children playing near the tracks? A. Yes.

Q. Where did they play? A. They play, they always run down the hill when the tran comes, a little boy, he always wants to jump on the train, but his mother hollers on him.

Q. What little boy do you mean?

By the Court:

Q. Is that Ambrose? A. Yes.

Mr. Tomlinson: I move to strike out what the little boy wanted to do.

The Court: Yes.

By Mr. Jacoby:

Q. He is the only boy you saw running on the cars? A. Yes.

Q. He runs down the hill, you say? A. Yes.

Q. Where is this hill, can you show us on the map? All right, never mind. Have you any brothers? A. Yes.

Q. Sisters? A. No.

Q. Did you ever see your brothers trying to get rides on the train?

Mr. Tomlinson: I object to that as leading. I think it is particularly vicious to try to lead a little child like this. Counsel had asked her if she saw anybody, and she said she saw one boy whom she described as Ambrose. Now, he is putting it right in this child's mouth to say she had seen her brothers play. Ordinarily I do not object to leading questions, but I object to that.

Mr. Jacoby: I will withdraw the question.

Q. Did you ever see anybody else trying to steal rides on the train? A. Yes.

Q. Ambrose is not the only boy, is he? A. No.

Q. Is that all the children do is just run down this hill and try to get rides?

Mr. Tomlinson: I object to that as leading.

The Court: That is very leading

A. No. Sometimes they play on the sand.

Q. Where is this sand? A. On the fields.

Q. What? A. Like on the fields.

Q. On the fields? A. Yes.

Q. Could you show us on the map just where this sand is? A. No.

Q. Where are the fields? A. Right across the street.

Q. Right across the street? A. Yes.

Q. Can you see the street on the map? A. Yes.

Q. Will you point it out, what street you mean? A. Across from Lafayette street.

Q. Right across Lafayette street are the fields? A. Yes.

Q. Is that where the sand is? A. Yes.

Q. That is where they play? A. Yes.

Mr. Tomlinson: That is certainly leading.

Mr. Jacoby: That is what the witness testified to.

Mr. Tomlinson: I object to counsel rehashing what the witness has said, or repeating it. He has no right to do that.

Q. Have you ever played there? A. Yes.

Cross-Examination by Mr. Tomlinson:

Q. You used to live at No. 7 Lafayette street, didn't you? A. Yes, sir.

Q. But you don't live there any more, do you? A. No.

Q. You live at 13 Lafayette street now, don't you? A. Yes.

Q. And you have a little brother named Steve, haven't you? A. Yes, sir.

Q. Is Steve here today? A. Yes, sir.

Q. And you have a bigger brother John, haven't you? A. Yes, sir.

Q. Where is John; is he here today? A. No.

Q. Does John go to school? A. Yes.

Q. John is older than you are, isn't he? A. He is fifteen.

Mr. Tomlinson: That is all.

The Court: That is all.

Redirect Examination by Mr. Jacoby:

Q. When you saw Michael this day was there anybody near him? Was he alone? When you saw him fall to the ground was he alone? A. No, I didn't see nobody. Everybody ran away.
Q. Everybody ran away. All right.

By Mr. Tomlinson:

Q. As soon as Michael got hurt all the rest of the children ran away, didn't they? A. Yes.
Q. So you don't know who was with Michael when he did get hurt? A. No.

ADJOURNED UNTIL MONDAY,
JANUARY 31, 1927 at 10.00 A. M.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT,

December Term, 1926.

MICHAEL KAPROLI, by Matron Kaproli, and MATRONA KAPROLI,

vs.

CENTRAL RAILROAD OF NEW JERSEY.

Transcript of stenographer's notes of evidence in the above entitled cause, taken before HON. PETER F. DALY, Circuit Court Judge, and a Jury, at the Middlesex County Court House, on the thirty-first day of January, A. D. 1927, at 10:00 A. M.

APPEARANCES:

NATHANIEL A. JACOBY, ESQ., Attorney for the plaintiffs.

WILLIAM A. BARKALOW, ESQ., DEVOE TOMLINSON, ESQ., (Present) Attorneys for the defendant.

WILLIAM DZURILLA, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Jacoby:

Q. Where do you live, Mr. Dzurilla? A. 76 Fitch street, Carteret, New Jersey.

Q. What is your occupation? A. Insurance salesman.

Q. Where is your territory? A. Operating through Carteret.

Q. What company are you employed with? A. Prudential Life Insurance Company.

Q. Do you have occasion—is your territory extended to Lafayette and Randolph street? A. Yes, sir.

Q. Does your territory extend in the lower end of Lafayette as it joins Randolph street? A. Yes, sir.

Q. Are you acquainted with the railroad which runs in that vicinity? A. Yes, sir.

Q. What is the name of that railroad? A. Central Railroad.

Q. How long have you been employed with the Prudential Life Insurance Company? A. Five years last September 12.

Q. Is that part of your territory during the five years? A. All the time.

Q. How long have you lived in Carteret? A. Thirty-one years.

Q. Prior to your employment with the Prudential Life Insurance Company was this territory familiar to you? A. It has been. I went through that street and across Lafayette for practically sixteen years when I was employed in the Wheeler Condenser Engineering Company.

Q. Will you take a look at that map? The territory in question, do you recognize it as being described on that map? A. What territory?

Q. The territory in question. A. Yes.

Q. Lafayette and Randolph street? A. Yes.

Q. The Wheeler Engineering and Condenser

Company, just where is it located with reference to that map? A. Opposite Lafayette street right on the other side of the railroad track.

Q. Directly opposite Lafayette street as shown on that map? A. Well, the biggest part of the plant is just southerly of Lafayette street.

Q. During a course of years you have been in this vicinity, both prior to your employment with the Prudential and during your employment with the Prudential, have you had occasion to see children playing? A. Oh, numerous times.

Q. Just what is the nature—is there anything unusual in their playing?

Mr. Tomlinson: I object to that as calling for a conclusion of the witness. He can describe what he saw and where he saw it, provided it is prior to the date of this accident April 4, 1925. As to whether or not it is usual or unusual that is purely a conclusion.

Q. Just what is the nature of their play in this vicinity? A. Well, they seem to do everything. They play all sorts of games there. Just in that sand lot there, across the street there from opposite Lafayette between the railroad track and Lafayette street.

Q. Will you go to that map and just point out just what territory you designate as the sand lot? A. I can safely say from the corner here, well, practically opposite this last house here, near the corner of Sharot Street, it takes in all sand right in here, right in through here (indicating).

Q. Is there any other sport they indulge in that you have seen? A. Well, they have a great habit of taking these—playing this game stunt master down in the sand bank. This railroad track is down into a valley like, and they play sort of a game of stunt the leader, or stunt master. See them time and time again jumping off the top of this bank and down to the bottom and trying to go one better than the fellow before. An baseball the children play out through there, the kid games.

Q. Is there anything else you observed them do? A. Well, I couldn't say. There is just a regular playground for the children, they all in that section, that neighborhood come there and play in that sand. They have been doing that for years. I have even done it when I was a boy.

Q. Have you observed trains going by on this track? A. Many times.

Q. Is there any other fun you engaged—that is, you engaged in besides playing in the sand and running up and down the bank? A. I don't know what you would consider it. I have seen children often get on freight cars.

Q. You have seen them get on freight cars? Have you seen them in the act as they were getting on?

Mr. Tomlinson: Objected to as leading.

The Court: It was leading. He said yes.

Q. Is there any particular point in this particular vicinity where they get on and off cars?

A. Why, I have always noticed them right at the corner there of Lafayette and Randolph where the bank is not quite as high as up at the upper end of Lafayette, and it seems to be a much easier thing, at the end there of that street. to get on the train as it comes up the track.

Mr. Tomlinson: I move to strike that out, that it seems to be the easiest thing to do.

The Court: Yes, of course.

Q. Was there anything peculiar about the trains in this vicinity that you observed? Is there anything different from any other place? A. Why, yes. The freight train that comes up through that way is considerably different, I will say, because they naturally have to slow up going up that hill, and as it slows up the children playing in that lot there naturally attempt, and I have seen them, I have chased them many a time myself, going down that embankment and boarding those trains.

Q. You say the train naturally slows up? A. It has got to, up that grade.

Q. What grade? A. That is runnig up towards Roosevelt avenue, practically parallel with Lafayette.

Q. Just what do you mean the grade? What is the grade in that particular case? A. Well, the railroad track is a hill there and nautrally the train has to slow up in order to get up it.

Q. Will you go to the map and just show us where this hill is located on this railroad track? A. After it makes this here turn here, this is

practically all a grade here, all the way up to Roosevelt avenue, and then it starts to go down again. After it crosses Roosevelt avenue it goes down another grade.

Q. Is Roosevelt avenue shown on that map? A. No, sir, not that far.

Q. Just what direction does Roosevelt avenue lie on that map? A. Well, it would be across in this way, running east and west.

Mr. Tomlinson: Indicating on the right of the map.

The Court: Yes.

Q. You mentioned an embankment; just what do you mean by an embankment in this particular vicinity? A. Well, the tracks runs down into a very steep valley, I should judge from the corner of Lafayette and Randolph there is a gradual incline to this embankment from, I will say at the corner there from four foot to about, well, a little bit higher than a box car. A box car can't be seen from any part of Lafayette street when the cars get up as far as, we will say, Sharot street there.

Q. It is within your knowledge whether these children have been seen getting on these cars by trainmen or other railroad employes?

Mr. Tomlinson: I object to that.

The Court: He cannot testify to what others saw.

Q. You say that you have yourself chased these children. Have you ever seen these children chased by anybody else? A. I certainly

have. By the trainmen of the Central Railroad, and women of that section, and I myself have chased them time and time again.

Q. You mention this grade, this incline or embankment extending from an average of four feet in depth to twelve; would you go to that map and show us just what part is the lowest depth, this gully is of lowest depth? A. Well, along here from the Wheeler Condenser plant I will say it is about two foot, until it gets about up here somewhere, and then that is all level there and flat, about two foot, and here is where, in my judgment, it starts to begin a steeper grade. It runs along gradually to the corner here, it it about four foot, Then it gradually runs along from, well, say eight to ten, or twelve, and about fourteen foot up this way. Right down.

Mr. Jacoby: That is all.

Cross-Examination by Mr. Tomlinson:

Q. You say you are an insurance salesman? A. Yes, sir.

Q. For the Prudential Company? A. Yes, sir.

Q. To what office of the Prudential Company do you report? A. Perth Amboy, detached district of New Brunswick.

Q. Where is that office located in Perth Amboy? A. 175 Smith street.

Q. What is the name of your superintendant, or other supervisor, the officer to whom you report at Perth Amboy? A. Albert C. Krouse is the assistant superintendant and L. J. Hayes is the district superintendant.

Q. I understood you to say that you lived at 76 Fitch street, Carteret? A. At the present time, for the last three years.

Q. Where is Fitch street located with reference to Lafayette street and Randolph street? A. I can't see it on there. There is just a block, as you see Sharot street there is just a block below that down the other end more westerly.

Q. It is up in the direction of Roosevelt avenue somewhere? A. One block, it is a block between Roosevelt avenue and Sharot street.

Q. Where did you live before you lived at 76 Fitch street? A. Randolph street.

Q. What number Randolph street? A. 47 at that time. It is changed today.

Q. What is its number now? A. I think it is 54, if I am not mistaken. Somewhere in that section.

Q. Now, you say that the tracks run in a valley. You mean by that, don't you, that the railroad tracks run up here in this section opposite Randolph street and Lafayette street through a cut, isn't that what you mean? A. Through a cut?

Q. Through a cut? You know what a cut is? A. That is a valley you mean.

Q. Well, I am trying to find out whether you mean by the expression valley what I mean by the word "cut". A. Yes, the track is laid in a cut.

Q. And you say that at a point opposite No. 7 Lafayette street, for instance, that embankment or that cut is so deep that the top of a box car cannot be seen from No. 7 Lafayette street, is that what you mean to convey to us? A. No, not as deep as that at that particular point, but

I will say it is about eight to ten foot at that point, up further it is.

Q. Go out, if you please, to the map, and indicate to us the point opposite which you say the top of the box car while it is in the cut cannot be seen. A. Well, anywhere from No. 9 here to No. 11.

Q. So that from No. 9 and 11 Lafayette street a person looking straight across to the cut cannot see the top of a box car in that cut, is that right? A. Not from Lafayette.

Q. Opposite all these buildings on Lafayette street, that is from 1 Lafayette street, 5 Lafayette street, 7, 9, 11 and 13 Lafayette street the tracks are on a steep grade towards Roosevelt avenue, aren't they? A. On a grade to Roosevelt avenue.

Q. And a steep grade, isn't it? A. Well, it is practically, I wouldn't say it is a very steep grade, because it is not. There is a grade there which has a tendency of making the train slow up.

Q. Well, it is such a grade that a freight train, an ordinary freight train going along there has to slow up on account of the grade, isn't that true? A. Yes, sir..

Q. And that is the only thing that you meant when you said that freight trains going along those tracks are different from other freight trains, because that freight train is going up a grade naturally it slows up, that is what you meant, isn't it? A. Certainly.

Q. That is the only way in which these trains differ from any other trains, isn't it? A. Yes, sir.

Q. You have often seen freight trains slow up going along railroad tracks, haven't you? You have often seen freight trains slow up and stop? A. Yes, sir.

Q. At various points, not only for points in Carteret, but various points, haven't you? A. Yes, sir.

Q. Now, you have said that you have seen these children try to get on freight cars? A. Yes, sir.

Q. And you have seen people chase them away? A. Yes, sir.

Q. And you have chased them away? A. Yes, sir.

Q. And you have seen the brakemen on these freight cars chase the children away, haven't you? A. I have.

Mr. Tomlinson: That is all.

DORA KIRCHER, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on her oath, saith:

Direct Examination by Mr. Jacoby:

Q. Mrs. Kircher, where do you live? A. Carteret.

Q. What street? A. 25 Lafayette.

Q. Is that in the vicinity of New Jersey Central Railroad? A. Yes, sir.

Q. Can you go to that map and point out just where your house is as shown on that map, that is, showus?

Mr. Tomlinson: If she understands the map and can point the house out.

Q. Do you recognize that map, just what it designates and what it describes? Do you recognize what this map portrays? A. Yes. This is Sharot street and this in Randolph street. This is Lafayette street.

Q. Will you show just where your house is on that street according to that map? A. Around this way (indicating), this way.

The Court: Indicating to the right and beyond the right of the map.

Q. Where would your house be on that map, No. 25 Lafayette street. A. Here (indicating).

Q. Right around here? A. Around here, yes.

Mr. Tomlinson: Indicating 25 Lafayette street. There is no question about where she lives.

Q. Do you know Michael Kaproli? A. No, sir; I didn't know the family at all. I know them now.

Q. Well, do you remember seeing an accident some time ago near your vicinity? A. Yes, sir, I did.

Q. Just what did you see? A. I was standing upstairs in the third story on the window and looked out, and the train was coming over the road, and the train was coming and some of the little children they run with the train, but one little boy came back, this was this boy was standing down further and he went down and

got this little boy and put him down that ditch and put him on the train.

Q. Then what did you see? A. Well, next minute the little boy was creeping up the bank and hollered.

Q. You heard him holler? A. The little boy was hollering like anything. He creep up the bank.

Q. Did you see anything else after that? A. No. I came downstairs.

Q. Was there anything wrong with the boy? A. Sure. I think his foot was off, cut off some part of it.

Q. Could you see that from where you were standing? A. No, I couldn't see it so plain but I know it was happen something to the boy.

Q. How many floors are there to your house, Mrs. Kircher? A. Three.

Q. You say you were standing at a window on the second floor? A. On the third floor.

Q. Now, just where is this window, on what side of the house is this window? A. It faces south, it faces Fitch street.

Q. Faces what street? A. Fitch street.

Q. From where you were standing you had a clear view? A. Yes, sir.

Q. Of the land around there? A. Yes.

Q. Did you see the boy get on the train? A. I seen that one little boy put this other one on I don't know how he hang on, or he get hold of it, I couldn't see that, I couldn't see it so plain.

Q. Was the train moving at the time? A. The The train was going.

Q. Well, was it moving fast? A. Not so very fast, no.

Q. Just at that point did you see this other boy leave the boy that you later saw get hurt? Show on the map just where these boys were at the time. A. Around here some place (indicating). No. Down here further There was a pole there and about ten feet that pole there was a little boy standing, I think the boy was standing here (indicating).

Q. I wish to show you a picture marked G and from this picture could you show us just what pole you have reference to? Did you see the poles on that picture? A. No, I don't think so. It is right on the bank by the railroad. This I think (indicating) It is right on the bank by the railroad.

Q. Can you see the picture, Mrs. Kircher? A. I can see it. I think that is the pole here.

The Court: There is no pole there.

Q. When you saw the boys can you show us on this picture just where the boys were standing? Do you see your house on that picture, the house you lived in, do you see it on that picture?

The Court: She could not see No. 25 on that picture.

A. No, there is not 25 here.

Q. Could you point just about where your house would be, from that picture, where your house is loated on that picture? Just where would your house lie? Do you reognize the vicinity from that picture? A. My house ain't on here.

Q. Is it clear to you? Do you know what that picture represents? A. No, sir.

Q. It is not clear to you? A. No.

Q. Will you go to that map once more and tell us on that map where these boys were?

The Court: She has already pointed Why take up the time? The point marked on the map "X" with a circle around it, that is where she pointed.

Q. How long have you been living at No. 25 Lafayette street? A. About thirty-two years.

Q. Have you observed children at play in this particular vicinity? A. No.

Q. Have you seen them playing? A. No.

The Court: She does not understand you. She does not know what vicinity means.

Q. Have you seen the children at play in your neighborhood? A. No.

Q. Never watched them? A. No, I didn't watch them.

Q. Well is this the first time—is the day that you speak of the first time you have seen children run after box cars? A. They didn't—no. I didn't see the children. The children play there on the sand, but not, I don't see them going after the trains.

Q. That was the first time you ever saw them run after a train? A. Yes.

Q. Was that day? A. Yes. I never watched them.

The Court: Who owns this triangular piece of land that is south of Lafayette street?

Mr. Jacoby: It belongs to Colwell.

The Court: It does not belong to the railroad? That is admitted?

Mr. Jacoby: That is admitted that it does not belong to the railroad.

Cross Examination by Mr. Tomlinson:

Q. You were looking out of the window in the third story of your house, weren't you? A. Yes, sir.

Q. That is your house there, isn't it? A. Yes, sir.

Q. And that is the window that you were looking out of? A. Yes, sir.

Mr. Tomlinson: I will mark that with a "K" on Exhibit C.

The Court: Yes.

Q. As I understand it, Mrs. Kircher, you looked out of your window and you saw some children running after this train? A. Yes, sir.

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

Q. And the train was moving, wasn't it? A. Yes, sir.

Q. And then you saw a boy take a little boy down by the tracks and put the little boy on the car? A. Yes, sir.

Q. And then the next thing you saw was when the little boy came hobbling up the bank? A. Yes, sir.

Q. And all this time the train was moving, wasn't it? A. Yes, sir.

Q. Now, Mrs. Kircher, do you know who the boy was? A. No, sir.

Q. That you saw take the little boy? A. No, sir. I didn't know the children.

Q. Would you know him if you saw him again? A. Not that boy. I didn't know him at all. But now I know the two boys, the little hurted boy.

Q. But I mean the other boy? A. No, sir.

Q. You would not know him if you saw him, would you? A. No.

Mr. Tomlinson: That is all.

STEPHEN RESKO, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Jacoby:

Q. Mr. Resko, where do you live? A. Carteret.

Q. How long have you been living in Carteret? A. Fifteen years.

Q. What is your occupation? A. Insurance agent.

Q. What company do you represent? A. John Hancock Mutual Life of Boston.

Q. Is your territory in Carteret A. Yes, sir.

Q. Does your territory extend to Lafayette and Randolph street A. I live nearby.

Q. The question is does your territory— A. Yes, sir.

Q. Have you occasion in your business to walk in the vicinity of Lafayette and Randolph? A. Two or three times a day.

Q. Are you acquainted with this railroad track that runs along Lafayette? A. Yes, sir.

Q. How long have you been with the Hancock Insurance Company? A. It will be six years next May.

Q. Has your territory always been the same? A. No, sir.

Q. Has it always extended to Lafayette and Randolph? A. No, sir; not always been the same territory.

Q. Well, prior to April 4, 1925, was that part of your territory? A. Since 1922.

Q. You say that you live near this vicinity? A. About 200 foot away from there.

Q. Will you look at the map and tell us whether the vicinity in question is described on that map? A. The location that I live in?

Q. No, the location of Lafayette and Randolph where the Central Railroad crossing is. A. Yes.

Q. Is it described on the map? A. Yes.

Mr. Tomlinson: I thought counsel had already admitted it was.

Mr. Jacoby: I just want to know if he is familiar with it. Whether he recognizes it.

Q. Did you observe children playing in this vicinity?

Mr. Tomlinson: I object to that as leading.

The Court: I know it is, but we will save time.

Mr. Tomlinson: Then I will withdraw the objection.

A. A good many times I seen them.

Q. Just what is the nature of their fun? A. Well, there is a lot of sand for the kiddies to play with, and jumping, doing all kinds of stunts, playing baseball and one thing another.

Q. You say jumping? A. A lot of jumping and playing.

Q. Just what manner do they jump? A. Well, I wouldn't say just what manner. Sometimes they jump off the bank; sometimes they play foot and a half, and I couldn't just recall what they are doing all the time.

Q. You say you have seen them jump off the bank? A. A good many times.

Q. What bank do you mean? A. Cut in, because the railroad going through there is in a cut like and they get up on the top of the bank and jump right down into the ditch, and slide off the bank a good many times.

Q. Have you seen them do anything else? A. Well, hopping freights, and firing stones at the freight cars.

Q. Hopping freights? A. Yes, sure.

Q. Did you notice whether these children had been stopped from firing stones and hopping freights? A. Well, a good many times I have seen firemen fire coal back at them.

Mr. Jacoby: That is all.

Cross-Examination by Mr. Tomlinson:

Q. Where do you live? A. No. 20 Randolph street, Carteret, New Jersey.

Q. Where is the office that you report to, the office of the John Hancock Insurance Company? A. Well, I report to Perth Amboy.

Q. What is the number? A. 175 Smith street.

Q. Who is your superintendant? A. Superintendant is Michael Lamb; assistant superintendant is Jacob Dinner.

Q. You know Mrs. Kaproli, don't you? A. I know her about two years, it is about two years since I know her.

Mr. Tomlinson: That is all.

FRED SIMONS, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath, saith:

Direct Examination by Mr. Jacoby:

Q. Mr. Simons, where do you live? A. Carteret.

Q. What is your occupation? A. Civil engineer and surveyor.

Q. Are you familiar with the vicinity of Randolph and Lafayette street? A. Yes, sir.

Q. Have you, at any time, had occasion to do work, engineering work on Lafayette and Randolph street? A. Many times.

Q. You made a survey in this vicinity, did you not? A. I did, yes, sir.

Q. I wish to show you this survey. Is this the survey that you made? A. Yes, sir.

Q. Will you look at the survey on the board and tell us whether or not in general this survey compares with what you made? A. Yes, it does.

Q. On your survey you show what you term a deep slope. Will you just describe that slope?

Mr. Tomlinson: I think I ought to object to that. He is now examining on something that is not in evidence, and even if it were in evidence, the words "deep slope" would not be evidential. If Mr. Simons wants to describe a slope along which that track extends of course we have no objection.

Q. Mr. Simons, will you describe the condition of the track as shown on that map, the condition of the track with relation to the land surrounding it? A. Beginning at this point here the grade of the track hits the natural grade of the ground there. Then she starts through a cut gradually increasing up to about five feet at this point, and increasing up to about thirteen or fourteen feet at a point opposite that fence.

Q. Have you observed the inclination of that slope?

The Court: He has given it to you. He says it starts at grade, at the natural surface of the land at a point marked "sound shore track", and continues to go upgrade until it reaches a point at the corner of Lafayette street, where it is about five feet, and continues to increase until it reaches the fence and then it is about thirteen feet.

Mr. Jacoby: I am speaking of the incline.

The Court: What do you mean incline?

Mr. Jacoby: The incline.

The Court: Isn't that the incline of the railriad, isn't it gradually all the way up here?

A. Yes, sir. Do you mean the nature of the slope itself?

By Mr. Jacoby:

Q. The nature of the slope itself. A. Well, it is a sandy slope. It is on a cut, what we call about one and one-half to one.

Q. Would you call it a steep incline?

Mr. Tomlinson: I object to that. What difference does it make whether he calls it steep or not?

By the Court:

Q. Just what kind is it, Mr. Simons? A. It is fairly steep. It is about an angle of about forty-five degrees.

By Mr. Jacoby:

Q. Now Mr. Simons, in your opinion as an engineer could anything be reasonably done that would prevent access to the tracks at the point described on that map?

Mr. Tomlinson: I object.

The Court: Objection sustained. That is not an expert opinion.

Mr. Jacoby: I believe, your Honor, an engineer is—

The Court: Oh, no, he cannot tell any more about that than you and I can. We know if they put up a proper kind of fence nobody could get to it, but that does not say they had the duty of doing that.

Mr. Jacoby: That is a question of law.
The Court: I know it is.

Q. Now, Mr. Simons, have you had any experience in estimating for fences A. Yes, sir.
Q. What would it cost to—just how many feet would it be from the corner of the place marked "fence" on the north side of that map, do you see the place marked "fence"? A. Yes, sir.
Q. Say extending 200 feet south of Randolph street?

Mr. Tomlinson: I object as incompetent, irrelevant and immaterial.
The Court: Objection sustained.
Mr. Jacoby: The idea of the question is this, that I want to convey the reasonableness, as well as the possibility of the railroad company building an obstruction that would have prevented approach and access to the railroad at this particular point, which we have tried to bring out was dangerous. I believe it is relevant in that respect.
The Court: You have asked him for the cost of a fence. You did not ask him whether a fence physically could be built there. As a matter of fact, there is no dispute but what a fence could be built there, is there?
Mr. Tomlinson: No, sir. That is a question for the jury. I mean if there is any duty owing from us. If we owe any obligation to put up a fence, or if we owe any obligation to exercise protection to prevent trespass, then it is a question for the jury as to what we ought to do as reasonable operators of railroads, and, of course, that would involve the question of whether or not trainmen could operate their trains through a picket fence, with nothing on the side to help them drill, in their work of drilling.

Mr. Jacoby: I believe the question of reasonableness goes into the question of whether there was a duty owing. I am trying to bring out the reasonableness of this to establish a duty.
Mr. Tomlinson: I think that is too obvious to even argue.
Mr. Jacoby: That is all. Now, my last witness is the doctor.

By The Court:

Q. Mr. Simons, is there anything there, from your viewpoint as a civil engineer, that would prevent the physical erection of a fence? A. No, sir.
Q. What kind of a fence is that that is there on the Wheeler Condenser A. That is a wire fence about seven feet high, with two strands of barbed wife fence on top. What they call a cyclone fence.
Q. Could such a fence as that be built on the other side? A. Oh, yes. The same conditions exist.
Q. The same conditions exist? A. Yes, sir.
Q. And that is the kind of a fence that would prevent access on the part of children, that is, it would be physically so constructed? A. Well,

it is practically impossible for anybody to get over it.

Q. Or beyond it? A. Beyond it; yes, sir.

The Court: That is all.

Cross-Examination by Mr. Tomlinson:

Q. This fence of the Wheeler plant goes all around the plant, doesn't it? Or does it? Do you know? A. On two sides; yes, sir.

Q. But not on all four sides? A. No, sir.

Mr. Tomlinson: That is all.

Mr. Jacoby: My last witness is the doctor.

It is impossible for him to be here before 11.30.

The Court: We cannot wait until then.

Mr. Jacoby: I have been in touch with him all morning, Dr. Meinzer. He cannot be here before 11.30. As far as liability is concerned, that is our case, your Honor.

MOTION FOR NONSUIT.

Mr. Tomlinson: The defendant moves for a nonsuit upon the ground that the proofs introduced by the plaintiff fail utterly to show the existence of any duty owing from the defendant company to the plaintiff, or the breach of any duty by the defendant, which defendant may have owed to the plaintiff.

It is admitted by the plaintiff that the child was a trespasser upon the tracks and property of the railroad company at the time the accident occurred. No contention is made that the employes of the railroad company performed any affirmative act towards this child, such as expressly inviting the child on the cars, or throwing anything at the child, to scare it off of the cars, or anything of that nature so as to bring the case within that line of cases involving those acts.

The sole theory of the plaintiff is that the railroad track constituted an attractive playground, an attractive danger, and that that being so, in view of the fact that children had played in those lots for some time, and in view of the fact that on some occasions children had tried to get on the cars, either moving or standing, of the defendant, and had been chased away by the employes, notwithstanding that they claim since this was an attractive danger, we owed a duty to these infants to take some precaution to keep them off our property.

It is quite true that in some jurisdictions the rule of attractive danger prevails, and it is quite true that in the old Stout case in the United States Supreme Court that doctrine was laid down. But so far as New Jersey is concerned,

and so far as railroad tracks are concerned, that rule has been thoroughly excluded by the decision of the Court of Errors and Appeals in this state in the Richmond case. By the Supreme Court of New Jersey in the Perry case; by the Supreme Court of New Jersey in the Barcolina case, and by the United States Supreme Court in the Hilt case.

In the Reach case, which is to be found in 61 Law at page 635, and which was decided subsequent to the old Stout case, the plaintiff, a very small child, was injured while on a turntable of the defendant company. This turntable was located on the defendant's own property, and not as in this case on some adjoining property.

It was near to a public street entirely unprotected and unguarded. (Citing case)

(Mr. Jacoby replies in opposition to the motion.) (Citing case of Friedman vs. Snare, reported 94 Circuit Court of Appeals, 369; also in 169 Federal, page 1.)

The Court: I do not like to take this case away from the jury, but I have no other choice in view of the decisions of our Courts. Those decisions bind me. I have the obligation to follow the decisions of our Appellate courts. The law of turntable cases, so called, the law of this state is that a child going on the property of another, because that property is attractive to children going there without invitation, is a trespasser, and no invitation generally can be implied because of the attractiveness of the thing itself to the child, like the turntable going around in a circle. It was strongly argued that that abutting public property, like a street, and

nothing between that turntable and the sidewalk, that children coming along would naturally be attracted to jumping on the turntable and have a ride. But our court held that did not make the railroad, in such a case as that, liable; that the child was a trespasser. That is a decision that has been very severely criticized since, and there have been dissenting opinions along that line, but that is the law and I, as trial judge, must follow it.

There is a further obstacle to allowing a case like this to go to the jury, and that is Section 55 of the General Railroad Act, which says that anyone who goes on a railroad, excepting at a street crossing, either for the purpose of walking or playing, is deemed guilty of contributory negligence if anything happens. The argument because a child is only four years of age, that under the Common Law it cannot be guilty of contributory negligence, does not apply if the Statute says that that is contributory negligence. It has been held in the celebrated decision, under the Volstead Act, that the legislature can declare that to be a fact, which is not a fact, that one half of one per cent. of intoxicating liquor to be all right, Congress had a right to do that.

So that if the legislature chooses to say that a certain act of a child, under certain conditions, is contributory negligence, that makes it contributory negligence, although it would be violating all the old reasoning under the Common Law, by which we determine contributory negligence in the case of children of tender years. There is a constant dispute about this. The turntable cases—take even that statute that the turntable

cases—the way that statute might be interpreted, that the child was invited there because of the attractiveness of the place. In this case here, there has been a playground, if the jury could find that had been a common playground, this triangular piece, and it abutted a place where there were the slowly moving railroad cars, and that was so attractive to children that it had the natural effect of an implied invitation upon the part of those responsible for the moving cars to go upon those moving cars. I cannot make law. In this case the jury might find from the evidence as a fact that this railroad company were fully appraised of the attractiveness that this open right-of-way was to the children, the attractiveness that the moving cars were to the children, or that a child might jump on those moving cars, that there was, from the very attractiveness, an invitation to children, in the manner of play, to ride on those cars, the jury might find that, but counsel for the plaintiff, if it was still in dispute, there is such a record here, that he will have the opportunity of having the appellate courts to change what has been disputed law for a long, long time, but I have to follow it. Therefore I am constrained, since I am obligated to follow the settled decisions of the State of this question, to grant this motion for a nonsuit. The motion for a nonsuit is granted. You may have an exception.

New Jersey Court of Errors and Appeals

MICHAEL KAPROLI, by MATRONA KAPROLI, his next friend, and MATRONA KAPROLI, individually,

Plaintiffs-Appellants,

vs.

CENTRAL RAILROAD OF NEW JERSEY,

Defendant-Respondent.

FACTS.

On the fourth day of April, 1925, the defendant, the Central Railroad of New Jersey, operated its railroad through a section of the Borough of Carteret, in the County of Middlesex and State of New Jersey, the tracks running between sections that is known as Carteret and Chrome. This track ran parallel with a certain street in the aforesaid Borough known as Lafayette Street. The plaintiff, an infant, age four years, lived at #7 Lafayette Street, the house facing the railroad track and located at a distance of about 105 feet from the said track. The width of Lafayette Street is approximately 40 feet. Directly in front of the plaintiff's home and on the other side of Lafayette Street between the said street and the railroad track was a triangular plot of ground, the greater part of which, it is admitted, is not owned by the Central Railroad of New Jersey and which, for many years was used as a playground by the children of that neighborhood. The total width of this triangular plot at its widest point was about 60

feet and the right of way of the railroad company at this point extended to about 25 feet. This land tapered to form a perfect triangle meeting the railroad track where a certain street, known as Randolph Street, ran at right angles with the aforesaid Lafayette Street both streets coming to a dead end at the railroad tracks. The railroad tracks ran through a deep ditch, or cut, the level of the track being about 8 feet below the highest point of this vacant lot the elevation tapering down to about one foot at the vertex of this triangular lot so as to form a deep incline or slope, descending to the Railroad track from the land used as a playground. For a long time, children, to the knowledge of the railroad company, were in the habit of playing in the sand located in this vacant lot and were also in the habit of running up and down the incline which extended from the vacant lot to the railroad tracks running below. At this point, long strings of freight trains were compelled to slow down due to an elevation in the rails and also due to a public crossing situated about 250 to 300 feet distant north from the scene of the accident. Children at play would take advantage of this situation and when freight trains had slowed down or had come to a complete stop at this point, they would slide or run down the embankment and climb upon the cars for the purpose of boarding and riding them. This continued for an indefinite length of time to the knowledge of the railroad company or its employees who, at time, took some means of chasing the children when they were in the act of boarding cars.

On this particular day, Michael Kaproli, an infant, age four years, was at play in this vacant lot, just as a freight train was rolling by

and had slowed down as it was accustomed to do at this point. He, together with other boys, slid down the enbankment and attempted to board the freight train. As he was about to get on the freight train, the cars were again set in motion and the child fell under the moving cars which resulted in the loss of his left foot. Aside from which was previously stated, i.e., the employees occasionally chasing the children whenever they chanced to see them boarding the cars, there were no means taken to prevent children while playing in this vacant lot from sliding down the enbankment and boarding the cars. As revealed by the testimony it would have been an easy matter to have erected a fence or other safe-guards thereby preventing children from boarding the cars at the scene of the accident.

ARGUMENT.

POINT I.

THE PLAINTIFF, MICHAEL KAPROLI, WAS MERELY A TECHNICAL TRESPASSER AND NOT A TRESPASSER SUCH AS WOULD PRECLUDE HIM FROM RECOVERY AT LAW.

Ordinarily as shown by the decisions of the Courts of the State of New Jersey and of the United States Supreme Court, no duty arises between the owner of premises and a trespasser, and such decisions hold that the owner is not

liable to make his premises safe for the use of trespassers.

Erie R. Co. vs. *Hilt,* 247 U. S. 97; 32 Sup. Ct. Rep. 435
Vanderlik vs. *Henry,* 34 N. J. L. 467
Turess vs. *N. J. Susquehanna & Western R. R. Co.* 61 N. J. L. 314
Del. & Western R. R. Co. vs. *Reich,* 61 N. J. L. 635
Friedman vs. *Snare,* 71 N. J. L. 605 (Overruled by U. S. S. Circuit Ct. of Appeals, 94 C. C. A. 369; 169 Fed. 1)
Hoberg vs. *Collins-Larer Co.,* 80 N. J. L. 436
Flickenstein vs. *Great A. & P. Co.* 94 N. J. L. 63

However, when children habitually enter upon private premises with the full and actual knowledge of the owner because of being urged or attracted by an agency created or maintained by the owner, they are merely technical trespassers and the owner is duty bound to either prevent this technical trespass or to take such reasonable precaution as would keep such children from peril. Failure on the part of the owner to take reasonable precaution under such circumstances amounts to wilfull and wanton neglect.

Friedman vs. *Snare,* 94 C. C. A. 369; 169 Fed. 1. (N. J. case)
Public Service Railway Co. vs. *Wursthorne,* 278 Fed. 409, Aff. 259 U. S. 858. (N. J. case)
Shawnee vs. *Cheek,* 41 Oklahoma 227; 137 Pac. 724
Altus vs. *Milliken,* 98 Okla. No. 1; 223 Pac. 851

In so far as the existence of a duty due and owing from the owner to infants before they become technical trespassers, the question of liability on part of the owner of a dangerous structure or premises which attracts and lures infants to their peril has never been decided in New Jersey.

Friedman vs. *Snare,* 94 C. C. A. 369; 169 Fed. 1
P. S. Railway Co. vs. *Wursthorne,* 278 Fed. 409, Aff. 259 U. S. 585.

THE ELEMENT OF KNOWLEDGE ON PART OF THE OWNER OF DANGEROUS PREMISES OR STRUCTURES OF THE FACT THAT CHILDREN, TO THEIR PERIL, ARE LURED AND ATTRACTED TO THE PROPERTY OF THE OWNER HAS BEEN ABSENT IN ALL CASES HERETOFORE DECIDED BY THE COURTS OF THE STATE OF NEW JERSEY AND SUCH KNOWLEDGE WOULD MATERIALLY HAVE CHANGED THE DECISIONS OF THE COURTS OF THIS STATE.

In the case of *Del. & Western R. R. Co.* vs. *Reich,* 61 N. J. L. 635, the Court, in arriving at its decision, laid great stress upon the following reason, viz:—Absence of proof of knowledge on part of the land-owner.

> "The suggestion contained in the line of cases first adverted to, viz., that the duty of protection is cast upon the land-owner solely by reason of the inability of the child to care for its own safety,

seems to me to be unsound in principle. Primarily, the duty of affording protection to a child rests upon the parent, who is responsible for its being. If the parent neglects the duty which the law casts upon him, and permits his child to stray upon the land of another, and there incur peril, why should the duty of protection be shifted from the negligent parent to the owner of the land? **It is usually the fact, in cases of this kind, that the Land-Owner has no knowledge that children have come upon his premises,** and are exposed to danger there, until after injury has actually occurred; while other persons, who are passing by, frequently observe the risk that is being run by childish intruders, but take no steps to bring it to an end. If the duty of protection, under such circumstances, is to be shifted from the parent to a third person, **it would seem more consonant with reason to place it upon those who have knowledge of the existence of the danger and opportunity to terminate it,** rather than upon the landowner, who is entirely ignorant of the entry of the children upon his premises. The mere fact that a child is unable to guard itself against peril, and that its parent fails to provide for its safety, does not, ipso facto, cast upon any third person the duty of affording protection."

Actual knowledge on the part of the landowner as to the habitual trespass by children on his property to their peril is from the language, and

reasoning of the Court, absent in the above case. The landowner's knowledge of the trespass and of the peril would have materially affected the decision in this case. As the court here states, a parent or stranger who sees and knows of the child's peril and who has knowledge of the existence of the danger and the opportunity to terminate it, is negligent in not preventing the child from approaching the peril. It, therefore, logically follows that the owner, who by himself, or his agents, sees and knows of the habitual approach of the children upon his property and of the child's peril, is duty bound to make a reasonable effort to protect the child from the danger which he has created or maintains and which attracts the child to its peril. Failure to prevent such injury under such circumstances amounts to wantonness.

In the case of *Friedman* vs. *Snare,* 71 N. J. L. 605, as in the case of *Del. & Western R. R. Co.* vs. *Reich,* 61 N. J. L. 635, the Court based its decision strongly on the great probability of the owner's ignorance as to the attractiveness and danger on his premises to infants. The Court here said,

> "A very practical difficulty that confronted the attempt to lay down any legal rule that depended for its limitation upon its attractiveness to children of tender years lay in the extreme improbability that any man however prudent would be able to forsee what might and what might not be attractive to children."

The Court here, as in the case of *Del. & Western R. R. Co.* vs. *Reich* fails to see a duty owned by the landowner due to the improbability of

his knowledge of the attractiveness and danger. In this case, no habitual playing by the children nor knowledge by the owner of the presence of the children upon his premises was alleged in the complaint or revealed in the testimony. The Court then, in this negative way, conceded that the basis of the duty is knowledge on part of the owner. If the owner knows that his premises attract children to their peril, a duty of reasonable care to prevent such danger arises.

Cases in all states which are strongly cited as having overruled the Attractive Nuisance Doctrine are cases where there was nothing to show that the defendant knew or had reasons to know or apprehend that the dangerous agency which he created or maintained would likely attract or was attracting children to their peril; or that children were in the habit of going upon his lands. These cases were admirably distinguished and the law well defined in the cases of

Kefe vs. *Milwaukee & St. Paul R. Co.* 21 Minn. 207; 18 A. M. Rep. 393; 19 L. R. A. (N. S.) 1123

Lewis vs. *Cleveland C. C. & St. L. R. Co.,* 84 N. E. 23; 19 L. R. A. (N. S.) 1122

Peters vs. *Bowman,* 115 Cal. 349; 19 L. R. A. (N. S.) 1123

Ramsay vs. *Tuthill Building Material Co.* 295 Ill. 395; 36 A. L. R. 27 (distinguishes a case where knowledge on the part of the owner of premises is not present from the case where knowledge does exist and the Court here says):

"If an owner maintains dangerous conditions upon his premises to which he permits children to come, he must use ordinary care to guard them against danger which their youth and ignorance prevent them from appreciating. There is no implied invitation from the mere existence of a dangerous attraction which is not discoverable off the premises; but, if, to the knowledge of the owner, children habitually come upon his premises, where a dangerous condition exists to which they are exposed, the duty to exercise care for their safety arises, not because of an implied invitation, but because of his knowledge of unconscious exposure to danger which the children do not realize. The situation is different from that in the case of *McDermott* vs. *Burke,* 256 Ill. 401; 100 N. E. 168, which the plaintiff in error has cited and relies upon. In that case, the attractive thing was a pile of sand in the middle of the lower floor of a building which was in process of construction. The sand itself was not dangerous and had nothing to do with the injury which gave rise to the cause of action in that case. The injury was occasioned by a rope running over a sheave used in hoisting material at some distance from the sand. The rope and sheave were not attractive and the injured child was not playing with them, but had merely rested his hand upon the rope, and was injured when the machinery was started. It did not appear that the defendant, who was the contractor engaged in constructing the building; knew that the children were there or that they had been in the habit of coming there and playing in the sand

In this case, it appears that for some time children had been in the habit of coming on the premises of plaintiff in error, playing in the sand on the ground, going up the ladder to the top of the elevated structure, jumping into the sand bins, playing in the sand there, and going down through the openings in the chutes. **This was known to the employees of plaintiff in error, who testified that they frequently told the children to stay away, but no effective means were taken to prevent their coming there; so that here the defendant, by taking no effectual means to prevent it,** permitted little children, too young to have judgment and exercise care to protect themselves from danger, to play constantly about its premises where it knew that they were habitually exposed to danger which they did not realize, and which was likely to result in serious injury or death to some of them, and which actually has resulted so. Under such circumstances, the owner of property is responsible for the injury which has occurred by reason of its negligence in failing to use adequate means to keep children away from the danger which it has created."

The Courts while holding that the innocense of a trespasser does not necessarily establish a legal duty of the landowner to protect him from injury, nevertheless holds that one who maintains on his premises dangerous instrumentalities or appliances or a character likely to attract children in playing with the knowledge that children are in the habit of resorting thereto

for amusement is liable for injury therefrom to children of tender years. This is evidenced by the following cases:

Ala. G. S. R. Co. vs. *Crocker,* 131 Ala. 584; 31 So. 561.

Thompson vs. *Alexander City Cotton Mills Co.* 190 Ala. 194, 67 So. 407.

Martin vs. *Northern P. R.* Co., 51 Mont. 31; 149 Pac. 89.

Atlanta & W. P. R. Co. vs. *Green,* (1917) 158 C. C. A. 632; 246 Fed. 676 (5th C.)

Kotowski vs. *Taylor* (1921) 114 Atlantic 861.

Chicago & E. R. Co. vs. *Fox* (1904) 38 Ind. 268; 70 N. E. 81.

Edgington vs. *Burlington, C. R. & N. R. Co.* 116 Iowa 410, 90 N. W. 95.

Union Light Heat & P. Co. vs. *Lunsford* (1920) 189 Ken. 785 25 S. W. 741.

Mayfield Water & Light Co. vs. *Webb,* (1908) 129 Ken. 395.

Fincher vs. *Chicago R. A. & P. R. Co.* 143 Louisiana 164.

Jackson vs. *Texas Co..* 143 La. 21; 78 So. 137.

Lane vs. *Atlantic Works,* 107 Mass 104; 111 Mass. 136.

Jaworski vs. *Detroit Edison Co.,* 210 Mich. 317; 178 N. W. 71.

Twist vs. *Winona St. P. R. Co.* 99 Minn. 164.

Martin vs. *Northern P. R. Co.* 51 Montana 31; 149 Pac. 89.

Chicago B. & Q. R. Co. vs. *Krayenbuhl,* 65 Neb. 889 91 N. W. 880; 12 Am. Neg. Rep. 300.

Johnson vs. *New Omaha-Thomson-Houston Elec. Light Co.* 78 Neb. 24; 110 N. W. 711.
Parks vs. *N. Y. Telephone Co.* (1923) 120 Misc. 459; 198 New York Supp. 698.—Aff. 207 App. Div. 869.
Fitzgerald vs. *Rodgers,* 58 App. Div. 298; 68 N. Y. Supp. 946.
Briscoe vs. *Henderson Lighting P. Co.,* 148 N. C. 396; 62 S. E. 600.
Harriman vs. *Pittsburgh C. & St. L. R. Co.,* 45 Ohio State 11; 4 Am. St. Rep. 507; 12 N. W. 451.
Hannah vs. *Ehrlich,* 102 Ohio State 176; 131 N. E. 504.
Kessler vs. *Berger,* 205 Pa. 289; 54 Atl. 887.
Baxter vs. *Park* (1921) 44 S. D. 360; 184 N. W. 198.
Burke vs. *Ellis,* 105 Tenn. 702; 58 S. W. 855.
Cooper vs. *Overton,* 102 Tenn. 222; 73 Am. St. Rep. 864; 52 S. W. 183.
Busse vs. *Rodgers,* 120 Wis. 443; 98 N. W. 219; 15 Am. Neg. Rep. 743.
Kelly vs. *Southern Wis. Co. Co.,* 152 Wis. 328; 140 N. W. 60.
Glasgow vs. *Taylor* (1922) 1 A. C. 44; 29 A. L. R. 846; 86 J. P. 89; 38 Times L. R. 102 (English Case)
Tucker vs. *Draper.* 62 Neb. 66; 54 L. R. A. 321; 36 A. L. R. 28.
Bjork vs. *Tacoma,* 76 Wash. 225; 125 Pac. 1005; 48 L. R. A. (N. S.) 33.

In the case of *Keefe* vs. *Milwaukee & St. Paul R. Co.* 21 Minn. 207, the Court said, "That the owner of the thing dangerous and attractive to

children was not always and universally liable for an injury to a child tempted by the attraction. His liability bore a relation to the character of the thing whether natural and common, or artificial and uncommon; to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short. to the reasonableness and propriety of his own conduct. in view of all the surrounding circumstances and conditions. As to common dangers existing in the order of nature, it was the duty of parents to guard and warn their children, and failing to do so, they should not expect to hold others responsible for their own want of care, but, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different."

POINT II.

WHERE ONE SETS UP, CREATES OR MAINTAINS DANGEROUS AGENCIES, STRUCTURES OR PREMISES WHICH, TO HIS KNOWLEDGE, ATTRACTS INFANTS TO THEIR PERIL, A DUTY OF REASONABLE CARE ARISES ON PART OF THE OWNER TO PREVENT INJURY, AND HIS OMISSION TO ACT AND PREVENT THE INFANTS FROM APPROACHING THIS DANGER MAY OR MAY NOT, UNDER CERTAIN CIRCUMSTANCES, BE NEGLIGENCE, AND WHETHER IT IS NEGLIGENCE IS A QUESTION FOR THE JURY TO DETERMINE IN EACH PARTICULAR CASE.

An Article of liability of landowner to children by Jermiah Smith Appearing in 11 Harvard Law Review 349 which article is considered the best criticism of the attractive nuisance doctrine ever written and which has been looked up to as authority in decisions of many states including this state, viz. *Del. & Western R. R. Co.* vs. *Reich.* Mr. Smith, though on the whole, a strong opponent of the attractive nuisance doctrine nevertheless conceded that circumstances may give rise to a duty and liability on part of landowner to children. He says:

> "Failure to advert probable consequences or even knowledge that certain consequences are probable is not equivalent to intent or desire that such consequences

> shall follow" but concludes, Mr. Smith, 'in such cases it may or may not be right to hold the landowner liable on the ground of negligence."

As to circumstances altering cases, Mr. Smith continues: (51 L. R. A. (N. S.) 678:

> "Upon the crucial inquiry whether the law should impose such a duty upon the landowner, there are considerations of undoubted weight to be urged in favor of either view. A balance must be struck between the benefit of the community of the unfettered freedom of owners to make a beneficial use of their land, and the harm which may be done in particular instances by the use of that freedom. The true ground for the decision is policy, i. e., expediency, in the Benthamic sense of the greatest good to the greatest number," "and the advantages to the community on one side and the other are the only matters really entitled to be weighed." On the one hand, it is the policy of the law to establish rules tending to preserve life, and to protect human beings from serious bodily harm. And this laudable purpose seems frustrated pro tanto by permitting a landowner to pursue with impunity a mode of user which he knows, or ought to know, is likely to occasionally result in the suffering of great harm on the part of some of his neighbor's children. The fact that a defendant neither desired nor intended to bring about a particular result does not necessarily exonerate him. (32 L. R. A. 574).

In *Ashworth* vs. *Southern* R. R. Co. 116 Ga. 639, 59 L. R. A. 592, supra, it is said that railroad companies may not be bound to anticipate that children will be allured by passing trains and attempt to board and ride upon them; but when the right of way of a railroad company extends through a place used as a playground by a number of children of ages varying from six to fifteen years, and when these children are accustomed continuously every time the train enters the playground when they are upon it, to swarm upon the train and ride to the limits of the playground, and when the employees of the company know of this custom, and make no objection to it, the company is bound to carry the burden which such tacit permission imposes, and this burden will require the company to comply with the demands of ordinary care for the prevention of injury to children.

If boys of immature years and discretion are on or about a train so frequently that persons of ordinary prudence would apprehend danger to them, although the employees at the time do not know that a boy, afterwards killed, is on the train, it is the duty of the employees to use ordinary care to ascertain whether children are on the train, and to prevent injury.

St. Louis Southwestern R. Co. vs. *Abernathy,* 28 Tex. Civ. App. 613, S. W. 538.

Also as was said in the case of *Thompson* vs. *Missouri K. & T. R. Co.* 11 Tex. App. 307.

(32 L. R. A. (N. S.) 575).

An engineer would not be bound to stop his train simply because he saw boys in the high-

way, close to the track, and not in places of danger, but only when he saw some act on their part indicative of an intent to board cars.

Horn vs. *Chicago M. & St. P. R. Co.,* Iowa 281; 99 N. W. 1068.

But in *Thompson* vs. *Missouri K. & T. R. Co.,* 11 Tex. Civ. App. 307; 32 S. W. 191, it was said, that, under the duty of a railroad company to exercise ordinary care, it may be negligence in some instances to fail to provide guards and lookouts at public crossings to prevent children from getting upon the cars, and whether it is negligence in any particular case is a question for the jury.

"It is the duty of a railroad company knowing that boys persistently frequent its yards and catch on moving cars, although it made some effort to stop the custom, to use ordinary care to prevent injury to any of them; and it is a question for the jury whether the company's employees used ordinary care to prevent boys from getting upon a moving train, or to discover them while hanging on and riding on moving cars."

David vs. *St. Louis Southwestern R. Co.* Tex. Civ. App. 92 S. W. 831.

In accord, Spengler vs. *Williams,* 67 Misc. 1; 6 So. 613.

Barrett vs. *Southern O. Co.* 91 Cal. 296; 25 Am. St. Rep. 186 27 Pac. 666.

Brinkel vs. *Cooper,* 70 Ark. 331; 67 S. W. 752.

McKay vs. *Vicksburg,* 64 Miss. 777; 2 So. 178.

Koons vs. *St. Louis & I. M. R. Co.* 65 Missouri 592.
Chicago R. I. & P. R. Co. vs. *Wright,* 62 Okla. 134; 161 Pac. 1070.
Hayes vs. *Southern Power Co.,* 95 S. C. 230; 78 S. E. 956.
Pekin vs. *McMahon,* 154 Ill. 141; 45 Am. St. Rep. 114; 39 N. E. 484.
Brown vs. *Salt Lake City,* 33 Utah 222; 126 Am. St. Rep. 828; 93 Pac. 570.
Hutchinson vs. *School District,* 114 Was. 548 195 Pac. 1020.

POINT III.

SECTION 55 OF THE GENERAL RAILROAD ACT DOES NOT APPLY IN THIS CASE SINCE THE PLAINTIFF IN THIS CASE WAS MERELY A TECHNICAL TRESPASSER AS A RESULT OF THE DEFENDANT'S OWN NEGLIGENCE.

Whether the plaintiff, Michael Kaproli, was guilty of contributory negligence due to his being a trespasser or whether he was merely a technical trespasser as a result of the defendant's own negligence is a question for the jury to determine.

Public Service Railway Co. vs. *Wursthorne,* 278 Fed. 409 aff. 259 U. S. 585.
Friedman vs. *Snare,* 94 C. C. A. 369; 169 Fed. 1.

Thompson vs. *Missouri K. & T. R. Co.,* 11 Tex. Civ. App. 307; 32 S. W. 191.
David vs. *St. Louis Southwestern R. Co.* Tex. Civ. App. 92 S. W. 831.
Kefe vs. *Milwaukee & St. Paul R. Co.,* 21 Minn. 207.
Louis vs. *Cleveland C. C. & St. L. R. Co.* 42 Ind. App. 337; 84 N. E. 23.
Peters vs. *Bowman,* 115 Cal. 349.
Ramsay vs. *Tuthill Building Material Co.* 295 Ill. 395.
Hight vs. *Am. Banking Co.,* 168 Mo. App. 431; 151 S. W. 776.
Daly vs. *Norwich & N. W. R. Co.,* 26 Conn. 591; 68 Am. Dec. 413.
St. Cartier vs. *N. Y. N. H. & H. R. Co.,* 179 App. Div. 117; 165 N. Y. Supp. 852.
Whirley vs. *Whiteman,* 1 Head 610.
Hardy vs. *Missouri P. & R. Co.*
Northwestern Eevated Co. vs. *O'Mally,* 107 Ill. App. 599.

CONCLUSION.

The trial court erred in granting a non-suit at the close of the plaintiff's case on grounds:

1. The plaintiff, Michael Kaproli, was merely a technical trespasser and not a trespasser such as would preclude him from recovery at law.

2. There is no settled rule established by decisions of the State of New Jersey which relieves a landowner under the circumstances such as in this case from liability to an infant before the infant becomes a trespasser.

3. There is no settled rule established by the decisions of this state which declares an infant to be guilty of contributory negligence because of a trespass which is due to the landowner's own wilful and wanton neglect to provide for safe-guards under such circumstances as prevailed in this case.

4. The element of knowledge on part of the landowner that his premises are dangerous and attractive to children has been absent in all cases heretofore decided by the courts of this state and such knowledge being alleged and proved by the testimony distinguishes this case from other cases heretofore decided in this state, and the question of the landowner's negligence under such circumstances is one for the jury to determine.

5. Whether or not the plaintiff, Michael Kaproli, was a trespasser and guilty of contributory negligence or merely a technical trespasser due to the defendant's own negligence should be a question for the jury to determine.

6. In face of all circumstances surrounding this case, the defendant, the Central Railroad Company of New Jersey, was guilty of willful or wanton injury and the question whether the injury was a result of wilfull and wanton neglect on part of the Central Railroad Company of New Jersey should have been submitted to the jury for its determination.

For all of which reasons it is respectfully urged that the decision of the Trial Court should be reversed.

Respectfully submitted,

Of Counsel:
ELMER E. BROWN

NATHANIEL A. JACOBY,
Attorney for Plaintiffs-
Appellant.

New Jersey Court of Errors and Appeals

MICHAEL KAPROLI, by Matrona Kaproli, his next friend, and Matrona Kaproli, individually, Plaintiffs-Appellants, *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant-Respondent.	ACTION AT LAW. On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

Michael Kaproli, an infant, and Matrona Kaproli, instituted this action against the Central Railroad of New Jersey to recover damages on account of personal injuries sustained on April 4, 1925, by the infant plaintiff at Carteret, New Jersey, the stated theory of the action being that while said infant plantiff was playing on the tracks of the defendant company in front of his house he was struck and injured by one of defendant's trains.

The case was tried in the Middlesex Circuit and at the end of the plaintiffs' case the trial court ordered a non-suit.

From the judgment entered thereon plaintiffs take this present appeal.

Statement of the Case.

The accident occurred on the branch of the Central Railroad of New Jersey, known as the New Jersey Terminal branch (Rec. 4, 25).

This line of railroad as it passes through the borough of Carteret is a single track road and runs approximately north and south (Rec. 25).

The infant plaintiff resided at No. 7 Lafayette Street, which street is on the west side of the railroad tracks and extends generally in a northerly and southerly direction, although as it progresses north it diverges diagonally away from the railroad tracks (Rec. 20, 25).

Lafayette Street does not cross the railroad tracks but terminates at the intersection of its southerly end with Randolph Street which runs approximately east and west. Randolph Street does not cross the tracks but terminates at the intersection of its easterly end with the southerly end of Lafayette Street (Rec. 25).

Between Lafayette Street and the railroad tracks there was a vacant lot which according to plaintiffs' proof was often used by the chiildren in the neighborhood as a playground, but which lot, it was conceded by plaintiffs, was not owned or controlled by the defendant railroad company (Rec. 28, 29).

The railroad track ran through this vicinity in a cut which was approximately 8 feet deep at its deepest point and approximately 2½ feet deep at its most shallow point (Rec. 30, 31, 33).

The distance from No. 7 Lafayette Street, where the infant plaintiff resided as aforesaid, to the railroad tracks in a straight line was approximately 130 feet (Rec. 27).

Plaintiffs' proof was to the effect that children often played in this lot between Lafayette Street and the railroad tracks; that they had also been in the habit of running up and down the embankment created by the cut through which the railroad tracks ran; that the tracks were on a considerable grade as they extended in a northerly direction, with the result that northbound freight trains were caused to be slowed up as they progressed up this grade, and that children had been seen to jump on and off such trains; although the proof also showed that each time that they had been detected doing this by the railroad trainmen, such trainmen had chased them away (Rec. 38, 43, 44, 45, 50, 51, 52, 53).

Plaintiffs' proof was further to the effect that on the day of the accident a freight train of the defendant was running north on these tracks. That an unidentified boy was seen to take the infant plaintiff, who was then 4 years of age, and put him on the train. No witness was produced to testify as to what then actually happened, but shortly thereafter, according to the plaintiffs' proof, the infant plaintiff was seen crawling up the embankment in an injured condition (Rec. 37, 41, 42, 57, 58, 59, 61).

The train was moving slowly all of this time (Rec 61), and there was neither allegation nor proof that it was operated in an unusual, careless or negligent manner.

The sole theory of the plaintiffs, as expressed through their counsel at the trial, was that the defendant company should have constructed a fence between this vacant lot and its tracks to prevent children from trespassing on the tracks (Rec. 68, 69, 70).

The Alleged Negligence.

The negligence of which the plaintiffs allege the defendant was guilty is set forth in paragraphs 2, 3 and 4 of the complaint as follows:

> "2. That on the day aforesaid, the plain-
> "tiff, Michael Kaproli, a minor, age four
> "years, was playing in front of his house,
> "said tracks passing directly in front of the

"home wherein said plaintiff lived, at a "point of about twenty-five yards distant "from the front of the plaintiff's home."

"3. While the minor child was thus play- "ing, a freight train belonging to or oper- "ated by the Central Railroad of New Jer- "sey passed on the said track and struck the "minor child cutting off his left foot a few "inches above his ankle all by reason of the "negligence of the defendant company."

"4. The defendant, the Central Railroad "of New Jersey, was negligent.

"1. That by reason of the proximity of "the said railroad track to the homes of "small children and also that the infant "complainant, the aforesaid defendant "should have anticipated the probability "of small children being attracted by the "moving cars of the defendant company "and that they would therefore trespass "upon the property of the said defendant "company to their probable injury and "therefore should have taken proper pre- "cautions and provided reasonable safe- "guards for preventing trespass by chil- "dren because of the aforesaid attraction. "This, the railroad company negligently "failed to do thereby causing the injury "to the infant complainant."

"2. The defendant railroad company, by "its agents and servants had actual knowl- "edge that children lived in close proxim- "ity to the aforesaid tracks of the railroad "company and had also, by its agents and "servants actual knowledge that children "played near the aforesaid tracks and that "children were attracted by moving cars "and were impelled by the aforesaid at- "traction to trespass upon the aforesaid "railroad property and that children thus "attracted indulged in the fun of boarding "and riding the moving cars of the defend-

"ant company and although the railroad "company, by its agents and servants had "actual knowledge of the aforesaid facts "and had reason to know of the probabil- "ity of danger and the injurious outcome "thereof yet it had negligently and care- "lessly failed to use proper precautions "and create proper safe-guards to prevent "children from trespassing on the afore- "said railroad property by reason of the "aforesaid attraction thereby causing the "injury of the infant plaintiff."

"3. The defendant railroad company was "also negligent in that by reason of the "proximity of the railroad track to the "homes of children and that of the infant "complainant and in that by the further "reason that the railroad tracks of the de- "fendant company, at a point situated di- "rectly in front of the plaintiff's home, "run through a gulley thereby leaving a "dangerous incline where children played "and by further reason that the aforesaid "defendant company had reasons to antici- "pate that children living in such close "proximity to the aforesaid defendant "railroad company would play upon the "company's property and the defendant "company, by its agents and servants "actually knew that children were in the "habit of playing on the property and also "in the habit of sliding or running up and "down the aforesaid dangerous incline yet "the defendant company failed to take "proper precaution and create reasonable "safe-guards to prevent children from "trespassing upon the aforesaid railroad "property thereby resulting in the injury "of the aforesaid injured infant complain- "ant." (Rec. 4, 5, 6).

ARGUMENT.

POINT I.

The infant plaintiff, Michael Kaproli, was a trespasser to whom defendant owed no duty, save to refrain from willful or wanton injury. In this case there was neither the allegation nor proof in any degree whatsoever of any willful or wanton injury.

Plaintiffs concede that the infant plaintiff was a trespasser and seek to circumvent this otherwise insurmountable obstacle to the action by attempting to invoke the doctrine of "attractive nuisance."

An examination of the authorities indicates conclusively and beyond question that this doctrine which was first expounded in the cases of *Railroad Company v. Stout,* 84 U. S. 657, and *Union Pacific Railway Company v. McDonald,* 152 U. S. 262 (familiarly known as the Turntable cases), has never received recognition or acceptance in the state courts of New Jersey, but on the contrary has been definitely rejected by such courts.

In *Turess v. The New York, Susquehanna and Western Railroad Company,* 61 N. J. L. 314, the question was presented to our Supreme Court for determination. There a child was injured by reason of playing on a turntable which was maintained by the defendant railroad company upon its own land. The Supreme Court speaking through Chief Justice Magie held that there was no cause of action upon the ground that the infant plaintiff was a trespasser, and that there was no duty owing by the defendant company to such plaintiff.

The Supreme Court in its opinion said, *inter alia:*

> "It will be observed that, in the case of "an implied invitation, the relation is im- "posed upon the owner or occupier of land "only when he has done something which "justifies one who enters upon the land and "makes use of it or something upon it in "believing that he intended such use to be "made; and he who makes such use can "claim the relation only when he is justified "by the acts or conduct of the owner or oc- "cupier in believing that such use was in- "tended. And entry and use by such invi- "tation are thus distinguished from entry "and use by mere permission.
>
> "Applying these views to the turntable "cases, it is obvious that the relation be- "tween a railroad company and a child who "enters its land to play with a turntable is "not one created by implied invitation. A "turntable, however attractive could not be "deemed to have been erected for the use "which the child makes of it. This objection "is not obviated by an appeal to the doctrine "that children of tender years are not held to "the same degree of prudence and care as "adults, but only to such prudence and care "as their years indicate them to possess, for "it is not a question of the child's negli- "gence, but a question of the duty of the "railroad company towards the child. If "that duty is conceived to arise from the "relation created by implied invitation, it "must appear that the child is justified in "believing that the turntable was designed "for the use he makes of it, which is, of "course, absurd.
>
> "In my judgment, it follows that the lia- "bility of a railroad company to a child in- "jured by playing on its turntable cannot "arise out of a duty imposed on the com- "pany by reason of a supposed implied in- "vitation.

"If a child is not to be deemed invited to "enter a railroad company's land to play "upon a turntable, it also follows that a "child in doing so is either a trespasser or "is there by mere permission. In neither case "is any duty cast upon the landowner, except "to abstain from willful injury, and from "maintaining hidden or concealed dangers."

In the case of *Delaware, Lackawanna and Western Railroad Company v. Reich,* 61 N. J. L. 635, the question was presented to the Court of Errors and Appeals for its consideration and determination. That case also involved an injury received by a young child while playing upon a turntable of the defendants which was located upon the defendant's private property near to a public street, and was entirely unprotected and unguarded. In addition the testimony showed that the turntable was frequented by children of all ages for the purpose of playing upon it.

The Court of Errors and Appeals rejected the theory of the *Stout* and *McDonald* cases and held that as a matter of law there was no liability for the reason that the infant plaintiff was merely a trespasser to whom the defendant railroad company owed no duty, save to refrain from willful or wanton injury.

Chief Justice Gummere in delivering the opinion of the Court of Errors and Appeals said, *inter alia:*

"The underlying question, upon the solu- "tion of which our decision must rest, is "whether the owner of land who constructs "or places upon it anything which, though "necessary for its proper enjoyment, hap- "pens to be of a character which is attrac- "tive to children and at the same time dan- "gerous to them if they yield to the attrac- "tion, thereby becomes chargeable with the

"duty of using reasonable care to keep them "off his premises or to protect them if they "enter, for it must be admitted that, unless "such user creates a duty on the part of the "landowner to protect the child who comes "upon his premises, the neglect of which "produces injury to the chid, no liability "rests upon him for such injury. If there is "no duty in the case there can be no negli- "gence; there cannot be such a thing as the "negligent performance of a non-existent "duty." * * *

"In my judgment the reasons upon which "the doctrine of a landowner's liability for "injuries received by children entering upon "his premises is rested do not justify such "a material restriction upon the full and un- "trammeled enjoyment of real property. On "the contrary, it seems to me that the doc- "trine of non-liability promulgated by the "line of cases last referred to is more in ac- "cord with settled principles, and should, "therefore, be adopted by this court. I con- "clude, therefore, that there was error in "submitting to the jury the question whether, "under the circumstances of this case, the "defendant company was chargeable with "the duty of providing for the safety of the "plaintiff. The trial judge should have di- "rected a verdict for the defendant."

In the case of *Friedman v. Snare & Triest Company,* 71 N. J. L. 605, the Court of Errors and Appeals again discussed and passed upon the "attractive nuisance" theory and followed the action of the Supreme Court in the *Reich* case, and also its own action in the *Turess* case in holding that the only liability of a landowner to an infant trespasser is to refrain from willful or wanton injury.

In that case, according to the theory of the plaintiff, Colgate & Company either placed or permitted to be placed in a public street in front

of their premises in Jersey City certain iron girders which were attractive to children. The infant plaintiff while playing upon these girders was injured and accordingly brought her action. The Court of Errors and Appeals held that she was a trespasser and therefore had no right of action.

Justice Pitney speaking for the Court of Errors and Appeals said:

> "No doubt, where a duty exists to take "care with respect to the safety of children "of tender years, their very age must be "taken into account, so that what might be "reasonable care with respect to the safety "of adults, who are capable, to some extent, "of looking out for themseves, might not be "reasonable care with respect to children. "But in the present case the very question "is whether any duty existed, and we are "not able to see that the age of the child is "pertinent upon this inquiry. That the party "injured in this case was less than five years "of age did not at all tend to give her any "property interest or right of user in the "defendant's girders. Whether she used them "as licensee or as trespasser, in either case "there was no duty upon the owner to ex- "ercise active care with respect to her "safety." * * *
>
> "We deem it unnecessary to rehearse at "length the decisions cited by counsel for "the plaintiff from the courts of some of "our sister states, affirming, as it is claimed, "the general principle upon which the pres- "ent plaintiff's right of action is based. "Many, if not most of those decisions de- "pend, fundamentally upon the same notion "that in many states, and in the Supreme "Court of the United States, has been given "effect in the so-called 'turntable cases,' "which will be found collated in 29 Am. & "Eng. Encycl. L. (2d ed.) 32. That is, that

> "a landowner, who maintains upon his own "premises, for his own purposes, that which "is alluring or tempting to little children, "is held to a duty of exercising care with re- "spect to their safety, in anticipation of the "probability that they may be tempted to "make use of his property for purposes of "play. This doctrine has been repudiated in "this state by the cases of Turess v. New "York, Susquehanna and Western Railroad "Co., 32 Vroom 314, decided by the Supreme "Court, and Delaware, Lackawanna and "Western Railroad Co. v. Reich, Id. 635, de- "cided by this court. The rule laid down in "these cases is, as we think, wholly incon- "sistent with the asserted liability of the "present defendant. That rule draws a clear "distinction between temptation and invita- "tion, and is to the effect that those who en- "ter upon private property for their own "purposes without invitation, but as tres- "passers or licensees, do so at their own "peril, so far as any right on their part to "call for active care on the part of the prop- "erty owner for their welfare is concerned, "and that although the injured party be an "infant of tender years, and for that reason "less able to care for its own safety, and "more susceptible to the attractions that pri- "vate property affords for purposes of play, "this circumstance does not create a duty "where none otherwise would exist."

Again in *Sutton v. West Jersey & Seashore Railroad Company*, 78 N. J. L. 17, where an infant was killed while crossing the railroad company's right of way by coming into contact with the electrical third rail which was entirely uncovered and exposed, it was held by the Supreme Court of New Jersey that there was no liability. Chief Justice Gummere in that case said:

> "The right of the plaintiff, therefore, de- "pends upon whether the defendant com-

"pany owes to a trespasser upon its right of "way the duty of using care either to safe- "guard its third rail in such a way as to pre- "vent him from coming in contact with it, "or else giving him notice that such contact "is dangerous to life and limb. The rule is "settled in this state that a landowner is "under no obligation to a trespasser to keep "his premises in a non-hazardous state; that, "as to him, the landowner's sole duty is to "abstain from acts willfully injurious. And "this rule is applicable whether the tres- "passer is an infant or an adult. *Delaware, "Lackawanna and Western Railroad Co. v. "Reich,* 32 Id. 635, and cases cited." * * *

Plaintiff's brief cites several cases in other jurisdictions which lean towards the approval or adoption of the "attractive nuisance" theory. Inasmuch, however, as both our Supreme Court and our Court of Errors and Appeals have passed upon this question and ruled adversely to the adoption of such theory, we consider it obviously unnecessary to discuss such decisions.

Plaintiffs' brief also cites the cases of *Snare & Triest Co.* v. *Friedman,* 169 Federal 1, and *Public Service Ry. Co.* v. *Wursthorn, et al.,* 278 Federal 408. Both of these cases, however, originated in and were decided by the United States Circuit Court of Appeals, and as distinctly indicated and emphasized in the decision in both of such cases, the rule in the Federal Courts on the question of a landowner's liability to an infant trespasser is essentially different from the rule adopted by our Supreme Court and Court of Errors and Appeals on this subject. Manifestly, therefore, a discussion of decisions in those cases is of no avail in the case at bar. The present action having been instituted in a State Court must, of course, be governed by the rules and decisions of the

State Courts of New Jersey, rather than by the Federal Courts since there is a conflict between the decisions of such respective courts.

In addition, it is to be noted that in all of the so-called "attractive nuisance" cases where there was held to be some duty upon the part of the landowner towards an infant trespasser, the landowner had maintained upon its own property some particular structure which was peculiarly attractive to children. In the instant case it is not alleged that the defendant maintained any such structure, the sole charge being that the railroad company maintained its track through a cut and operated trains on such track, and that such passing trains and cars were attractive to children. The difference and distinction is so obvious as to require no discussion.

Plaintiffs' brief also attaches some significance to the fact that children had on various occasions been seen at play upon the defendant's tracks and had been observed jumping on and off defendant's trains before this accident, the contention seemingly being that these occurrences constituted a notice to the defendant that children were so apt to play and that such notice or knowledge imposed a greater obligation on defendant than in the absence of such notice or knowledge.

The plaintiffs' evidence on this phase of the case showed that each time that any employees of the defendant observed children playing on its cars they chased them away.

Even if the defendant observed the children trespassing in this manner, however, and made no effort to discourage such trespassing, this would only constitute a mere acquiescence by the defendant in such practice, and of course, the rule is firmly established in New Jersey that use, even with the knowledge of the owner of the lands,

by sufferance, acquiescence or permission involves no liability upon the part of the owner of said lands towards the person so using them. *Phillips* v. *Library Company of Burlington,* 55 N. J. Law 307, *Hammill* v. *Pennsylvania R. R. Co.,* 56 N. J. Law 370, *Fitzpatrick* v. *Cumberland Glass Manufacturing Co.,* 61 N. J. Law 378, *Turess* v. *New York, Susquehanna & Western R. R. Co.,* 61 N. J. Law 314, *DeVoe* v. *New York, Ontario & Western Ry. Co.,* 63 N. J. Law 276, *Dieckman* v. *D. L. & W. R. R. Co.,* 81 N. J. Law 460, *Furey* v. *New York Central & Hudson River R. R. Co.,* 67 N. J. Law 270.

It is only where the railroad company or landowner has *performed some act* to exhibit an intention that its property should be thus used, and has thus induced and allured the public to its use, that an invitation is implied. *Hammill* v. *Pennsylvania R. R. Co.,* 56 N. J. Law 370, *D. L. & W. R. R. Co.* v. *Trautwein,* 52 N. J. Law 169, *Phillips* v. *Library Company, supra.*

It is submitted that it has been shown conclusively that the courts of New Jersey have definitely rejected the doctrine of "attractive nuisance." This being so, since the infant plaintiff in the case at bar was concededly a trespasser, there could manifestly be no recovery.

POINT II.

Section 55 of the General Railroad Act applies in this case and of itself constitutes a complete and conclusive bar to the action.

Quite irrespective of the doctrine of "attractive nuisance" it appears that any recovery in this case is barred by Section 55 of the General Railroad Act.

This section reads as follows:

> "55. TRESPASSING ON TRACKS; CONTRIBUTORY NEGLIGENCE; CROSSINGS. It shall not "be lawful for any person other than those "connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid "upon a public highway; if any person shall "be injured by an engine or car while walking, standing or playing on any railroad, "or by jumping on or off a car while in motion, such person shall be deemed to have "contributed to the injury sustained, and "shall not recover therefor any damages "from the company owning or operating said "railroad; provided, that this section shall "not apply to the crossing of a railroad by "any person at any lawful public or private "crossing. (P. L. 1903, p. 673.)" 3 Comp. Stat. 4245.

The provisions of this Act are clear, and in unambiguous and unequivocal terms absolutely prevent a recovery by one who is injured by reason of being upon the tracks, or by jumping on or off a car while in motion of a railroad company, provided, of course, that such person does not come within the specific exceptions enumerated in the Act.

In the case of *Barcolini v. Atlantic City & S. R. R. Co.,* 82 N. J. Law 107, the New Jersey Su-

preme Court interpreted this section in the case of a child aged 21 months who had strayed upon the private right of way of the defendant company at a place not a public crossing, and was struck by defendant's car, resulting in the loss of one of his legs.

The Supreme Court said:

> "This statute is a bar to recovery by any "person who walks, stands or plays upon a "railroad. It in terms precludes any recov- "ery for damages due to injuries received "under the conditions therein mentioned, "and applies to all persons alike, without "distinction as to their age or physical or "mental condition."

In the case of *Erie Railroad Company v. Hilt*, 247 U. S. 97, the United States Supreme Court interpreted this section as applying to injuries sustained by infants. There a boy less than 7 years of age had been playing marbles near the siding of the defendant's railroad when a marble rolled under a car. The boy tried to reach the marble with his foot and while he was doing so the car was backed and his left leg was so badly hurt that it had to be cut off.

The United States Supreme Court citing the *Barcolini* case held that there could be no recovery.

Mr. Justice Holmes speaking for the United States Supreme Court said, *inter alia:*

> "There is no ground for the argument that "the plaintiff was invited upon the tracks. "Temptation is not always invitation. *Dela- "ware, Lackawanna & Western R. R. Co. v. "Reich,* 61 N. J. L. 635; *Holbrook v. Aldrich,* "168 Massachusetts, 15, 16; *Romana v. Bos- "ton Elevated Ry. Co.,* 218 Massachusetts "76. In this case too the plaintiff was not "moved by the temptation, if any, offered by

> "the cars, but by the wish to recover his "marble. Therefore it is unnecessary to con- "sider whether an express invitation would "have affected the case, or what conclusion "properly could be drawn from the fact that "children had played in that neighborhood "before and sometimes had been ordered "away. The statute seemingly adopts in an "unqualified form the policy of the common "law as understood we believe in New Jer- "sey, Massachusetts, and some other States, "that while a landowner cannot intentionally "injure or lay traps for a person coming "upon his premises without license, he is not "bound to provide for the trespasser's "safety from other undisclosed dangers, or "to interrupt his own otherwise lawful occu- "pations to provide for the chance that some- "one may be unlawfully there. *Turess v. "New York, Susquehanna & Western R. R. "Co.,* 61 N. J. L. 314; *Delaware, Lackawanna "& Western R. R. Co. v. Reich; Holbrook v. "Aldrich; Romana v. Boston Elevated Ry. "Co., Supra."

The foregoing decisions clearly establish that in New Jersey, an infant trespasser, as well as an adult who is injured while trespassing upon railroad tracks is by Section 55 of the General Railroad Act conclusively barred from any action. And in this connection it is interesting to note that in *Public Service Ry. Co.* v. *Wursthorn, et al.,* 278 Federal 408, where the United States Circuit Court of Appeals stated for the Federal Courts a different rule with regard to "attractive nuisance" than our State courts had established, the court very carefully pointed out that there was no statute involved such as was involved in the *Hilt* case and as involved in the instant case.

The court in the *Wursthorn* case said:

> "It is important here to note that no stat-
> "ute of the state was involved."

It follows, therefore, that not only was the present action barred by the common law of this State as interpreted by the Supreme Court and the Court of Errors and Appeals upon the ground that the infant plaintiff was a trespasser, but in addition it was also independently barred by Section 55 of the General Railroad Act of New Jersey.

POINT III.

The trial court properly ordered a non-suit and the judgment should be affirmed.

Respectfully submitted,

DeVoe Tomlinson,
Wm. A. Barkalow,
Of Counsel with Defendant-Respondent.